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PART ONE: GENERAL

1. Introduction

1.1. For the purposes of this proposal, the term 'computer program' is used. This means a set of instructions the purpose of which is to cause an information processing device, a computer, to perform its functions. The program, together with the supporting and preparatory design material which have made possible the creation of the program, can also be called 'computer software'. All such material is intended to be covered by the provisions of this proposal in so far as it can be demonstrated that, from the material in question, a form of program has been or could be created. However, it is not thought advisable to include a definition in the Directive to avoid it becoming outdated. Where the material is of a nature such that it could not lead to the creation of a program, for example, a user manual accompanying a program, although the material will not be protected as part of the computer program, protection by copyright or other means may nevertheless apply.

1.2. Computer technology now plays a significant role in almost every aspect of the social and economic life of the Community, in fields as diverse as leisure, medicine, banking, education, transport, commerce and industry. It follows that the programs which are devised to cause the computer to perform its functions occupy a place of growing importance alongside the other more traditional expressions of the human intellect, such as works of literature, art or music, or industrial designs and inventions. The size and growth of the computer industry is such that its importance in the economy of the Community cannot be over-emphasized.

1.3. It is essential to create a legal environment which will afford a degree of protection against unauthorized reproduction to the computer program which is at least comparable to that given to works such as books, films, music recordings or industrial designs, if research and investment in computer technology are to continue at a sufficient level to allow the Community to keep pace with other industrialized countries. In particular, as regards small and medium sized enterprises it is important that their ability to create and market innovative software is not significantly reduced by unauthorized reproductions of their products. Protection must therefore be strengthened and made uniform throughout the Community as much in the interests of the specialized small and medium sized software firms which can contribute so much to the future success of the European software industry as in the interests of the existing major producers.

Without such a legal environment, the intellectual effort and financial resources employed to devise computer programs are put at risk by the ease with which the program can be reproduced, imitated or counterfeited. If the level of protection given to computer programs in Member States should fall below that accorded to programs created in other countries it is evident that the work of European innovators in this fast moving and highly competitive field will be easily appropriated by predatory activities from outside the Community.

1.4. An adequate level of protection should therefore be unequivocally enshrined in the laws of all Member States and any difference which could affect the functioning of the common market should be eliminated. Common principles are not only necessary in order to promote the free circulation of computer software within the Community without any restrictions due to diverging intellectual property rules, but also to create conditions in which industry can take advantage of the single market. The current absence of such clear and congruent legislative provisions in Member States concerning the rights of authors of computer programs has thus prompted the Commission to make this proposal to the Council.

2. The need for action

2.1. In establishing the need for action to harmonize computer program protection, the Commission has had regard for three factors: the nature of the intellectual property to be protected, the protection measures existing at present in Member States and the need to harmonize those protection measures throughout the Community.

I. THE NATURE OF THE INTELLECTUAL PROPERTY

2.2. As far as the property right is concerned, a computer program, in common with other works protected by intellectual property legislation, is the result of a creative intellectual human activity. While its mode of expression or fixation may still be unfamiliar to many, the degree of creativity, skill and inventiveness required to devise a program make it no less deserving of protection than other works protected by copyright. The fact that computer programs have a utilitarian function does not change this.

2.3. These elements of creativity, skill and inventiveness manifest themselves in the way in which the program is elaborated. The tasks to be performed by a computer program need to be defined and an analysis of the possible ways to achieve these results must be carried out. A selection has to be made of the various solutions and the steps to achieve the end result must be listed. The way in which these steps are expressed gives the program its particular characteristics of speed, efficiency and even style. A program has a structure, with sections and subsections, through which information flows. In common with other literary works, the computer program also has an underlying logic in the presentation of the various steps.

2.4. These steps, the algorithms, from which the program is built up, should not be protected as such against unauthorized reproduction. They are the equivalent of the words by which the poet or the novelist creates his work of literature, or the brush strokes of the artist or the musical scales of the composer.

2.5. As with literary works in general, protection can only be envisaged for a computer program from the point at which the selection and compilation of these elements indicate the creativity and skill of the author, and set his work apart from that of other authors.
2.6. It is evident that the more simple and limited the functions which the program requires the computer to perform, the more simple the program will be. Similarities between programs are thus inevitable wherever the tasks are similar and the solutions limited in number. The steps by which the computer will arrive at the completion of its task will also be similar, even identical from one program to another, where the task, the solution and the steps required to achieve it are extremely simple.

Provided that copying does not take place, a program maker might, in theory, even produce an entire program which bears a very great similarity to existing programs, where the tasks to be performed are identical and the degree of complexity of operations is very low.

2.7. In practice, computer programs are rarely of such simplicity that authors will arrive at totally identical programs, independently of each other. On the other hand many sub-routines which programmers habitually use in order to build up programs are in themselves commonplace in the industry and the originality of the program may lie in the selection and compilation of these otherwise commonplace elements.

2.8. The success of the program in terms of its ability to perform the task for which it is required will to a large extent be conditioned by these choices made by the author of the program at every step along the way. This success will manifest itself in a program which is quicker, easier, more reliable, more comprehensive, more productive to use than its predecessors or its competitors.

II. EXISTING PROTECTION MEASURES

2.9. The following countries have explicitly recognized the protection of computer programs by copyright: Australia, Brazil, Chile, Dominican Republic, France, Federal Republic of Germany, Hungary, India, Indonesia, Japan, Malaysia, Mexico, Philippines, Republic of Korea, Singapore, Spain, Trinidad and Tobago, Turkey, United Kingdom, United States of America. Draft laws are also under consideration in a number of countries to the same effect, including Denmark, Italy and the Netherlands.

2.10. The analysis of the existing copyright legislation in the Member States already reveals one major difference; the term of protection ranges from 25 years from creation to 70 years after the death of the author. Further divergences appear if the interpretation of the law by courts is taken into account. It is true that so far courts have had only a limited number of opportunities to judge cases involving the protection of computer programs, but as regards one basic condition for protection, the originality criterion, diverging interpretations exist between Member States, which result in a difference in the range of computer programs which can be considered protected by copyright. There is similar uncertainty as to the scope of protection afforded to computer programs by copyright protection.

III. HARMONIZATION OF PROTECTION MEASURES

2.11. Such differences in legislation can only be allowed to remain if they do not affect the functioning of the internal market. Intellectual property rights, which are by their very nature territorial rights merit special attention to ensure that they do not result in new barriers or perpetuate existing barriers to intra-Community trade. Divergencies and uncertainty concerning the scope of protection and the different duration of exclusive rights may not only affect the free circulation of computer programs in the Community but may also influence the decision to establish new firms or commercial initiatives and thus create a distortion of competition.

2.12. The aim of the present proposed Community action is therefore to establish legal protection in those Member States where it does not yet clearly exist and to ensure that the protection in all Member States is based on common principles. These principles can be summarized as follows:

- computer programs are protected as literary works by exclusive rights under copyright,
- the person in whom the right arises is defined,
- the acts which require authorization of the right holder and the acts which do not constitute an infringement are determined,
- the term and the conditions for protection of the program are defined.

3. The type of intellectual property protection retained

3.1. Although it has been clearly established that there is a need for legal protection in this field and that divergences in legislation in Member States could bring about a situation in which the functioning of the internal market is adversely affected, the question has been raised as to whether copyright is the most appropriate mode of protection to choose. A number of forms of legal protection exist and have been applied already in practice to protect computer programs.

I. PATENTS

3.2. As regards patent protection, this possibility seems to be limited in all Member States to those programs which form part of a patentable invention having a technical character and which meet the normal criteria for patentability. But even for the limited group of computer programs which may satisfy most of these conditions the requirement of an inventive step will lead, in the case of a large majority of valuable computer programs, to the conclusion that the conditions for patent protection are not fulfilled. The inventive step may often pertain to the algorithms underlying the programs, which have normally to be considered unpatentable, like any mathematical formulae, principle or natural law. Therefore, patent protection can play a limited role in the legal protection of computer programs, but does not provide an adequate solution for the basic legal protection of such works.

II. CONTRACT

3.3. As regards contract law, this is a valuable form of protection in so far as individual contractual relations exist and respect of the contract clauses can be controlled. Much of the
software put on the market today is subject to licence agreements between right holder and user. Indeed, this is the normal mode of commercialization for all but the most simple, mass-produced software, such as games or standard business packages. Such licence agreements allow right holders to circumscribe the activities of users in respect of all the acts connected with the use of the program. The user is free to accept or reject the limitations on his activities which the licensing contract proposes. However, in some areas, the balance of power between producers and users of computer programs may not permit the latter to negotiate equitable contract conditions, due to the market strength of some software suppliers. Therefore, it seems necessary to provide for basic principles of protection which apply regardless of specific contractual provisions. Nevertheless, individually negotiated arrangements should be possible as long as they are not in conflict with the applicable competition law.

3.4. Contract law alone does not provide efficient protection against most forms of misappropriation. In particular, as regards mass-marketed programs for personal computers and computer games which do not need maintenance, contract law does not provide an adequate means to prevent the copying and use of computer programs by third persons. Nor is it entirely clear whether the practice of so-called 'shrink-wrap licensing' where use conditions are attached to a product which is, to all intents and purposes 'sold' to the user, constitutes a valid licence in all circumstances and in all jurisdictions.

3.5. It is therefore proposed that the granting and limitation of exclusive rights in computer programs should reflect these different modes of commercial exploitation, outright sale, and licensing. Where 'sale', in the normal sense of the word occurs, certain rights to use the program must be taken to pass to the purchaser along with the physical copy of the program. Where licensing takes place in the conventional sense by means of a written contract signed by both parties, the rights to use the program which has been provided will, with a limited number of exceptions, remain circumscribed by contractual arrangements. The choice remains open for the supplier then to decide on the most appropriate form of commercialization for his product, and for the user to manifest his preference for an outright purchase or a licensing agreement.

III. COPYRIGHT

3.6. The overwhelming weight of evidence submitted to the Commission during the consultation process which followed publication of the Green Paper indicated that protection by copyright is the most appropriate measure to adopt. Given the trend towards copyright as the best available means to ensure the international protection of programs not only among Member States but among the major trading partners of the Community, it is hardly surprising that so many commentators on the Green Paper have indicated that harmonization of copyright modes of commercialization within the Community is now becoming a priority. It is further believed that within the framework of copyright, protection as a literary work is desirable. Copyright can provide the solution of ensuring adequate protection against misappropriation and, in particular, against unauthorized reproduction. Copyright has already in the past proved its capacity to adapt to new technologies, such as films and broadcasts. Copyright protection does not grant monopolies hindering independent development. Copyright protects only the expression but not the underlying idea of a work. It does not therefore block technical progress or deprive persons who independently developed a computer program from enjoying the benefits of their labour and investment.

3.7. Protection by copyright allows a clear balance to be achieved between too little protection and over-protection. It provides sufficient flexibility to permit a fair compromise between the divergent interests of producers or suppliers on one side and users of computer programs on the other. But the main advantages of this type of intellectual property protection relate to the fact that the protection covers only the individual expression of the work and gives thus sufficient flexibility to permit other authors to create similar or even identical programs provided that they abstain from copying. This is particularly important because the number of algorithms available, on which computer programs are based, is considerable, but not unlimited.

3.8. Some countries have introduced 'genre specific' provisions in their copyright laws to accommodate possible differences between computer programs and other more traditional literary works. Such 'genre specific' provisions should be kept to a minimum if the full benefit of the established copyright protection granted under the Berne and Universal Copyright Conventions is not to be overly diluted. Accordingly, the present Directive seeks as far as possible to stay within the common parameters of literary work protection as it exists today in the Member States of the EC.

3.9. Computer program protection by means of copyright raises two particular issues, that of standardization of aspects of programs in the interests of greater inter-operability of hardware and software, and that of availability of information concerning the access protocols and interfaces which ensure such inter-operability. Moves towards greater standardization of products within the computer and telecommunications industries are well under way, through the encouragement and initiatives of both the Commission itself and the industries concerned. Many aspects of computer hardware and software inter-operability are already governed by the International Standards Organization's Open Standards initiative. In addition, the existence of bodies such as X-Open indicates a willingness on the part of industry to cede proprietary rights in some parts of programs into the public domain in order to achieve greater compatibility between systems. The provisions of this Directive should contribute to the trend towards a greater use of standardization in so far as they determine with more legal certainty what are the exclusive rights of the author of the program.

3.10. As regards the question of the protection of 'access protocols and interfaces' themselves, the question was raised in the Green Paper as to whether copyright protection should apply to these parts of programs.
3.11. In order to produce inter-operative systems it is necessary to replicate the ideas, rules or principles by which interfaces between systems are specified, but not necessarily to reproduce the code which implements them. Ideas, rules or principles are not copyrightable subject matter. Such ideas, rules or principles may be used by any programmer in the creation of an independent implementation of them in an inter-operative program.

3.12. Competitors are therefore free, once they establish through independent analysis which ideas, rules or principles are being used, to create their own implementation of the ideas, rules or principles in order to make compatible products. They may build on the identical idea, but may not use the same expression as that of other protected programs. There is thus no monopoly on the information itself, but only a protection of the form of expression of that information.

3.13. If similarities in the code which implements the ideas, rules or principles occur as between inter-operative programs, due to the inevitability of certain forms of expression, where the constraints of the interface are such that in the circumstances no different implementation is possible, then no copyright infringement will normally occur, because in these circumstances it is generally said that idea and expression have merged.

3.14. Although it is technically possible to decompile a program in order to find out information concerning access protocols and interfaces this is a lengthy, costly and inefficient procedure. It is usually more efficient for the parties concerned to agree on the terms under which the information will be made available. Problems of access to information may have to be addressed by other means which are outside the scope of this Directive.

3.15. In view of the rapid evolution of the computer industries the Commission will keep all these matters under constant review.

4. Relation to international conventions

Copyright has the added advantage of affording a high level of international protection to works so covered, through the application of the Berne and Universal Copyright Conventions. Although neither convention expressly mentions computer programs among the works to be covered by copyright it is generally understood that as new forms of intellectual property are developed they will be encompassed by the conventions in so far as the same kinds of creativity are involved in the elaboration of such new forms of work as for existing works. The conclusion that computer programs are indeed literary 'works' within the meaning of the Berne and Universal Copyright Conventions leads to the assumption that where a Member State grants protection under the Berne Convention it will apply the principle of national treatment. Whatever the theoretical merits of 'sui generis' legislation in this field might be, they are far outweighed by the advantages of the existence of these international conventions.

5. Legal basis

5.1. In its White Paper on the completion of the internal market, the Commission stated its intention to pay particular attention to the introduction of a Community framework for the legal protection of software and announced a proposal for a Directive. The present proposal therefore forms part of the Commission's program for the completion of the internal market before 31 December 1992.

5.2. It follows from the approach of fixing basic common principles that a Directive is the appropriate legal instrument to harmonize the laws of the Member States as regards the legal protection of computer programs.

5.3. Because differences in and uncertainties regarding the legal protection of computer programs can have a negative effect on the functioning of the common market in these products, Article 100A is the appropriate legal basis for the present proposal.

For the completion of the internal market before 31 December 1992, Article 100A, first paragraph, provides by way of derogation from Article 100:

'The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

Article 8A, second paragraph, defines the internal market as comprising 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

5.4. The present proposal will favour the free circulation of computer programs in so far as industry in those countries with clear and established protection of computer programs is currently in a more favourable position than that in countries where protection is uncertain; such differences in legal protection distort the conditions of establishment and of competition in Member States for firms which engage in activities concerned with computer programs. This situation may affect the growth of the Community software industry and the operation of the internal market. In addition by harmonizing the conditions under which the results of research and development in the computer program field are legally protected on a uniform basis in the Member States, innovation and technical progress throughout the Community will be encouraged.

5.5. In the preparation of this proposal the Commission has taken into account the requirements of Article 8C of the EEC Treaty and has concluded that no special provisions or derogations seem warranted or justified at this stage.

5.6. Likewise the Commission has studied the question of the high level of health/safety/environmental and consumer protection required by the terms of Article 100A (3) of the EEC Treaty.

It has done so following consultation with the industrial and social partners concerned, and in the light of an analysis of the risks inherent in this area and of the current technical capabilities of European industry. The proposal takes full account of these considerations in the light of the overall objectives of this provision of the Treaty.
PART TWO: PARTICULAR PROVISIONS

Article 1
Object of protection

1. The words 'computer program' are not defined for the purposes of this Article. It has been recommended by experts in the field that any definition in a directive of what constitutes a program would of necessity become obsolete as future technology changes the nature of programs as they are known today.

Given the present state of the art, the word 'program' should be taken to encompass the expression in any form, language, notation or code of a set of instructions, the purpose of which is to cause a computer to execute a particular task or function.

The term should be taken to encompass all forms of program, both humanly perceivable and machine readable, from which the program which causes the machine to perform its function has been or can be created.

Preparatory and design material such as flow charts or descriptions of sequences of steps in plain language will be included, as will embodiments of the program within the hardware itself, either permanently or in removable form. Material such as user manuals or maintenance manuals will not be considered to be parts or manifestations of the program, except that where substantial parts of the program are reproduced therein, those extracts from the program will be protected by copyright in the program independently from any rights which may subsist in the manual or other documentation.

2. Member States shall be required to apply the same provisions for the protection of computer programs as apply to literary works. A program has all the characteristics of a literary work, namely that it is the expression in language and in a perceivable form from which it can be reproduced of an idea or series of ideas, created by the expenditure of human skill and labour. The fact that the language may be only comprehensible to those skilled in the art, and that some manifestations of the program may take forms which are not at all times comprehensible to the human senses does not preclude protection as a literary work, since other literary works may also be embodied in carriers which require a mechanical device to render them perceivable to the human mind.

In order to avoid legal uncertainty, computer programs must be protected as literary works and not 'as if' they were literary works or 'assimilated to' literary works. Similarly they should not be treated as a new and separate 'sub-category' of literary work. Failure to accord the full protection given to literary works generally in Member States could result in divergencies in the nature and scope of protection and in uncertainties as to the level of protection afforded to such works under the Berne and Universal Copyright Conventions.

3. Copyright protects the expression of ideas but not the ideas themselves. Therefore the protection given to computer programs will extend to the program as a whole, and to its constituent parts, in so far as they represent a sufficient degree of creativity to qualify as 'works' in themselves. The only criterion which should be applied to determine the eligibility for protection is that of originality, that is, that the work has not been copied. No other aesthetic or qualitative test should be applied. Sub-routines and routines which go together to form modules which in turn form programs may all qualify for protection independently of the protection given to the program as a whole, that is, as a compilation of such elements. The algorithms which go to make up the sub-routines are not normally in themselves capable of receiving protection under copyright in so far as they are similar in nature to mathematical formulae. They may in exceptional circumstances attract patent protection. Similarly, the ideas, principles, or logic which underlie the program will not be copyrightable.

4. (a) Many algorithms and many sub-routines are commonplace in the industry. They may have been placed or have fallen into the public domain or they may be de facto standard routines or algorithms. Where a program is composed wholly or in part of such commonplace or unprotected algorithms and routines, it should nevertheless be protected as a compilation, provided that it is original in the abovementioned sense and that the creator demonstrated skill and labour in the creation of the compilation.

(b) An increasingly large number of programs are now generated by using a computer. This means that program A is used in order to create programs B, C and so on with some degree of human intervention in order to select the most appropriate means to achieve the objective. Program A could in this respect be likened to a literary work such as a dictionary which permits the creation of other literary works. Although much of the routine programming work is done by purely mechanical means, human effort is still nevertheless a critical element in the creative process. It is therefore proposed that in so far as programs generated by such means fulfil the criteria which would enable them to be categorized as 'original works' they should be protected in the same way as programs created without the aid of such machine generation processes.

Article 2
Authorship of program

1. In common with all literary works, the question of authorship of the program is to be resolved in favour of the natural person or persons who have created the work. Although the right to exercise exclusive rights may be assigned to another, the author will retain at least the unalienable rights to claim paternity of his work.

2. Copyright in a work created by a group of persons, which is normally the case with the development of computer programs, is to be exercised in common unless the persons concerned contract otherwise.

3. Computer programs are frequently created by freelance programmers working on particular projects on behalf of organ-
izations which have commissioned a given program. In such circumstances, unless the parties agree otherwise, it is normal that the person or entity which causes the work to be created should wish to retain the control over the exclusive rights in the program, with the exception of the right to claim paternity of the work mentioned in paragraph 2.1 above.

4. In circumstances where a programmer is employed to create programs within a company or organization, the employer will normally require that the exclusive rights in the program should remain within his control, with the exception of the right to claim paternity of the work, unless the parties agree otherwise. In respect of the circumstances described in this paragraph and in paragraph 2.3 above, it is the intention of this Directive that a certain measure of harmonization of current practice in Member States should be brought about. Nevertheless the freedom to negotiate contracts of employment and terms for commissioned works must remain to a large extent a subject for contractual negotiation between the parties.

In respect of other aspects of authors' moral rights such as the right to maintain the integrity of the work, the nature of computer programs is such that substantial modification and re-utilization of parts of programs is constantly taking place and the concept of integrity of the work is of much less relevance to the author's interests than has traditionally been the case with other literary works.

5. As indicated in 4 (b), a large number of works are now generated by means of a computer program which serves as a tool to generate new programs. The question arises as to whether authorship of these programs generated by the first computer program should reside with the creator of the first program, or with the person who causes it to generate other works. Since the first program is no different in its function from any other tool used to create a work, such as an instruction manual by means of which another work is created, it would seem appropriate that the person who uses such a tool to generate programs should be considered as the creator of those programs. In practice, such a person may be the operator of the computer, or the natural or legal persons who retain the right to exercise the rights in programs which they have commissioned or which have been created by their employees. In these circumstances it is doubtful that a right to claim paternity of the programs generated by a machine could be upheld. The human input as regards the creation of machine generated programs may be relatively modest, and will be increasingly modest in future. Nevertheless, a human 'author' in the widest sense is always present, and must have the right to claim 'authorship' of the program.

1. (a) Under traditional copyright protection for literary works the author's exclusive rights comprise the right to control reproduction, adaptation and translation of his work. The Berne Convention does not expressly give a right to control the distribution of works but the exclusive rights in respect of reproduction are in practice exercised in most countries of the Berne Union to allow the author to determine how his work shall be put on the market.

The right to control reproduction given in Article 4 (1) (a) is fundamental to achieve adequate protection for computer programs. Unlike other forms of literary work, a computer program cannot serve its purpose unless it is 'reproduced'. This 'reproduction' should not be confused with 'replication'. The program may be re-created in part or in whole as part of the internal processes of the computer which runs it. No second permanent copy of the program is made during this process, although parts of the program will be 'reproduced' and stored in other parts of the memory of the computer during the operation of the program. These temporary copying, moving and storing operations may leave no trace once the operation of the machine has terminated. Thus 'copying' in the traditional sense of producing a second permanent version of an original does not normally take place unless a 'back-up' copy of the program is made. Nevertheless, where programs are licensed, reproduction without authorization should be prohibited, principally because all the acts which could be prejudicial to the author's interests, namely, loading, viewing, running, transmitting or storing the program cannot be performed except by means of a reproduction of the program.

Loading of the program is to be considered a restricted act in so far as it normally at the present time necessitates reproduction of the program in part or in whole. In future programs may be more often contained in media which can be inserted physically into the computer, such as chips, or may be an integral part of the hardware. In these circumstances, reproduction of the program may...
Adaptation of a literary work normally implies transformation of a given text such as a novel into another literary ‘genre’ such as a play. Translation of a literary work is normally done from one human language into another. In the case of computer programs, whether the act is a translation from humanly readable form into machine readable form, or from one programming language to another, or an adaptation of a program designed to perform one task in order that it may perform another, the term ‘adaptation’ best describes the activities involved. It is therefore to be understood that ‘adaptation’ in this Directive includes ‘translation’.

Distribution of a computer program by means of sale or licence is normally controlled by the author of the program, either directly if he is also the producer of the marketed product, or indirectly by assignment of his right to a publisher or producer of programs. The author’s right is normally exhausted once the product has been put on the market with his consent. This Directive proposes that as regards the rental, leasing and licensing of software, the distribution right should not be exhausted by the first sale, leasing or licensing of the program. This will enable the right holder to exercise control over rental of products which have been previously sold, leased or licensed and to have continued control over the rental, leasing or licensing of products which have been previously distributed by these means. Once a product has been sold with the right holder’s consent he should no longer be able to exercise control over subsequent sale, that is sale to third parties of legally acquired programs. Likewise, as regards importation for the purposes of sale, licensing, lease or rental, once the program has been imported into the Community with the author’s consent, his right to control subsequent importation will be exhausted.

It is essential to permit right holders to control the rental of programs which have been sold or licensed if copying of programs without authorization is to be prevented. It is possible at present to rent a copy of a software package at a nominal charge, to copy it at home using relatively inexpensive material and to return it the following day. It is clear that given the complexity of most programs and the fact that they are used for a given purpose rather than read for enjoyment, cheap, short-term rental allows the home copier to save on the cost of purchasing or leasing programs: as such, rental is highly prejudicial to right holders’ interests and should be subject to the right to prohibition, with the limited exceptions indicated in Article 5 below.

**Article 5**

Exceptions to the restricted acts

1. Where a program is sold to the public, it is normal that certain rights to use the property thus acquired should apply. These rights should of necessity include the right to use the program without further express authorization from the right holder. It should not be necessary to obtain the right holder’s authorization in order to lend the program to a third party or to use it on a given piece of apparatus or in a given location. Similarly the acts of loading, viewing, running, transmission or storage should be taken as not requiring express authorization of the right holder provided that, particularly in the case of transmission and storage, they are only carried out for the purposes of using the program and do not result in a second permanent replication of the program. Thus temporary or permanent transmission to and storage by a second party of a program legally acquired by a purchaser for his own use will not fall within the exceptions to the restricted acts enumerated in Article 4, whereas such acts of transmission and storage performed by the purchaser temporarily for the purposes of using the program himself will not require authorization by the right holder. Similarly any form of reproduction other than that required for use will not be permitted, in particular, the making of a back-up copy or a copy for private use. Where a back-up copy is necessary for the purposes of use of a program this is normally expressly permitted by the right holder.

All reproduction should be controllable whether it is of part of the program or of the entire program, in that a partial reproduction may be sufficient to cause considerable economic harm to the author’s interests, for example, by copying the protocol and interface program elements of a given program.

As regards the Anglo-Saxon law concept of ‘fair dealing’ by which reproduction of insubstantial parts of literary works is permitted in certain circumstances, it is believed that in respect of licensed programs, which constitutes the most common method of commercialization at present, the parties are free to...
negotiate exceptions to the author's exclusive right to control insubstantial reproduction of the program if circumstances warrant such a derogation. In the case of programs which are sold or made available by means other than a written license agreement signed by both parties, the provisions which exist in the copyright laws of Member States in relation to exceptions to the exclusive rights of the author of a literary work should continue to apply in the case of computer programs.

Where the current practice of 'shrink-wrap' licensing applies, program producers impose conditions on the use of programs which have been in reality 'sold' to the consumer. The provisions of Articles 4 and 5 are intended to have as their effect that where software is licensed in the normal sense of the word, right holders will be able to exercise exclusive rights in respect of all acts of reproduction and adaptation, the exact provisions being the subject of contractual arrangements under the terms of the licence. But where no written, signed licence agreement is employed, as is the case with 'shrink-wrap' licences (the customer being merely advised by means of instructions contained within the packaging which surrounds the program carrier of his rights in respect of his purchase) the provisions of Article 5 (1) will allow the purchaser to assume the rights described above. This is a necessary compromise between the interests of suppliers and consumers of computer programs. Article 4 of the Directive gives wide powers to right holders to control the acts of reproduction, adaptation and distribution, but these powers should not in fairness be used to circumscribe the normal enjoyment of property by a person who legally acquires a program by purchase. If program producers wish to ensure the greater degree of control over the reproduction, adaptation and distribution of their programs which the system of licences permits, the would-be 'purchaser' of a program should be required to read and sign a legally binding licence agreement at the point of sale.

2. Adaptation and translation of programs are acts which the licensee of sophisticated programs may frequently wish to do in the course of normal use of the program. Many custom-made computer programs have not stabilized when they are supplied to end users; similarly many programs require correction in use or adaptation to changes in user requirements. This correction and adaptation work could in many instances be done by the user. However the supplier has a number of reasons for wishing to maintain his exclusive rights to control adaptation and translation. A guarantee and maintenance contract may attach to the program, in terms of the number of users and the amount of support which can be offered. Such control is exercised by means of copy protection and metering systems incorporated in the program itself. If the user were able to adapt the program, he would be at liberty to remove these control mechanisms.

Therefore any adaptation and translation which is done should be subject to the right holder's control in the case of licensed software and should be the subject of contractual arrangements between supplier and user.

3. The exclusive right to control rental given in Article 4 (c) is subject to a derogation in favour of one group of users for whom special arrangements can and should be made. This is non-profit making public libraries where members of the public may go to use and to study computer programs. Libraries are able to control the use made of such programs by means of safeguards to prevent their duplication or their removal from the premises. It is important, given the need to encourage computer literacy in all sections of the Community, that libraries are able to offer computer programs for study by the public in the same way as they offer other literary works.

Article 6
Secondary infringement

1. In order to ensure that right holders may bring successful actions against infringers of the exclusive rights given in Article 4, it is necessary to provide for the cases where infringing copies have been put in circulation. The ease with which unauthorized copies of programs can be transferred electronically from one 'host' computer to another, across national borders and without trace, requires that the importation and possession of infringing copies should also be actionable as should be all dealing with infringing copies in the sense of selling, offering for sale, receiving, transmitting and storing such copies.

2. Many programs are marketed with a technical protection system which prevents or limits their unauthorized use or reproduction. If such systems are used by right holders to protect their exclusive rights, it should not be legally possible to remove or circumvent such systems without the authorization of the right holder. The term 'deal with' should be taken in this context to include sale, offer or advertise for sale, transmit, store or receive such means to circumvent protection systems, and to include also the communication of information as to the means for circumvention or removal of protection systems.

Article 7
Term of protection

Although the term of protection for literary works is life of author plus 50 years, 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. These hesitations outweigh the benefits of maintaining the classical 'literary work' term.

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100A thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

Whereas the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently;

Whereas computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community's industrial development;

Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;

Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;

Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and further in establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts, and for how long the protection should apply;

Whereas the function of a computer program is to communicate and work with other components of a computer system and with users;

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 they are intended to function; whereas the principles describing any such means of interconnection and interaction are generally known as 'an interface'; whereas the specification of interfaces constitutes ideas and principles which underlie the program; whereas those ideas and principles are not copyrightable subject matter;

Whereas the Community is fully committed to the promotion of international standardization;

Whereas protection of computer programs under copyright laws should be without prejudice to the application in appropriate cases of other forms of protection,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

Article 1

Object of protection

1. Member States shall protect computer programs by conferring exclusive rights in accordance with the provisions of this Directive.

2. Exclusive rights shall be conferred by the provisions of copyright laws. Protection shall be accorded to computer programs as literary works.

3. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

4. (a) A computer program shall not be protected unless it satisfies the same conditions as regards its originality as apply to other literary works.

(b) Programs generated by means of a computer shall be protected in so far as they satisfy the conditions laid down in point (a).
Article 2

Authorship of program

1. Subject to the following paragraphs, the author of a computer program is the natural person or group of natural persons who has created the program.

2. In respect of computer programs created by a group of natural persons, the exclusive rights shall be exercised in common unless otherwise provided by contract.

3. Where a computer program is created under a contract, the natural or legal person who commissioned the program shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.

4. Where a computer program is created in the course of employment, the employer shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.

5. In respect of programs which are generated by the use of a computer program, the natural or legal person who causes the generation of subsequent programs shall be entitled to exercise all rights in respect of the programs, unless otherwise provided by contract.

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. In the case referred to in Article 2 (2) the computer program shall be protected in favour of all authors if at least one author is a beneficiary of protection in accordance with paragraph 1 of this Article.

Article 4

Restricted acts

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. In so far as they necessitate a reproduction of the program in part or in whole, loading, viewing, running, transmission or storage of the computer program shall be considered restricted acts;

(b) the adaptation of a computer program;

(c) the distribution of a computer program by means of sale, licensing, lease, rental and the importation for these purposes. The right to control the distribution of a program shall be exhausted in respect of its sale and its importation following the first marketing of the program by the right holder or with his consent.

Article 5

Exceptions to the restricted acts

1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4 (a) and (b) shall not require the authorization of the right holder, in so far as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purposes of its use shall require the authorization of the right holder.

2. Where a computer program has been sold or made available to the public by means other than a written licence agreement signed by both parties, the exclusive right of the right holder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.

Article 6

Secondary infringement

1. It shall be an infringement of the author's exclusive rights in the computer program to import, possess or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

2. It shall be an infringement of the author's exclusive rights in the computer program to make, import, possess or deal with articles intended specifically to facilitate the removal or circumvention of any technical means which may have been applied to protect a program.

Article 7

Term of protection

Protection shall be granted for 50 years from the date of creation.
CHAPTER II

Article 8

Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to any legal provisions concerning patent rights, trade marks, unfair competition, trade secrets or the law of contract in so far as such provisions do not conflict with the principles laid down in the present Directive.

2. The provisions of this Directive are applicable also in respect of works created prior to [date in Article 9].

CHAPTER III

Article 9

Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to comply with this Directive by [date].

2. Member States shall ensure that they communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

Article 10

This Directive is addressed to the Member States.
In adopting a proposal for a Council Directive on the legal protection of computer programs, the Commission approves the following policy guidelines. It affirms its conviction that computer programs, given the intellectual effort and the financial investment which may be necessary for their creation and the ease with which they can be copied, merit adequate legal protection. Following a worldwide trend, the Commission proposes copyright as a suitable legal basis for ensuring a balance between an effective level of protection and the interests of users. Divergencies between the copyright statutes of the Member States as to the availability and scope of the protection have caused the Commission to initiate the harmonization process in view of the objective of completing the internal market.

Software is an industrial tool which is essential to the Community’s economic development. The grant of exclusive rights under copyright law will create incentives for software developers to invest their intellectual and financial resources and thereby to promote technical progress in the public interest. Technical progress and public welfare, however, are also ensured by a system of indistorted competition, one of the principal goals of the Treaty. Exclusive proprietary rights and free competition, while in principle designed to achieve the same objective by different means, may conflict where a copyright owner is in a position to exercise his statutory exclusive rights beyond their intended purpose. The exercise of exclusive copyrights will not prejudice the application of the competition rules and the imposition of effective remedies in appropriate cases. Further, the Community commitment to international standardization in the fields of information technology and telecommunications must not be compromised.

The relation between the Community’s competition rules and copyright is governed by the European Court’s distinction between the existence and the exercise of the intellectual property rights in question. Any arrangement or measure which goes beyond the existence of copyright can be subject to control under the competition rules. This means that for example any attempt to extend by contractual agreements or other arrangements the scope of protection to aspects of the programs for which protection under copyright is not available, or the prohibition of any act which is not reserved for the right owner may constitute an infringement of the competition rules.

Moreover, companies in a dominant position must not abuse that position within the meaning of Article 86 of the Treaty. For example, under certain circumstances the exercise of copyright as to the aspects of a program, which other companies need to use in order to write compatible programs, could amount to such an abuse. This could also be the case if a dominant company tries to use its exclusive rights in one product to gain an unfair advantage in relation to one or more products not covered by these rights.

Furthermore, the ability of a competing manufacturer to write an independent but compatible program often depends on his possibility to have access to the target program or to certain information relating to it. Access to information is not a matter of copyright law. Article 86 always applies where a dominant company abusively refuses access to such information or restricts unreasonably such access.
FORWARDING OF A PROPOSAL

<table>
<thead>
<tr>
<th>from:</th>
<th>Commission of the European Communities, received on 29 March 1989</th>
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<tr>
<td>by letter dated:</td>
<td>11 January 1989, signed by Lord COCKFIELD, Vice-President</td>
</tr>
<tr>
<td>to:</td>
<td>Mr FERNANDEZ ORDOÑEZ, President of the Council of the European Communities</td>
</tr>
<tr>
<td>Subject:</td>
<td>Proposal for a Council Directive on the legal protection of computer programs</td>
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Sir,


The aim of the proposal is to ensure effective legal protection for computer programs in all the Member States of the Community. That objective is to be achieved by the harmonization of certain aspects of national legislation on copyright as applied to literary works.

As the proposal is based on Article 100a of the Treaty establishing the European Economic Community, the co-operation procedure with the European Parliament and consultation of the Economic and Social Committee are mandatory.

The Council should adopt its common position in December 1989. To that end, the European Parliament and the Economic and Social Committee should be asked to deliver their Opinions in June 1989.

(Complimentary close).

(s.) COCKFIELD

Encl.: COM(88) 816 final - SYN 183
Proposal for a
COUNCIL DIRECTIVE

on the legal protection of computer programs

(presented by the Commission)
EXPLANATORY MEMORANDUM

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PART ONE: GENERAL

1.0. INTRODUCTION

1.1. For the purposes of this proposal, the term "computer program" is used. This means a set of instructions the purpose of which is to cause an information processing device, a computer, to perform its functions. The program, together with the supporting and preparatory design material which have made possible the creation of the program, can also be called "computer software". All such material is intended to be covered by the provisions of this proposal insofar as it can be demonstrated that, from the material in question, a form of program has been or could be created. However, it is not thought advisable to include a definition in the Directive to avoid it becoming outdated. Where the material is of a nature such that it could not lead to the creation of a program, for example, a user manual accompanying a program, although the material will not be protected as part of the computer program, protection by copyright or other means may nevertheless apply.

1.2. Computer technology now plays a significant role in almost every aspect of the social and economic life of the Community, in fields as diverse as leisure, medicine, banking, education, transport, commerce and industry. It follows that the programs which are devised to cause the computer to perform its functions occupy a place of growing importance alongside the other more traditional expressions of the human intellect, such as works of literature, art or music, or industrial designs and inventions. The size and growth of the computer industry is such that its importance in the economy of the Community cannot be over-emphasized.

1.3. It is essential to create a legal environment which will afford a degree of protection against unauthorized reproduction to the computer program which is at least comparable to that given to works such as books, films, music recordings or industrial designs.
If research and investment in computer technology are to continue at a sufficient level to allow the Community to keep pace with other industrialised countries. In particular, as regards small and medium sized enterprises it is important that their ability to create and market innovative software is not significantly reduced by unauthorized reproductions of their products. Protection must therefore be strengthened and made uniform throughout the Community as much in the interests of the specialized small and medium sized software firms which can contribute so much to the future success of the European software industry as in the interests of the existing major producers.

Without such a legal environment, the intellectual effort and financial resources employed to devise computer programs are put at risk by the ease with which the program can be reproduced, imitated or counterfeited. If the level of protection given to computer programs in Member States should fall below that accorded to programs created in other countries it is evident that the work of European innovators in this fast moving and highly competitive field will be easily appropriated by predatory activities from outside the Community.

1.4. An adequate level of protection should therefore be unequivocally enshrined in the laws of all Member States and any difference which could affect the functioning of the Common Market should be eliminated. Common principles are not only necessary in order to promote the free circulation of computer software within the Community without any restrictions due to diverging intellectual property rules, but also to create conditions in which industry can take advantage of the single market. The current absence of such clear and congruent legislative provisions in Member States concerning the rights of authors of computer programs has thus prompted the Commission to make this proposal to the Council.
2.0. THE NEED FOR ACTION

2.1. In establishing the need for action to harmonize computer program protection, the Commission has had regard for three factors: the nature of the intellectual property to be protected, the protection measures existing at present in Member States and the need to harmonize those protection measures throughout the Community.

THE NATURE OF THE INTELLECTUAL PROPERTY

2.2. As far as the property right is concerned, a computer program, in common with other works protected by Intellectual property legislation, is the result of a creative intellectual human activity. While its mode of expression or fixation may still be unfamiliar to many, the degree of creativity, skill and inventiveness required to devise a program make it no less deserving of protection than other works protected by copyright. The fact that computer programs have a utilitarian function does not change this.

2.3. These elements of creativity, skill and inventiveness manifest themselves in the way in which the program is elaborated. The tasks to be performed by a computer program need to be defined and an analysis of the possible ways to achieve these results must be carried out. A selection has to be made of the various solutions and the steps to achieve the end result must be listed. The way in which these steps are expressed gives the program its particular characteristics of speed, efficiency and even style. A program has a structure, with sections and subsections, through which information flows. In common with other literary works, the computer program also has an underlying logic in the presentation of the various steps.
2.4. These steps, the algorithms, from which the program is built up, should not be protected as such against unauthorized reproduction. They are the equivalent of the words by which the poet or the novelist creates his work of literature, or the brush strokes of the artist or the musical scales of the composer.

2.5. As with literary works in general, protection can only be envisaged for a computer program from the point at which the selection and compilation of these elements indicate the creativity and skill of the author, and set his work apart from that of other authors.

2.6. It is evident that the more simple and limited the functions which the program requires the computer to perform, the more simple the program will be. Similarities between programs are thus inevitable where the tasks are similar and the solutions limited in number. The steps by which the computer will arrive at the completion of its task will also be similar, even identical from one program to another where the task, the solution and the steps required to achieve it are extremely simple.

Provided that copying does not take place, a program maker might, in theory, even produce an entire program which bears a very great similarity to existing programs, where the tasks to be performed are identical and the degree of complexity of operations is very low.

2.7. In practice, computer programs are rarely of such simplicity that authors will arrive at totally identical programs, independently of each other. On the other hand many sub-routines which programmers habitually use in order to build up programs are in themselves commonplace in the industry and the originality of the program may lie in the selection and compilation of these otherwise commonplace elements.
2.8. The success of the program in terms of its ability to perform the task for which it is required will to a large extent be conditioned by these choices made by the author of the program at every step along the way. This success will manifest itself in a program which is quicker, easier, more reliable, more comprehensive, more productive to use than its predecessors or its competitors.

EXISTING PROTECTION MEASURES

2.9. The following countries have explicitly recognized the protection of computer programs by copyright: Australia, Brazil, Chile, Dominican Republic, France, Germany (Federal Republic of), Hungary, India, Indonesia, Japan, Malaysia, Mexico, Philippines, Republic of Korea, Singapore, Spain, Trinidad and Tobago, Turkey, United Kingdom, United States of America. Draft laws are also under consideration in a number of countries to the same effect, including Denmark, Italy and the Netherlands.

2.10. The analysis of the existing copyright legislation in the Member States already reveals one major difference: the term of protection ranges from 25 years from creation to 70 years after the death of the author. Further divergences appear if the interpretation of the law by courts is taken into account. It is true that so far courts have had only a limited number of opportunities to judge cases involving the protection of computer programs, but as regards one basic condition for protection, the originality criterion, diverging interpretations exist between Member States, which result in a difference in the range of computer programs which can be considered protected by copyright. There is similar uncertainty as to the scope of protection afforded to computer programs by copyright protection.
HARMONISATION OF PROTECTION MEASURES

2.11. Such differences in legislation can only be allowed to remain if they do not affect the functioning of the internal market. Intellectual property rights, which are by their very nature territorial rights merit special attention to ensure that they do not result in new barriers or perpetuate existing barriers to intracommunity trade. Divergencies and uncertainty concerning the scope of protection and the different duration of exclusive rights may not only affect the free circulation of computer programs in the Community but may also influence the decision to establish new firms or commercial initiatives and thus create a distortion of competition.

2.12. The aim of the present proposed Community action is therefore to establish legal protection in those Member States where it does not yet clearly exist and to ensure that the protection in all Member States is based on common principles. These principles can be summarized as follows:

- computer programs are protected as literary works by exclusive rights under copyright;
- the person in whom the right arises is defined;
- the acts which require authorization of the right holder and the acts which do not constitute an infringement are determined;
- the term and the conditions for protection of the program are defined.

3.0. THE TYPE OF INTELLLECTUAL PROPERTY PROTECTION RETAINED

3.1. Although it has been clearly established that there is a need for legal protection in this field and that divergences in legislation in Member States could bring about a situation in which the functioning of the internal market is adversely affected, the
question has been raised as to whether copyright is the most appropriate mode of protection to choose. A number of forms of legal protection exist and have been applied already in practice to protect computer programs.

PATENTS

3.2. As regards patent protection, this possibility seems to be limited in all Member States to those programs which form part of a patentable invention having a technical character and which meet the normal criteria for patentability. But even for the limited group of computer programs which may satisfy most of these conditions the requirement of an inventive step will lead, in the case of a large majority of valuable computer programs, to the conclusion that the conditions for patent protection are not fulfilled. The inventive step may often pertain to the algorithms underlying the programs, which have normally to be considered unpatentable, like any mathematical formulae, principle or natural law. Therefore, patent protection can play a limited role in the legal protection of computer programs, but does not provide an adequate solution for the basic legal protection of such works.

CONTRACT

3.3. As regards contract law, this is a valuable form of protection insofar as individual contractual relations exist and respect of the contract clauses can be controlled. Much of the software put on the market today is subject to licence agreements between rightholder and user. Indeed, this is the normal mode of commercialization for all but the most simple, mass produced software, such as games or standard business packages. Such licence agreements allow right holders to circumscribe the activities of users in respect of all the acts connected with the use of the program. The user is free to accept or reject the
limitations on his activities which the licensing contract proposes. However in some areas, the balance of power between producers and users of computer programs may not permit the latter to negotiate equitable contract conditions, due to the market strength of some software suppliers. Therefore, it seems necessary to provide for basic principles of protection which apply regardless of specific contractual provisions. Nevertheless, individually negotiated arrangements should be possible as long as they are not in conflict with the applicable competition law.

3.4. Contract law alone does not provide efficient protection against most forms of misappropriation. In particular, as regards mass-marketed programs for Personal Computers and computer games which do not need maintenance, contract law does not provide an adequate means to prevent the copying and use of computer programs by third persons. Nor is it entirely clear whether the practice of so-called "shrink-wrap licensing" where use conditions are attached to a product which is, to all intents and purposes "sold" to the user, constitutes a valid licence in all circumstances and in all jurisdictions.

3.5. It is therefore proposed that the granting and limitation of exclusive rights in computer programs should reflect these different modes of commercial exploitation, outright sale, and licensing. Where "sale", in the normal sense of the word occurs, certain rights to use the program must be taken to pass to the purchaser along with the physical copy of the program. Where licensing takes place in the conventional sense by means of a written contract signed by both parties, the rights to use the program which has been provided will, with a limited number of exceptions, remain circumscribed by contractual arrangements. The choice remains open for the supplier then to decide on the most appropriate form of commercialisation for his product, and for the user to manifest his preference for an outright purchase or a licensing agreement.
3.6. The overwhelming weight of evidence submitted to the Commission during the consultation process which followed publication of the Green Paper indicated that protection by copyright is the most appropriate measure to adopt. Given the trend towards copyright as the best available means to ensure the international protection of programs not only among Member States but among the major trading partners of the Community, it is hardly surprising that so many commentators on the Green Paper have indicated that harmonisation of copyright laws within the Community is now becoming a priority.

It is further believed that within the framework of copyright, protection as a literary work is desirable. Copyright can provide the solution of ensuring adequate protection against misappropriation and, in particular, against unauthorized reproduction. Copyright has already in the past proved its capacity to adapt to new technologies, such as films and broadcasts. Copyright protection does not grant monopolies hindering independent development. Copyright protects only the expression but not the underlying idea of a work. It does not therefore block technical progress or deprive persons who independently developed a computer program from enjoying the benefits of their labour and investment.

3.7. Protection by copyright allows a clear balance to be achieved between too little protection and over-protection. It provides sufficient flexibility to permit a fair compromise between the divergent interests of producers or suppliers on one side and users of computer programs on the other. But the main advantages of this type of intellectual property protection relate to the fact that the protection covers only the individual expression of the work and gives thus sufficient flexibility to permit other authors to create similar or even identical programs provided that they abstain from copying. This is particularly important because the number of algorithms available, on which computer programs are based, is considerable, but not unlimited.
3.8. Some countries have introduced "genre specific" provisions in their copyright law to accommodate possible differences between computer programs and other more traditional literary works. Such "genre specific" provisions should be kept to a minimum if the full benefit of the established copyright protection granted under the Berne and UCC Conventions is not to be overly diluted. Accordingly, the present Directive seeks as far as possible to stay within the common parameters of literary work protection as it exists today in the Member States of the EC.

3.9. Computer program protection by means of copyright raises two particular issues; that of standardization of aspects of programs in the interests of greater interoperability of hardware and software, and that of availability of information concerning the access protocols and interfaces which ensure such interoperability. Moves towards greater standardization of products within the computer and telecommunications industries are well under way, through the encouragement and initiatives of both the Commission itself and the industries concerned. Many aspects of computer hardware and software interoperability are already governed by the International Standards Organisation's Open Standards Initiative. In addition, the existence of bodies such as X-Open indicates a willingness on the part of industry to cede proprietary rights in some parts of programs into the public domain in order to achieve greater compatibility between systems. The provisions of this Directive should contribute to the trend towards a greater use of standardization insofar as they determine with more legal certainty what are the exclusive rights of the author of the program.

3.10. As regards the question of the protection of "access protocols and interfaces" themselves, the question was raised in the Green Paper as to whether copyright protection should apply to these parts of programs.
3.11. In order to produce interoperative systems it is necessary to replicate the ideas, rules or principles by which interfaces between systems are specified, but not necessarily to reproduce the code which implements them. Ideas, rules or principles are not copyrightable subject matter. Such ideas, rules or principles may be used by any programmer in the creation of an independent implementation of them in an interoperative program.

3.12. Competitors are therefore free, once they establish through independent analysis which ideas, rules or principles are being used, to create their own implementation of the ideas, rules or principles in order to make compatible products. They may build on the identical idea, but may not use the same expression as that of other protected programs. There is thus no monopoly on the information itself, but only a protection of the form of expression of that information.

3.13. If similarities in the code which implements the ideas, rules or principles occur as between interoperative programs, due to the inevitability of certain forms of expression, where the constraints of the interface are such that in the circumstances no different implementation is possible, then no copyright infringement will normally occur, because in these circumstances it is generally said that idea and expression have merged.

3.14. Although it is technically possible to decompile a program in order to find out information concerning access protocols and interfaces this is a lengthy, costly and inefficient procedure. It is usually more efficient for the parties concerned to agree on the terms under which the information will be made available. Problems of access to information may have to be addressed by other means which are outside the scope of this Directive.

3.15. In view of the rapid evolution of the computer industries the Commission will keep all these matters under constant review.
RELATION TO INTERNATIONAL CONVENTIONS.

4.0. Copyright has the added advantage of affording a high level of international protection to works so covered, through the application of the Berne and Universal Copyright Conventions. Although neither convention expressly mentions computer programs among the works to be covered by copyright, it is generally understood that as new forms of intellectual property are developed, they will be encompassed by the conventions insofar as the same kinds of creativity are involved in the elaboration of such new forms of work as for existing works. The conclusion that computer programs are indeed literary "works" within the meaning of the Berne and Universal Copyright Conventions leads to the assumption that where a Member State grants protection under the Berne Convention it will apply the principle of national treatment. Whatever the theoretical merits of "sui generis" legislation in this field might be, they are far outweighed by the advantages of the existence of these international conventions.

5.0. THE LEGAL BASIS

5.1. In its White Paper on the completion of the Internal Market, the Commission stated its intention to pay particular attention to the introduction of a Community framework for the legal protection of software and announced a proposal for a directive. The present proposal therefore forms part of the Commission's program for the completion of the Internal Market before 31 December 1992.

5.2. It follows from the approach of fixing basic common principles that a Directive is the appropriate legal instrument to harmonize the laws of the Member States as regards the legal protection of computer programs.

5.3. Because differences in and uncertainties regarding the legal protection of computer programs can have a negative effect on the functioning of the common market in these products, Article 100 A is the appropriate legal basis for the present proposal.
For the completion of the internal market before 31 December 1992, Article 100A paragraph 1, sentence 2 provides by way of derogation from Article 100:

"The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

Article 8A paragraph 2 defines the internal market as comprising "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

5.4. The present proposal will favour the free circulation of computer programs insofar as industry in those countries with clear and established protection of computer programs is currently in a more favourable position than that in countries where protection is uncertain; such differences in legal protection distort the conditions of establishment and of competition in Member States for firms which engage in activities concerned with computer programs. This situation may affect the growth of the Community software industry and the operation of the Internal Market. In addition by harmonizing the conditions under which the results of research and development in the computer program field are legally protected on a uniform basis in the Member States, innovation and technical progress throughout the Community will be encouraged.

5.5. In the preparation of this proposal the Commission has taken into account the requirements of Article 8c of the EEC Treaty and has concluded that no special provisions or derogations seem warranted or justified at this stage.
5.6. Likewise the Commission has studied the question of the high level of health/safety/environmental and consumer protection required by the terms of Article 100A(3) of the EEC Treaty. It has done so following consultation with the industrial and social partners concerned, and in the light of an analysis of the risks inherent in this area and of the current technical capabilities of European industry. The proposal takes full account of these considerations in the light of the overall objectives of this provision of the Treaty.
CHAPTER 1

Article 1

Object of protection

1.1. The words "computer program" are not defined for the purposes of this Article. It has been recommended by experts in the field that any definition in a Directive of what constitutes a program would of necessity become obsolete as future technology changes the nature of programs as they are known today.

Given the present state of the art, the word program should be taken to encompass the expression in any form, language, notation or code of a set of instructions, the purpose of which is to cause a computer to execute a particular task or function.

The term should be taken to encompass all forms of program, both humanly perceivable and machine readable, from which the program which causes the machine to perform its function has been or can be created.

Preparatory and design material such as flow charts or descriptions of sequences of steps in plain language will be included, as will embodiments of the program within the hardware itself, either permanently or in removable form. Material such as user manuals or maintenance manuals will not be considered to be parts or manifestations of the program, except that where substantial parts of the program are reproduced therein, those extracts from the program will be protected by copyright in the program independently from any rights which may subsist in the manual or other documentation.

1.2. Member States shall be required to apply the same provisions for the protection of computer programs as apply to literary works. A program has all the characteristics of a literary work, namely
that it is the expression in language and in a perceivable form from which it can be reproduced of an idea or series of ideas, created by the expenditure of human skill and labour. The fact that the language may be only comprehensible to those skilled in the art, and that some manifestations of the program may take forms which are not at all times comprehensible to the human senses does not preclude protection as a literary work, since other literary works may also be embodied in carriers which require a mechanical device to render them perceivable to the human mind.

In order to avoid legal uncertainty, computer programs must be protected as literary works and not "as if" they were literary works or "assimilated to" literary works. Similarly they should not be treated as a new and separate "sub-category" of literary work. Failure to accord the full protection given to literary works generally in Member States could result in divergencies in the nature and scope of protection and in uncertainties as to the level of protection afforded to such works under the Berne and Universal Copyright Conventions.

1.3. Copyright protects the expression of ideas but not the ideas themselves. Therefore the protection given to computer programs will extend to the program as a whole, and to its constituent parts, insofar as they represent a sufficient degree of creativity to qualify as "works" in themselves. The only criterion which should be applied to determine the eligibility for protection is that of originality, that is, that the work has not been copied. No other aesthetic or qualitative test should be applied. Sub-routines and routines which go together to form modules which in turn form programs may all qualify for
protection independently of the protection given to the program as a whole, that is, as a compilation of such elements. The algorithms which go to make up the sub-routines are not normally in themselves capable of receiving protection under copyright insofar as they are similar in nature to mathematical formulae. They may in exceptional circumstances attract patent protection. Similarly, the ideas, principles, or logic which underlie the program will not be copyrightable.

1.4a. Many algorithms and many sub-routines are commonplace in the industry. They may have been placed or have fallen into the public domain or they may be de facto standard routines or algorithms. Where a program is composed wholly or in part of such commonplace or unprotected algorithms and routines, it should nevertheless be protected as a compilation, provided that it is original in the above mentioned sense and that the creator demonstrated skill and labour in the creation of the compilation.

1.4b. An increasingly large number of programs are now generated by using a computer. This means that program A is used in order to create programs B, C and so on with some degree of human intervention in order to select the most appropriate means to achieve the objective. Program A could in this respect be likened to a literary work such as a dictionary which permits the creation of other literary works. Although much of the routine programming work is done by purely mechanical means, human effort is still nevertheless a critical element in the creative process. It is therefore proposed that insofar as programs generated by such means fulfill the criteria which would enable them to be categorized as "original works" they should be protected in the same way as programs created without the aid of such machine generation processes.
Article 2  

Authorship of program

2.1. In common with all literary works, the question of authorship of the program is to be resolved in favour of the natural person or persons who have created the work. Although the right to exercise exclusive rights may be assigned to another, the author will retain at least the unalienable rights to claim paternity of his work.

2.2. Copyright In a work created by a group of persons, which is normally the case with the development of computer programs, is to be exercised in common unless the persons concerned contract otherwise.

2.3. Computer programs are frequently created by freelance programmers working on particular projects on behalf of organisations which have commissioned a given program. In such circumstances, unless the parties agree otherwise, it is normal that the person or entity which causes the work to be created should wish to retain the control over the exclusive rights in the program, with the exception of the right to claim paternity of the work mentioned in paragraph 2.1 above.

2.4. In circumstances where a programmer is employed to create programs within a company or organisation, the employer will normally require that the exclusive rights in the program should remain within his control, with the exception of the right to claim paternity of the work, unless the parties agree otherwise.
In paragraph 2.3 above, it is the intention of this Directive that a certain measure of harmonisation of current practice in Member States should be brought about. Nevertheless the freedom to negotiate contracts of employment and terms for commissioned works must remain to a large extent a subject for contractual negotiation between the parties.

In respect of other aspects of authors' moral rights such as the right to maintain the integrity of the work, the nature of computer programs is such that substantial modification and re-utilisation of parts of programs is constantly taking place and the concept of integrity of the work is of much less relevance to the author's interests than has traditionally been the case with other literary works.

2.5. As indicated in 1.4b, a large number of works are now generated by means of a computer program which serves as a tool to generate new programs. The question arises as to whether authorship of these programs generated by the first computer program should reside with the creator of the first program, or with the person who causes it to generate other works. Since the first program is no different in its function from any other tool used to create a work, such as an instruction manual by means of which another work is created, it would seem appropriate that the person who uses such a tool to generate programs should be considered as the creator of those programs. In practice, such a person may be the operator of the computer, or the natural or legal persons who retain the right to exercise the rights in programs which they have commissioned or which have been created by their employees. In these circumstances it is doubtful that a right to claim paternity of the programs generated by a machine could be upheld. The human input as regards the creation of machine generated programs may be relatively modest, and will be increasingly modest in future. Nevertheless, a human "author" in the widest sense is always present, and must have the right to claim "authorship" of the program.
Article 3  

Beneficiaries of protection

3.1. Where the literary works of natural and legal persons are currently protected by copyright in Member States either by virtue of nationality or residence, in the case of natural persons, or by having a real and effective presence in a Member State in the case of legal persons, the same protection will apply for computer programs. Where Member States afford protection on the basis of first publication of a literary work in a Member State, that criterion should also apply to computer programs. Thus the rules of national treatment under the Berne Convention will be applied to computer programs as to all other literary works.

3.2. As mentioned above, computer programs are frequently the creation of large teams of programmers, some of whom would not be currently eligible for protection under the residence, nationality or first publication criteria outlined in Article 3 (1) above. This anomaly can be removed by extending the application of Articles 3 and 5 of the Berne Convention to all authors where a work has been created jointly, provided that at least one member of the group is able to establish a right to protection. In this way, programmers from outside the Community and in particular programmers from developing countries who cooperate on joint projects with programmers from Member States will not be unfairly disadvantaged.

Article 4

4.1.a. Under traditional copyright protection for literary works the author's exclusive rights comprise the right to control reproduction, adaptation and translation of his work. The Berne Convention does not expressly give a right to control the distribution of works but the exclusive rights in respect of reproduction are in practice exercised in most countries of the Berne Union to allow the author to determine how his work shall be put on the market.
The right to control reproduction given in Article 4.1.(a) is fundamental to achieve adequate protection for computer programs. Unlike other forms of literary work, a computer program cannot serve its purpose unless it is "reproduced". This "reproduction" should not be confused with "replication". The program may be re-created in part or in whole as part of the internal processes of the computer which runs it. No second permanent copy of the program is made during this process, although parts of the program will be "reproduced" and stored in other parts of the memory of the computer during the operation of the program. These temporary copying, moving and storing operations may leave no trace once the operation of the machine has terminated. Thus "copying" in the traditional sense of producing a second permanent version of an original does not normally take place unless a "back-up" copy of the program is made. Nevertheless, where programs are licensed, reproduction without authorization should be prohibited, principally because all the acts which could be prejudicial to the author's interests, namely, loading, viewing, running, transmitting or storing the program cannot be performed except by means of a reproduction of the program.

Loading of the program is to be considered a restricted act insofar as it normally at the present time necessitates reproduction of the program in part or in whole. In future programs may be more often contained in media which can be inserted physically into the computer, such as chips, or may be an integral part of the hardware. In these circumstances, reproduction of the program may no longer be necessary in order to work on it. For the present time, and in view of the risk of unauthorized users entering and corrupting programs, it is felt that loading should remain under the author's exclusive control.
Similarly, viewing, running, transmission and storage of the program all involve reproduction and are potentially damaging to the right holder’s interests. Computer programs are especially vulnerable not only to copying by electronic means but also to unauthorized adaptation, destruction or corruption, either for financial gain or for political objectives. Computer programs controlling banking, military or security operations must be protected against attack by “hacking” — that is unauthorized entry into the system in order to remove, add or change information contained within it. Such acts of fraud or sabotage can only be controlled if authors have wide and enforceable powers to protect programs against reproduction.

4.1.b. Adaptation of a literary work normally implies transformation of a given text such as a novel into another literary “genre” such as a play. Translation of a literary work is normally done from one human language into another. In the case of computer programs, whether the act is a translation from humanly readable form into machine readable form, or from one programming language to another, or an adaptation of a program designed to perform one task in order that it may perform another, the term “adaptation” best describes the activities involved. It is therefore to be understood that “adaptation” in this Directive includes “translation”.

4.1.c. Distribution of a computer program by means of sale or licence is normally controlled by the author of the program, either directly if he is also the producer of the marketed product, or indirectly by assignment of his right to a publisher or producer of programs. The author’s right is normally exhausted once the product has been put on the market with his consent. This Directive proposes that as regards the rental, leasing and licensing of software, the distribution right should not be exhausted by the first sale, leasing or licensing of the program. This will enable the right holder to exercise control over rental of products which have been previously sold, leased or licensed and to have continued control over the rental,
leasing or licensing of products which have been previously distributed by these means. Once a product has been sold with the right holder's consent he should no longer be able to exercise control over subsequent sale, that is sale to third parties of legally acquired programs. Likewise, as regards importation for the purposes of sale, licensing, lease or rental, once the program has been imported into the Community with the author's consent, his right to control subsequent importation will be exhausted.

It is essential to permit right holders to control the rental of programs which have been sold or licensed if copying of programs without authorization is to be prevented. It is possible at present to rent a copy of a software package at a nominal charge, to copy it at home using relatively inexpensive material and to return it the following day. It is clear that given the complexity of most programs and the fact that they are used for a given purpose rather than read for enjoyment, cheap, short-term rental allows the home copier to save on the cost of purchasing or leasing programs: as such, rental is highly prejudicial to right holders' interests and should be subject to the right to prohibition, with the limited exceptions indicated in Article 5 below.

**Article 5 Exceptions to the restricted acts**

5.1. Where a program is sold to the public, it is normal that certain rights to use the property thus acquired should apply. These rights should of necessity include the right to use the program without further express authorization from the right holder. It should not be necessary to obtain the right holder's authorization in order to lend the program to a third party or to use it on a given piece of apparatus or in a given location. Similarly the acts of loading, viewing, running, transmission or
storage should be taken as not requiring express authorization of the right holder provided that, particularly in the case of transmission and storage, they are only carried out for the purposes of using the program and do not result in a second permanent replication of the program. Thus temporary or permanent transmission to and storage by a second party of a program legally acquired by a purchaser for his own use will not fall within the exceptions to the restricted acts enumerated in Article 4, whereas such acts of transmission and storage performed by the purchaser temporarily for the purposes of using the program himself will not require authorization by the right holder. Similarly any form of reproduction other than that required for use will not be permitted, in particular, the making of a back-up copy or a copy for private use. Where a back-up copy is necessary for the purposes of use of a program this is normally expressly permitted by the right holder.

All reproduction should be controllable whether it is of part of the program or of the entire program, in that a partial reproduction may be sufficient to cause considerable economic harm to the author's interests, for example, by copying the protocol and interface program elements of a given program.

As regards the Anglo-Saxon law concept of "fair dealing" by which reproduction of insubstantial parts of literary works is permitted in certain circumstances, it is believed that in respect of licensed programs, which constitutes the most common method of commercialisation at present, the parties are free to negotiate exceptions to the author's exclusive right to control insubstantial reproduction of the program if circumstances warrant such a derogation. In the case of programs which are sold or made available by means other than a written license agreement signed by both parties, the provisions which exist in the copyright laws of Member States in relation to exceptions to the exclusive rights of the author of a literary work should continue to apply in the case of computer programs.
Where the current practice of "shrink wrap" licensing applies, program producers impose conditions on the use of programs which have been in reality "sold" to the consumer. The provisions of Articles 4 and 5 are intended to have as their effect that where software is licensed in the normal sense of the word, right holders will be able to exercise exclusive rights in respect of all acts of reproduction and adaptation, the exact provisions being the subject of contractual arrangements under the terms of the licence. But where no written, signed licence agreement is employed, as is the case with "shrink-wrap" licences (the customer being merely advised by means of instructions contained within the packaging which surrounds the program carrier of his rights in respect of his purchase) the provisions of Article 5 (1) will allow the purchaser to assume the rights described above. This is a necessary compromise between the interests of suppliers and consumers of computer programs. Article 4 of the Directive gives wide powers to right holders to control the acts of reproduction, adaptation and distribution, but these powers should not in fairness be used to circumscribe the normal enjoyment of property by a person who legally acquires a program by purchase. If program producers wish to ensure the greater degree of control over the reproduction, adaptation and distribution of their programs which the system of licences permits, the would-be "purchaser" of a program should be required to read and sign a legally binding licence agreement at the point of sale.

5.2. Adaptation and translation of programs are acts which the licensee of sophisticated programs may frequently wish to do in the course of normal use of the program. Many custom-made computer programs have not stabilized when they are supplied to end users; similarly many programs require correction in use or adaptation to changes in user requirements. This correction and adaptation work could in many instances be done by the user. However the supplier has a number of reasons for wishing to maintain his exclusive rights to control adaptation and
translation. A guarantee and maintenance contract may attach to the program which has been supplied and such guarantee and maintenance arrangements may be invalidated or rendered expensive and impracticable if the licensee is able to constantly amend his licensed program. The supplier will also frequently set the licence rate to take into account the use which can be made of the program, in terms of the number of users and the amount of program which can be accessed. Such control is exercised by means of copy protection and metering systems incorporated in the program itself. If the user were able to adapt the program, he would be at liberty to remove these control mechanisms. Therefore any adaptation and translation which is done should be subject to the right holder's control in the case of licensed software and should be the subject of contractual arrangements between supplier and user.

5.3. The exclusive right to control rental given in Article 4 (c) is subject to a derogation in favour of one group of users for whom special arrangements can and should be made. This is non-profit making public libraries where members of the public may go to use and to study computer programs. Libraries are able to control the use made of such programs by means of safeguards to prevent their duplication or their removal from the premises. It is important, given the need to encourage computer literacy in all sections of the Community, that libraries are able to offer computer programs for study by the public in the same way as they offer other literary works.
Article 6  Secondary Infringement

6.1. In order to ensure that right holders may bring successful actions against infringers of the exclusive rights given in Article 4, it is necessary to provide for the cases where infringing copies have been put in circulation. The ease with which unauthorized copies of programs can be transferred electronically from one "host" computer to another, across national borders and without trace, requires that the importation and possession of infringing copies should also be actionable as should be all dealing with infringing copies in the sense of selling, offering for sale, receiving, transmitting and storing such copies.

6.2. Many programs are marketed with a technical protection system which prevents or limits their unauthorized use or reproduction. If such systems are used by right holders to protect their exclusive rights, it should not be legally possible to remove or circumvent such systems without the authorization of the right holder. The term "deal with" should be taken in this context to include sale, offer or advertise for sale, transmit, store or receive such means to circumvent protection systems, and to include also the communication of information as to the means for circumvention or removal of protection systems.

Article 7  Term of Protection

7.1. Although the term of protection for literary works is life of author plus fifty years, 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. These hesitations outweigh the benefits of maintaining the classical "literary work" term.
Proposal for a
COUNCIL DIRECTIVE

on the legal protection of computer programs

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community
and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas computer programs are at present not clearly protected in all
Member States by existing legislation and such protection, where it
exists, has different attributes;

Whereas the development of computer programs requires the investment of
considerable human, technical and financial resources while computer
programs can be copied at a fraction of the cost needed to develop them
independently;

Whereas computer programs are playing an increasingly important role in
a broad range of industries and computer program technology can
accordingly be considered as being of fundamental importance for the
Community's industrial development;
Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;

Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;

Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and further in establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts, and for how long the protection should apply;

Whereas the function of a computer program is to communicate and work with other components of a computer system and with users;

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 they are intended to function. The principles describing any such means of interconnection and interaction are generally known as "an interface". Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter;
Whereas the Community is fully committed to the promotion of international standardization;

Whereas protection of computer programs under copyright laws should be without prejudice to the application in appropriate cases of other forms of protection;

HAS ADOPTED THIS DIRECTIVE:
CHAPTER 1

Article 1

Object of protection

1. Member States shall protect computer programs by conferring exclusive rights in accordance with the provisions of this Directive.

2. Exclusive rights shall be conferred by the provisions of copyright laws. Protection shall be accorded to computer programs as literary works.

3. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

4. (a) A computer program shall not be protected unless it satisfies the same conditions as regards its originality as apply to other literary works.

(b) Programs generated by means of a computer shall be protected in so far as they satisfy the conditions laid down in 4(a) above.

Article 2

Authorship of program

1. Subject to the following paragraphs, the author of a computer program is the natural person or group of natural persons who has created the program.

2. In respect of computer programs created by a group of natural
persons, the exclusive rights shall be exercised in common unless otherwise provided by contract.

3. Where a computer program is created under a contract, the natural or legal person who commissioned the program shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.

4. Where a computer program is created in the course of employment, the employer shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.

5. In respect of programs which are generated by the use of a computer program, the natural or legal person who causes the generation of subsequent programs shall be entitled to exercise all rights in respect of the programs, unless otherwise provided by contract.

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. In the case referred to in Article 2 paragraph 2 the computer program shall be protected in favour of all authors if at least one author is a beneficiary of protection in accordance with paragraph 1 of this article.
Article 4

Restricted Acts

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, viewing, running, transmission or storage of the computer program shall be considered restricted acts,

b) the adaptation of a computer program,

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

Article 5

Exceptions to the restricted acts

1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4 (a) and (b) shall not require the authorization of the rightholder, insofar as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purposes of its use shall require the authorization of the rightholder.

2. Where a computer program has been sold or made available to the public by means other than a written licence agreement signed by both parties, the exclusive right of the rightholder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.
Article 6  

Secondary Infringement

1. It shall be an infringement of the author's exclusive rights in the computer program to import, possess or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

2. It shall be an infringement of the author's exclusive rights in the computer program to make, import, possess or deal with articles intended specifically to facilitate the removal or circumvention of any technical means which may have been applied to protect a program.

Article 7  

Term of protection

Protection shall be granted for fifty years from the date of creation.

CHAPTER II

Article 8  

Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to any legal provisions concerning patent rights, trade marks, unfair competition, trade secrets or the law of contract insofar as such provisions do not conflict with the principles laid down in the present Directive.

2. The provisions of this Directive are applicable also in respect of works created prior to __date in Article 9__. 
CHAPTER III

Article 9

Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to comply with this Directive by [date.]

2. Member States shall ensure that they communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

Article 10

This Directive is addressed to the Member States.

Done at Brussels

For the Council

The President
In adopting a proposal for a Council directive on the legal protection of computer programs, the Commission approves the following policy guidelines. It affirms its conviction that computer programs, given the intellectual effort and the financial investment which may be necessary for their creation and the ease with which they can be copied, merit adequate legal protection. Following a worldwide trend, the Commission proposes copyright as a suitable legal basis for ensuring a balance between an effective level of protection and the interests of users. Divergencies between the copyright statutes of the Member States as to the availability and scope of the protection have caused the Commission to initiate the harmonisation process in view of the objective of completing the internal market.

Software is an industrial tool which is essential to the Community's economic development. The grant of exclusive rights under copyright law will create incentives for software developers to invest their intellectual and financial resources and thereby to promote technical progress in the public interest. Technical progress and public welfare, however, are also ensured by a system of indistorted competition, one of the principal goals of the Treaty. Exclusive proprietary rights and free competition, while in principle designed to achieve the same objective by different means, may conflict where a copyright owner is in a position to exercise his statutory exclusive rights beyond their intended purpose. The exercise of exclusive copyrights will not prejudice the application of the competition rules and the imposition of effective remedies in appropriate cases. Further, the Community commitment to international standardisation in the fields of information technology and telecommunications must not be compromised.

The relation between the Community's competition rules and copyright is governed by the European Court's distinction between the existence and the exercise of the intellectual property rights in question. Any arrangement or measure which goes beyond the existence of copyright can be subject to control under the competition rules. This means that for example any attempt to extend by contractual agreements or other arrangements the scope of protection to aspects of the programs for which protection under copyright is not available, or the prohibition of any act which is not reserved for the right owner may constitute an infringement of the competition rules.
Moreover, companies in a dominant position must not abuse that position within the meaning of Article 86 of the Treaty. For example, under certain circumstances the exercise of copyright as to the aspects of a program, which other companies need to use in order to write compatible programs, could amount to such an abuse. This could also be the case if a dominant company tries to use its exclusive rights in one product to gain an unfair advantage in relation to one or more products not covered by these rights.

Furthermore, the ability of a competing manufacturer to write an independent but compatible program often depends on his possibility to have access to the target program or to certain information relating to it. Access to information is not a matter of copyright law. Article 86 always applies where a dominant company abusively refuses access to such information or restricts unreasonably such access.
Brussels, 3 April 1989

WORKING DOCUMENT
of the Section for Industry, Commerce, Crafts and Services
on the
the legal protection of computer programs
(COM(88) 816 final)

Rapporteur: Mr MORELAND

Sent on: 3 April 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 19 April 1989.

R/CES 358/89
1. Summary of the Proposal

The draft Directive introduces the concept of copyright into Community law for the protection of computer programs. 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.

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 of programs used by the public in non-profit making public libraries.

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. Initial General Comments

The Commission has produced its proposal before the Committee gave its Opinion on the "Copyright Green Paper". Perhaps the Commission should be commended on its power of prophesy as regards certain of the comments of the Committee - particularly as regards the "literary works" basis of its proposal!

Nevertheless, lack of clarity and dubious drafting underlines the haste in which the Directive was compiled after the publication of the Green Paper. The Rapporteur foresees some difficulty over certain clauses within the Council.
The priority given to this Directive is not disputed nor is the legal basis upon which protection is to be given to computer programs. However members may wish to bear in mind the balance required between adequate protection to encourage initiative and fair reward and the concern that restrictive protection of computer programs may limit the ability of European business to make the fullest use of modern technology, particularly to compete against third country competitors. Complicated and restrictive copyright licences are not at all helpful as incentives to industry.

3. Initial Specific Comments on Questions

Article I - Object of Protection

Paragraph 1

The key clause. Is protection as "literary works" acceptable? It is based not so much on its own merits, but on the absence of any other basis that would not take considerable time and effort to establish. Does it allow for the situation, as recommended in our Opinion on copyright, for a separate code for copyright, as operates in France? In other words, should it require computer programs simply to be protected, or to be protected specifically as copyright works?

Paragraph 3

This appears to be in line with the Committee's comments on the Green Paper (see page 8, clause c) but the drafting in unhappy. The principle on which this provision is based should be, perhaps, that the ideas which underlie the program should not be protected but that the way those ideas are expressed in coding and structure should be.
The second sentence is redundant as the point is covered by the first sentence and should either be deleted or proceeded with "For the avoidance of doubt".

Paragraph 4a

The Commission does not define "originality" as the interpretation of this word in law differs from Member State to Member State (for example, the Federal Republic has a stiff test of originality). This clause does not harmonize anything, particularly as the Court of Justice, if tested, would probably uphold the validity of different degrees of originality as it has upheld the validity of different terms of protection.

Article 2 - Authorship of Programs

Paragraph 3

This paragraph (and the next) are likely to create problems for some Member States, particularly (but not exclusively) ones with a strong "droit d'auteur" philosophy as the legal rights are given not to the "author" or company employing the "author" but to the commissioner. Also how will the use of "subordinates" be tackled, e.g. a consultant develops a program for one client as part of an overall consultancy project. Can he develop that program (or use routines first developed for that program) for another customer? Perhaps this area should be left entirely to freedom of contract?

Paragraph 4

Should the employee who has devised the program have rights particularly as it may have been his skill which has produced a program that could be used outside his own company and make it a substantial "windfall" profit?
Article 4 - Restricted Acts

Is this article too "protectionist" of the computer industry?

Again drafting could be tighter. "Transmission" and "Storage" need more precise definition. In 4b, what is meant by "adaptation"? Does "exhausted in respect of sale" mean that the draftsman intended to prohibit the control by a licensor over his licensees sub-licensing? Anyway, very few computer programs are "sold": either they are licensed or they are simply made available for use, with the copyright owner reserving all intellectual and physical property rights.

Article 5 - Exceptions to the Restricted Acts

Paragraph 2

Presumably this is intended to allow use of programs for educational reasons. If so it should say this or, at least, add, for example, a list of appropriate bodies such as schools, universities, rather than the curious "non-profit-making public libraries". In any event, presumably a rented program would not necessarily have to be used "in non-profit-making public libraries".

Article 7 - Term of Protection

The life of a computer program is invariably short. Therefore 50 years is complete protection. But, in effect so is 25-20 years which is the more common length of protection for industrial products. Perhaps this is to follow the recent UK Copyright Act. If so it is to misinterpret the position of the UK which gives protection not from the "date of creation" but from the end of the year in which the author dies. (This was done...
(somewhat questionably) to encourage other countries to regard computer programs as covered by the Berne Convention on international copyright protection). In other words the Commission appears to have either fallen between two stools or simply made a mistake.

Other Consideration

Because this breaks new ground for the Community should there be an automatic review period for the Directive, say, after five years, particularly to review whether or not continued existence of different copyright laws in different Member States is having an adverse impact on the development of the single market?
Brussels, 14 June 1989

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: 14 June 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 5 July 1989.
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


(COM(88) 816 final - SYN 183).

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:

1. Summary of the Proposal

1.1. The draft Directive introduces the concept of copyright into Community law for the protection of computer programs. 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. First, in accordng 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. Secondly (and this could be made more explicit in the proposals) the approach is intended to bring computer programs within the definition of "literary works" in the Berne Convention. The 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.
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.

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.

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.

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:

"as defined by the Berne Convention".

3.4. Article 1: Paragraph 3

3.4.1. The Section supports the exclusion of ideas, principles and algorithms from copyright protection.

3.4.2. As to "logic", although it is a term of art widely used in the computer industry, its meaning is unclear and frequently interchangeable with the word "algorithm". Its inclusion may only serve to confuse rather than clarify and the Section therefore recommends that it be excluded from the paragraph.

3.4.3. However, the Section does support the exclusion from copyright protection of programming languages as such. The paragraph as drafted does not (as we understand it) affect the copyrightability of any program written in a specific language, or the copyrightability of any compilers or interface programs.
which may make a language understandable on a particular computer or in conjunction with particular programs. But a language itself, as such, has not been copyrightable in most Member States until now and the Section sees no reason to alter that state of affairs.

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.

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 or algorithms or programming languages 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 (for example, the Federal Republic of Germany has a stiff test of originality). 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 Community will therefore have to decide what degree of originality is necessary in order to qualify for copyright protection.

3.5.3. In any event, 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."

3.6. Article 2: Paragraph 3

3.6.1. 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.

3.6.2. 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.

3.7. 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)".

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. It does not consider that any amendment is necessary to do so, but invites the Commission to re-examine the wording with a view to ensuring that the original copyright owner's position is protected.

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)

The Section proposes that, for the 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. The use of the word “sale” is inappropriate in this context; computer programs are licensed, not sold, and the word can be deleted.

3.11.2. 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 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 its being licensed or made available to any person anywhere in the world by the rightholder or with his consent.”

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 either the reference to written agreement signed by
the parties be deleted and replaced by the words "any legally enforceable licence agreement"; or 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, indefeasible rights of the user.


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

"Where 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 display 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."

3.15. Article 7

3.15.1. 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. 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 made."

3.15.2. 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.
3.16. 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.

3.17. 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.

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. Because this proposal breaks new ground in Community law, and because it covers technology which is changing rapidly the Section considers that there should be an automatic review 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"). As this clearly has implications for the regulation of the single market (but is an issue distinct from that of copyright), the Section recommends that the Commission give this issue serious examination with a view to making legislative proposals.
SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programmes)
on: 10 July 1989
No. Cion prop.: 5682/89 PI 25
Subject: Proposal for a Council Directive on the legal protection of computer programs

At the first meeting of the Working Party on Intellectual Property (Computer Programs) on 10 July 1989 (1) the Commission representative presented the above proposal. The Working Party held an initial general exchange of views and then began the first reading of the individual articles.

1. The Commission's presentation of the proposal

1.1. Explaining the need for the proposed Directive, the Commission representative mentioned the following aspects:

(a) the undertaking the Commission had given in this connection in the White Paper on the completion of the Internal Market.

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(1) The Luxembourg delegation was not represented at this meeting.
(b) the lack of harmonization between national legislations and between the Member States' jurisprudence in the field of the protection of computer programs;

c) the need to ensure a level of protection equivalent to that available under the laws of the Community's principle trading partners, with the aim of preventing the illegal copying of computer programs;

d) the creation of a stable legal situation that would encourage investment in this field in the Community.

1.2. The Commission representative stressed that the Commission's approach was minimalist and involved no more than the vertical harmonization of laws in this area.

1.3. The Commission proposed that computer programs be protected by copyright as literary works but that other means of protection should not be ruled out in special cases.

1.4. The Commission representative stressed that the proposal was to be situated in the context of the Berne Convention for the Protection of Literary and Artistic Works, and that the Commission had attempted to balance the interests of the creators of computer programs and those of their competitors and of users. He also indicated that the first reactions on the part of the industry concerned had been generally positive.

2. General discussion

2.1. Without prejudice to comments on individual provisions, all delegations welcomed both the Commission's initiative of harmonizing the legal protection for computer programs in the Member States and the form of
protection adopted, although the Greek delegation entered a scrutiny reservation on the text of the proposal.

2.2. Several delegations, however, felt it would be better to ensure greater conformity between certain provisions of the Directive and the Berne Convention, in particular as regards the duration of protection. The German delegation, supported by several others, referred to Articles 19 and 20 of the Berne Convention and commented that the States party to that Convention had the option of conferring rights more extensive than those granted by the Convention itself. On the other hand, the duration of protection as laid down in Article 7 of the proposal for a Directive was more limited than that provided for in the Berne Convention. Those delegations stressed in that connection that Article 7 of the proposal for a Directive as it stood could create a dangerous precedent that might be invoked by other States to provide for other exceptions to the Berne Convention.

The Commission representative pointed out that when drafting Article 7 of the proposal the Commission had taken as its basis a suggestion made at WIPO for the duration of the protection of collective works, as computer programs were very often considered as such.

3. First reading of the Articles of the Directive (Articles 1 to 3)

3.1. Article 1 - The object of protection

(a) Paragraphs 1 and 2

3.1.1. The French delegation, supported by the Belgian delegation, preferred to say "software" rather than "computer program" (2), as in its opinion

(2) The Spanish delegation said that the expression "programas de ordenador" should be used in Spanish.
the Directive should provide for the protection not only of computer programs as such but also of design material and auxiliary documentation.

Other delegations (DK/D/NL/UK and the Commission) felt that auxiliary documentation was already protected by copyright and that accordingly it would be sufficient to provide for the protection of computer programs.

The French delegation drew the Working Party's attention to the distinction to be made between auxiliary documentation such as instruction manuals on the one hand and material used in the design of computer programs on the other hand, and the Commission representative expressed the intention of specifying that computer programs included design material, as a consequence of which the expression "computer programs" could be maintained.

3.1.2. The Spanish, French and Netherlands delegations preferred the term "works" without referring specifically to literary works. The Italian delegation also supported that view and added that it would be in favour of a broader term than "literary works".

The German and United Kingdom delegations, on the other hand, and the Commission representative were in favour of maintaining "literary works".

The Irish delegation suggested specifying "literary works as defined in the Berne Convention". That suggestion was welcomed by the Italian delegation and the Commission representative.

3.1.3. The Spanish delegation felt that the expression "exclusive rights" should be interpreted as covering not only property rights but also moral rights.
3.1.4. The German delegation, supported by the French and United Kingdom delegations, suggested merging paragraphs 1 and 2. It suggested the following wording:

"The Member States shall confer copyright protection on computer programs as literary works".

(b) Paragraph 3

3.1.5. Two objections were raised regarding the first sentence of paragraph 3:

- certain delegations pointed out that it was already established that copyright protected expression but did not protect ideas and principles, and that accordingly it was superfluous to restate that principle;

- certain delegations voiced hesitations regarding the terms "logic", "algorithms" and "programming language".

In response to those objections, most delegations felt that this sentence could be reduced to the following:

"The protection provided for in this Directive shall apply to the expression in any form of a computer program".

The Irish delegation supported this position but wanted a guideline to be laid down to the effect that protection did not extend to the programming language.

The Commission representative noted that majority view but stressed the wisdom of laying down guidelines for national courts regarding the distinction between the expression of a computer program, which was protectable, and the ideas and principles which were the basis of such
a program, which were not protectable. To meet that concern the German delegation raised the possibility of referring to that distinction in the recitals.

3.1.6. Most delegations were also in favour of deleting the second sentence of paragraph 3, pointing out that interfaces were an integral part of computer programs and must consequently be protected in the same way.

The Commission representative said that the intention of that sentence was to leave open the possibility of protecting interfaces in certain cases although in most they were not protectable.

(c) Paragraph 4

Subparagraph (a)

3.1.7. In view of the lack of uniform criteria of originality \(^{(3)}\) in the laws of the Member States and the lack of any definition of that concept in the Berne Convention, several delegations felt it was desirable that a definition of the originality either of literary works or of computer programs be included in the Directive. Some of them expressed hesitation regarding the definition suggested by the Commission in the explanatory memorandum (page 18, point 1.3.): "that the work has not been copied".

\(^{(3)}\) It was pointed out that in the German version "Originalität" must be substituted for "Individualität".
The Danish delegation wondered whether the concept of originality should not be replaced by the terms used in Article 2(2) of the Council Directive of 16 December 1986 on the legal protection of topographies of semiconductor products (4).

The Netherlands delegation asked whether computer programs which were not originals could be protected under the Directive.

The Commission representative said he would review this subparagraph in the light of the delegations' comments.

Subparagraph (b)

3.1.8. Several delegations pointed to the distinction between programs generated by computers and programs generated with the help of computers and the Commission representative said that the Commission's intention had been to restrict the scope of this subparagraph to programs generated by computers.

In the light of that clarification several delegations felt that this subparagraph was unnecessary at the present level of technical development, at which it was not yet possible to have computers generate programs without any human intervention.

The Commission would re-examine this question.

(4) That paragraph reads as follows:
"2. The topography of a semiconductor product shall be protected in so far as it satisfies the conditions that it is the result of its creator's own intellectual effort and is not commonplace in the semiconductor industry. Where the topography of a semiconductor product consists of elements that are commonplace in the semiconductor industry, it shall be protected only to the extent that the combination of such elements, taken as a whole, fulfils the abovementioned conditions."
3.2. Article 2 - Authorship of a program

3.2.1. Several delegations felt it was necessary to make a clearer distinction in this Article between the author and the owner of a computer program and between property rights and the author's moral rights, the latter being inalienable while the former could be transferred.

The German delegation stressed in this connection that paragraphs 2 to 5 were not a derogation from the principle enunciated in paragraph 1 and that accordingly the phrase "subject to the following paragraphs" should be reconsidered.

3.2.2. The United Kingdom delegation pointed out that in connection with the phrase "unless otherwise provided by contract" in paragraphs 2, 3, 4 and 5 it should be stipulated that the author of a computer program must be a party to the contract in question.

3.2.3. The Spanish and French delegations expressed doubts regarding the imposition in paragraph 2 of an obligation on a group of authors to exercise exclusive rights in common without any indication of the procedure to be followed in the event of disagreement amongst them.

The German and Italian delegations considered this paragraph superfluous as the provisions of national law on collective works should apply to computer programs created by groups of persons.
3.2.4. Several delegations asked whether paragraphs 3 and 4 were compatible with Article 6a of the Berne Convention.

In connection with paragraph 4 the Danish delegation said that Danish law allowed the universal transfer of all rights, both property and moral, to an employer.

The Spanish delegation suggested specifying in paragraph 4 that rights should be exercised by an employer only insofar as necessary for the pursuit of his commercial activities.

The Commission representative proposed examining the possibility of resolving the problem of the compatibility of paragraphs 3 and 4 with the Berne Convention by specifying that the rights referred to in those two paragraphs were property rights, not moral rights.

3.2.5. The Italian delegation doubted the need for paragraph 5.

3.3. Article 3 - The beneficiaries of protection

3.3.1. The Netherlands and the United Kingdom delegations questioned the point of the first paragraph since it did no more than restate a principle enunciated in the Berne Convention. The Italian delegation suggested that an explicit reference to that Convention would clarify this provision.
3.3.2. The Commission representative explained that the purpose of paragraph 2 was to extend to one or more members of a team of programmers the right to the protection to which they would not normally be entitled because they were nationals of a State which was not a party to the Berne Convention.

Several delegations entered reservations on the wisdom of granting any such extension of protection without making it subject to reciprocity.
1.2. The adaptation of a program (Article 4(b)). Adaptation requiring authorization includes translation, as shown in the Commission's explanatory memorandum. Most of the delegations were prompted by the wording of this point to comment on the difficulty of accurately interpreting the concept of translation of computer programs in this context. The delegations suggested referring to the provisions of the Berne Convention (hereinafter referred to as BC) (Article 12). (1)

1.3. The distribution of a program (Article 4(c), first sentence). Some delegations (D/NL/1) suggested referring in this first part to "the distribution of a copy of a computer program". It was pointed out that account should be taken of the non-material aspects of distribution (NL).

1.4. Distribution: Exhaustion of the right to control (Article 4(c), second sentence). The great majority of delegations critizised the present wording of this text, mainly on the following grounds:

(a) Exhaustion of the right to control meant that a computer program could be sold following its first marketing by the rightholder. However, if the concept of first marketing is defined, this could include licensing, lease, etc., with the result that the program would no longer be protected. The delegations proposed referring to the copy or copies of the program and not to the program itself.

(b) Exhaustion of the right to control would make it difficult to harmonize that right, since it would be possible as things stood to deny the right of the author to control distribution of his own work even though he was selling it (right of destination), a right that was recognized under certain national legislations (B/F). These delegations, plus UK, pointed out the possible effects of including exhaustion of the right to control not only Community-wide but also internationally.

(c) The restrictive nature of the aspects of distribution listed.

(1) "Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works." (Article 12, BC).
1.5. **Back-up copies** (Article 4(a))

Since the text of the Directive makes no explicit mention of back-up copies, these remain subject to authorization. A number of delegations said that such copies should be explicitly authorized (I/GR/E). Other delegations thought that this was a problem to be solved in the context of legally valid licensing (NL/UK/B). It was suggested that reference be made to Article 9.2 BC (D). (1)

2. **EXCEPTIONS TO THE RESTRICTED ACTS** (Article 5)

2.1. **Sale of a program to the public other than by a written and signed licence agreement** (paragraph 1). All the delegations commented on this paragraph, as they thought it was difficult to understand. They made the following points:

(a) other types of licence which did not take the form of a written agreement signed by both parties already existed or might evolve in the future;
(b) some national legislations allowed the making of reserve copies if the licence agreement did not explicitly prohibit this (DK);

The French delegation thought that in the absence of contractual provisions it would be possible to authorize the making of a single back-up copy. The Italian delegation agreed with recognition of the purchaser's rights as indicated in the text but would add "except where the parties have agreed otherwise".

2.2. **Special exception to the right of distribution** (paragraph 2). The delegations expressed doubts about the interpretation of some of the terms such as "use", "use by the public" and "public libraries". Some delegations asked for this exception to be limited to rental and not to be extended to other forms of exclusive right to distribution.

(1) "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." (Article 9.2)
3. **INFRINGEMENT** (Article 6)

Although they did not object to its principles and aims, some delegations expressed doubts about **paragraph 1**. The Italian delegation put forward some ideas about national activities which might come to mind in examination of this Article.

The Greek and Portuguese delegations queried whether possession of an infringing copy implied an infringement of exclusive rights in cases not involving application or use of the illegally copied or imported program.

Regarding **paragraph 2** of this Article, a number of delegations had strong reservations about such a provision, which they felt might introduce serious difficulties into national legislations.

4. **TERM OF PROTECTION** (Article 7)

Delegations' reactions fell into two categories:

(a) **Alignment of the period of protection on that provided for in the BC.** (Article 7.1) (D/B/NL/DK/UK/P), mainly on the grounds of compatibility with the BC and (if it were ever revised), in order not to prejudge a tendency in third countries towards shorter periods of protection. Consideration was also given to introducing varying periods of protection for the countries which were signatories to the BC and for computer programs and auxiliary documentation.

(b) **Flexibility in setting the period** (1/E/F/GR), on the grounds that Article 7.4 of the BC allowed for a shorter period of protection and full reference to Article 2 of the BC would allow a margin of manoeuvre in selecting the period of protection. Having a shorter period might constitute an incentive to third countries to protect computer programs in accordance with the BC.
With a view to resolving some of the difficulties raised, it was considered that reference could be made to Article 7.3 of the BC. If this were done, the period of protection granted to pseudonymous or anonymous works would expire 50 years after the date on which the work was made available to the public with the consent of the rightholder.

A text reading as follows could be considered: "Where the author of a program is not identified, or the individual contribution of an author to a program created by a group of authors cannot be identified, the program shall be considered a pseudonymous or anonymous work. The term of protection for such pseudonymous or anonymous works shall be 50 years from the date of first making available of the work to the public".

5. COMPATIBILITY WITH OTHER LEGAL PROVISIONS (Article 8)

Paragraph 1 lists other forms of protection which should not be affected by the provisions of the Directive. Most of the delegations thought that this should be an open-ended list in order not to exclude other matters from protection (designs, semiconductors).

Most of the delegations suggested deleting the final part of this paragraph: "insofar as such provisions do not conflict with the principles laid down in the present Directive". The German delegation pointed out that the purpose of the Directive was to provide a form of exclusive protection, but there were other kinds of exclusive protection and the priority of a given form of protection should not be prejudged in cases of dispute. The delegation went on to suggest that the explanatory memorandum should make clear that patent law was limited to patented products, since it was possible to protect by
patent an invention which included among its components a computer program that could also be protected, together with the non-technical components of the invention (formulae, algorithms, etc.).

Regarding paragraph 2, a number of delegations (DK/F/UK/1) indicated that they would prefer to delete it, because for one thing it depended on the duration of protection and for another it was out of the question to revive protection of a program which had expired at the end of a set period (Article 18.1 and 2 of the BC). (1)

6. FINAL PROVISIONS (Article 9)

6.1. Entry into force (Article 9(1))

The Chairman of the Working Party suggested that delegations should propose the date they thought most suitable for transposing the Directive into national legislation. There was much to be said in favour of 1 January 1993.

Similarly, the Chairman suggested that there was an obligation to communicate the texts of the provisions of national law - referring directly or relating to the relevant provisions of the Directive - not only to the Commission, but also to the other Member States in their various languages. A number of delegations agreed that it would be a good idea to promote specific initiatives by economic operators, and in particular by small and medium-sized undertakings, by means of adequate distribution and familiarity with the legal standards.

(1) "(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection. (2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew." (Article 18.1 and 2 of BC).
During a second reading, the Working Party considered Articles 1 and 2 of the Directive.

7. OBJECT OF PROTECTION (Article 1)

7.1. Extent of protection conferred (paragraphs 1 and 2). Delegations' positions fell into two categories:

(a) Definition of works in the same way as or differently from the Commission, but complying with the period of protection laid down in the BC (Article 7.1). Under this approach, the United Kingdom and Danish delegations said that they were in favour of the definition of literary works in order to avoid any ambiguity which would arise from protection differing from that laid down in the said Convention. The Netherlands, Belgian and Portuguese delegations thought it sufficient to make a general reference to works, under the BC, provided that there was compliance with the period laid down in Article 7.1 thereof. The German delegation proposed using the expression linguistic works as a subdivision of literary works while noting the link which existed between the definition of works (Article 1 of the Directive) and the term of protection (Article 7 of the Directive).

(b) Generic reference to the BC, allowing for greater flexibility in applying the provisions of the Directive, with particular reference to the term of protection. This view was taken by the Italian, French and Spanish delegations, which proposed a phrase such as: "works within the meaning of the Berne Convention" (1).

The Commission representative's criterion was that acceptance of a different definition for programs would affect the contents of Articles 4 and 5 of the Directive and introduce an element of distortion into the body of national law. The Commission representative pointed

(1) "Literary and artistic works within the meaning of the Berne Convention" (1).
out that computer programs should be given the same protection as was conferred on literary works under copyright law.

7.2. Protection of auxiliary documentation (paragraphs 1 and 2). A number of delegations repeated their positions on the way documentation should be treated (7938/89 P1 53 of 20 July 1989, p. 5, point 3.1.4.). Although they agreed with the clarifications provided by the Commission in the explanatory memorandum regarding the extent of protection conferred on preparatory materials and documentation, a number of delegations proposed referring explicitly to documentation; the Italian delegation proposed adding: "and auxiliary documentation"; the French delegation proposed: "Computer programs shall include preparatory technical documentation."; the Spanish delegation suggested: "technical documentation".

The Commission representative agreed to consider making it clear that the term "program" as used in the Directive included adequate preparatory materials.

7.3. Proposal to combine paragraphs 1 and 2. This proposal was made at the first meeting (7938/89, p. 5, point 3.1.4.): "The Member States shall confer copyright protection on computer programs as literary works".

7.4. Limit on extending protection (paragraph 3, first and second subparagraphs). About not extending protection to the ideas, principles, logic, algorithms or programming languages underlying the program, the delegations maintained the views they had expressed at the previous meeting (7938/89, p. 5, point 3.1.5.).

Most of the delegations (D/UK/DK/F/I/E/P) repeated their criterion that interfaces could be protected under copyrights if the specifications they contained involved original presentation. The current wording of the text might leave room for the interpretation that interfaces were not protected. Interfaces, as an expression of ideas, principles and specifications, should not be left unprotected.
As for extending the protection under paragraph 3, the Commission representative said that he was continuing to examine this with a view to introducing clarifications and would like further suggestions. He also stressed the obvious link between protection of interfaces and Community policy on competence.

7.5. The concept of originality (subparagraph 4(a)). It was pointed out that there was a need to define and harmonize the concept of originality in order to avoid the drawbacks of referring to varying national legislations. The Danish delegation repeated the wording submitted at the Working Party's previous meeting (7938/89, p. 7, first paragraph and footnote 4), which was supported by the German, United Kingdom, Italian, Greek and Spanish delegations, to varying degrees. The French delegation expressed doubts about the appropriateness of this proposal and suggested referring to the idea of individual effort. The Working Party repeated its wish that the Directive should include a definition of originality which added the aspect of individuality to the concept of a creator's intellectual powers.

8. AUTHORSHIP OF PROGRAM (Article 2)

8.1. Natural author of the program (paragraph 1). The German delegation suggested that the most suitable wording would be: "The author of a computer program is the natural person or group of natural persons who has created the program".

8.2. Collaborative works (paragraph 2). The French, Spanish and Italian delegations pointed out the difficulties raised by this provision. The German delegation pointed to the importance of stressing the exercise of common ownership rights.

8.3. Contractual relationship (paragraph 3). Delegations' positions on this paragraph comprised the possibility of an alternative wording, deleting the paragraph or maintaining the text.
8.4. **Employment contract** (paragraph 4). Some delegations pointed out that the program should be created "within the framework of a work contract", in order to avoid any possible abusive interpretation of the employer's rights.

8.5. **Programs generated by the use of other programs** (paragraph 5). A number of delegations (D/F/1/E/P) said that they would prefer to delete this paragraph.
In order to facilitate discussion at the next meeting, delegations will find annexed suggestions for improvements to the drafting of Articles 1.1, 1.2, 1.4(a), 1.4(b), 2.1, 2.2, 2.3, 2.4, 2.5, 4 (title), 4(a), 4(b), 4(c), 5.1, 5.2, 6(title), 8.1.

These suggestions reflect the views articulated by a number of delegations and the agreement by the representative of the Commission to consider improvements to the drafting where appropriate. The Working Group is asked to confirm that this wording adequately expresses the views put forward.

1.1. In accordance with the provisions of this Directive, Member States shall grant copyright protection to computer programs as literary works within the meaning of the Berne Convention.

1.4(a) A program shall be protected if it is the result of the author’s own [creative/intellectual] effort.

1.4(b) A program which is generated by means of a computer program shall be protected if it demonstrates [creative/intellectual] effort. Such protection shall be without prejudice to rights existing in the generating program.

2.1. The natural person or group of natural persons who created the computer program shall be considered the author of the program and shall be entitled to exercise exclusively all rights in respect of the program.

2.2. In respect of a computer program created by a group of natural persons jointly, the exclusive economic rights shall be owned and exercised jointly unless otherwise provided by contract.

2.3. Where a computer program is created under a contract, the natural or legal person who commissions the program shall be entitled to exercise exclusively all economic rights in respect of the program, unless otherwise provided by contract.

2.4. Where a computer program is created in the course of employment under a labour contract, the employer shall be entitled to exercise exclusively all economic rights in respect of the program, unless otherwise provided by the labour contract.

2.5. In respect of a program generated by means of a computer program, the natural or legal person who causes the generation of subsequent programs shall, subject to rights existing in the generating program, be entitled to own and exercise all rights in the program so generated.
4. **Restricted acts [Acts subject to control by the right holder]**
   (Actes soumis à l'autorisation de l'auteur).

   The exclusive rights of the author or his successor in title 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 translation, adaptation, arrangement and other alteration of a program, and the reproduction of the results thereof.

   c) the distribution, including importation, of a computer program. The first sale of a copy of a program shall exhaust the right of the author to control further sale of that copy, but shall not exhaust the right to control its rental.

**Exceptions to the restricted acts (actes soumis à autorisation)**

5.1. Where a copy of a computer program has been sold [or in the absence of any contractual provisions to the contrary], the acts enumerated in Article 4a and 4b above shall not require the authorization of the right holder insofar as they are technically necessary for the intended use of that copy of the program by its lawful acquiror.

5.2. Performance of the acts enumerated in Article 4a and 4b above other than for the purposes of such use shall require the authorization of the right holder.

5.3. Where a copy of a computer program has been sold, the exclusive right of the right holder to authorize rental of that copy shall not be exercised to prevent that copy being made available for use as reference material only, without removal from the premises, of non-profit making libraries and research institutions.

6. **Further restricted acts [Acts subject to control by the right holder]**
   (Autres actes soumis à l'autorisation de l'auteur)

8.1 The provisions of this Directive shall be without prejudice to other legal provisions such as patent rights, trade marks, unfair competition, trade secrets, the law of a contract, protection of semiconductor products.
As regards substance, the representative of the Commission notes the concerns expressed in relation to Articles 2.3., 3.2., 6.2., 7., and agrees to reflect on her position.

As regards the substance of Article 1.3., the representative of the Commission notes with regret the strength of view expressed against the present proposal, but maintains the position taken, and will reflect further on possible clarifications to the present text.
Brussels, 22 August 1989

REVISED PRELIMINARY DRAFT OPINION
of the Section for Industry, Commerce, Crafts and Services
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.

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:

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
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.

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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:
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."
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 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.
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.
1. Introduction

1.1. The Working Party gave a second reading to the proposal for a Council Directive on the legal protection of computer programs (5682/89 PI 25), taking into account as well the drafting improvements to a number of Articles suggested in the Annex to 8395/89 PI 58.

1.2. On the basis of the Working Party's discussions, the Secretariat has prepared suggested wordings for some Articles in order to facilitate discussions at the next meeting. The suggestions in question are set out in the Annex.
2. Article 1(1) and (2) and Article 7

At the Working Party's earlier meetings, opinions differed as to whether computer programs should be protected as "literary works" or simply as "works" (see 7398/89, point 3.1.2. and 8395/89, point 7.1); the length of protection for literary works also proved controversial (see 7398/89, point 2.2. and 8395/89, point 4).

In order to resolve these two issues satisfactorily, the German delegation proposed a compromise whereby the Directive would stipulate, in Article 1, that Member States were to grant copyright protection to computer programs as works (without the adjective "literary") within the meaning of the Berne Convention (1) and, in Article 7, that protection was to be granted for the life of the author and for fifty years after his death. This proposal, which would have the merit of providing a period of protection in accordance with that in Article 7(1) of the Berne Convention without expressly referring to literary works, was supported by the French and Netherlands delegations.

The Spanish and Italian delegations agreed to the German delegation's proposal in referring to works within the meaning of the Berne Convention but entered reservations on the length of protection proposed; they felt that this should be fifty years from the program's publication or creation.

(1) Berne Convention for the Protection of Literary and Artistic Works.
While willing to assist in arriving at a satisfactory compromise, the United Kingdom, Danish and Irish delegations entered scrutiny reservations on the omission of "literary".

To help those delegations go along with the compromise proposed by the German delegation, the French delegation explained that it had no problem in granting computer programs the protection provided for by the Berne Convention for literary works, which represented a minimum of protection, but that the reason for its difficulty in accepting the reference to literary works was that its national legislation on the protection of literary works contained provisions which went well beyond that minimum and which should not extend to computer programs.

In response to this concern, the idea was mooted of stipulating in the Directive that Member States were to grant computer programs the minimum copyright protection provided for literary works by the Berne Convention but that they were free to extend to such programs, or not, the protection deriving from additional national-law provisions on literary works.

The Commission representative urged the need to protect computer programs as literary works since the omission of that adjective could give rise to uncertainty in relation to the relevant case law.
Most delegations found the wording suggested in the Annex to 8395/89 an improvement on that in the Commission proposal. The United Kingdom delegation and the Commission representative preferred the alternative "intellectual effort", while the German delegation preferred "creative effort". The Italian and Netherlands delegations favoured using both adjectives; the Italian delegation proposed the following wording:

"Computer programs shall be protected if they are the original result of the author's own creative intellectual effort." (2).

The German delegation felt that this subparagraph should express the idea that computer programs were not to be subject to more stringent creativity criteria than those applied to other works under the Berne Convention; it proposed the following wording:

"Computer programs shall be protected if, having regard to their own nature, they fulfil the same criteria as other works under the Berne Convention." (3).

(2) "I programmi per elaboratore sono tutelati a condizione che costituiscano il risultato originale dello sforzo intellettuale creativo del loro autore."
(3) "Computerprogramme werden geschützt, wenn sie hinsichtlich ihrer eigenen Art die gleiche Voraussetzungen wie andere Werke des Berner Uebereinkommens erfüllen."
4. Article 1(4)(b)

As it was not possible in the present state of the art for computer programs to be created by computer programs without the intervention of any human agency, a large majority of delegations felt that this provision was premature and should be deleted.

5. Article 2(1)

5.1. The French delegation, with the support of the Spanish delegation, pointed out that neither the wording in the Commission proposal nor that suggested in the Annex to 8395/89 took account of French legislation on collective works, i.e. works created, at the instigation of a natural or legal person, by a number of persons without it being possible to attribute separate rights to each of them; under that legislation, the rights in such a case went to the person at whose instigation the work was created. The Netherlands delegation said that, under its national legislation, in such a case the person at whose instigation the work was created was deemed to be its author. Those delegations wanted the provision's wording adapted to take account of their national laws. The Netherlands delegation accordingly suggested the following wording:

(4) Such collective works ("œuvres collectives") should be distinguished from those in paragraph 2 of this Article, which were collaborative works ("œuvres de collaboration") under French law.
"The person or group of persons who created the computer program or any person deemed to be its author under national law shall be considered the author of the program." (5).

The German delegation suggested that it would suffice to state that this provision was without prejudice to national provisions regarding collective works.

5.2. The United Kingdom delegation thought it should be stated in this paragraph, as in the Article's other paragraphs, that the author of the program could transfer his rights by contract.

6. Article 2(2)

6.1. The Netherlands and Spanish delegations entered reservations on the term "droits économiques" (economic rights) (6) in this paragraph. Other delegations were in favour of retaining that term to show that the paragraph did not cover moral rights.

6.2. The German delegation thought that computer programs created jointly by a group of natural persons should continue to be governed by the provisions of national law.

(5) "Maker van een computerprogramma is de persoon of groep van persoon die het programma gecreëerd heeft of degene die door de nationale wet als maker wordt aangemerkt."

(6) The term used should be that in Article 6a of the Paris Convention ("droits patrimoniaux" in French, "economic rights" in English).
6.3. The United Kingdom delegation wanted the words "unless otherwise provided by contract" revised to avoid the interpretation that a contract between one of the authors and a user could be invoked to thwart a contract between the joint authors.

6.4. The French delegation wanted it stipulated that, in the event of disagreement between the joint authors over the joint exercise of rights, one of them could refer the dispute to a court.

7. Article 2(3)

The Danish, German, Greek, Netherlands and United Kingdom delegations were opposed to this paragraph, arguing that there was no justification for allowing the person who commissioned the program to reproduce and sell it without the author's consent; any exceptions to the author's exclusive right should be considered under Article 5.

The Working Party Chairman suggested that consideration be given to the possibility of amending this provision to the effect that the author of the program was to exercise all economic rights, unless otherwise provided by contract.

8. Article 2(4)

Most delegations were in favour of such a provision, with the Netherlands delegation entering a scrutiny reservation on the wording.
The German delegation wanted it stipulated that the employer was to exercise economic rights in respect of the program only insofar as was necessary in the context of the employment relationship.

9. Article 2(5)

Most delegations were in favour of deleting this paragraph for the same reasons as were given for the deletion of Article 1(4)(b).

Only the Irish and United Kingdom delegations and the Commission representative would prefer the Directive to contain a provision on the subject.

10. Article 3(1)

The United Kingdom delegation suggested the following wording for this paragraph on the basis of Article 3 of the Berne Convention:

"Member States shall protect computer programs which are created by nationals of States party to the Berne Convention or first published in such a State in accordance with the provisions of the Berne Convention." (7)

(7) "Les États membres protègent les programmes d'ordinateur qui sont créés par les ressortissants d'États parties à la Convention de Berne ou qui sont publiés pour la première fois dans un tel État conformément aux dispositions de la Convention de Berne."
The Spanish, Italian and Portuguese delegations were in favour of an explicit reference to the Berne Convention.

The German and French delegations could agree to either the wording proposed by the United Kingdom delegation or the deletion of the paragraph; the German delegation could also agree to the wording proposed by the Commission.

The Netherlands delegation was in favour of deleting the paragraph.

11. Article 3(2)

Most delegations were in favour of deleting this paragraph.

12. Heading of Article 4

The Commission representative proposed that the Article heading be rendered using the customary term in each language rather than translating it literally (8).

13. Article 4(a)

13.1. The Danish, German, Greek, Italian, Netherlands and Portuguese delegations were in favour of deleting the second sentence of subparagraph (a), while the United Kingdom and Irish delegations wanted it to stand.

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(8) This proposal also applied to the headings of Articles 5 and 6.
13.2. The French delegation proposed that this subparagraph be worded as follows:

"(a) the reproduction of a computer program, in whole or in part by any means, in any form and for whatever purpose, such as loading, displaying, running, transmission or storage of the computer program;".

Most delegations proposed to state their views on this wording at the Working Party's next meeting.

The Netherlands delegation suggested that the words "and making public" be inserted after "reproduction" in the wording proposed by the French delegation.

14. Article 4(b)

14.1. The German and Greek delegations considered that the word "translation" in the wording suggested in the Annex to 8395/89 should not be construed as including transposition of programs from source code to object code or vice versa; the Irish delegation and the Commission representative, however, maintained that "translation" should include such transposition.

14.2. The Netherlands delegation pointed out that, where translation was performed by a person other than the program's author with the latter's permission, the person in question should be entitled to copyright in respect of the translation.
14.3. **The Netherlands delegation** entered a scrutiny reservation on the phrase "and the reproduction of the results thereof" in the wording suggested in the Annex to 8395/89.

14.4. **The United Kingdom delegation** entered a scrutiny reservation on the whole of subparagraph (b) as suggested in the Annex to 8395/89.

15. **Article 4(c)**

15.1. **The German, Spanish, French and Irish delegations** voiced doubts about the inclusion of the reference to importation in subparagraph (c) in the wording suggested in the Annex to 8395/89.

15.2. **The Netherlands delegation** proposed that the second sentence in subparagraph (c) refer to the first sale by the **author or with his consent**.

15.3. **The German and Greek delegations** were opposed to the second sentence of subparagraph (c) as set out in that Annex in that, under it, the first sale of a copy of a program did not exhaust the right to control its rental; they did not want the Directive to require their authorities to introduce a rental right in respect of computer programs. The German delegation proposed the following wording for the subparagraph:
"(c) the distribution of copies of a computer program. The first sale of a copy of a program shall exhaust the right of the author to control further distribution of that copy." (9).

The Danish and United Kingdom delegations objected to this proposal on the grounds that their national legislation recognized rental rights and they feared this wording would exclude such rights. The Belgian, Danish, German, Netherlands and United Kingdom delegations considered that subparagraph (c) should neither require Member States not recognizing rental rights to introduce them nor require Member States which did recognize such rights to cease to do so.

15.4. The Belgian delegation suggested the following wording for the second sentence of subparagraph (c):

"The first sale of a copy of a program shall exhaust the right of the author to control successive sales or further sale of that copy".

15.5. The Italian delegation suggested the following wording for subparagraph (c):

"(c) any commercial act, such as sale, licensing, leasing, rental and importation for such purposes. Unless otherwise provided by contract, the first sale of a copy of a program..."

(9) "(c) die Verbreitung von Kopien eines Computerprogramms. Mit dem Erstverkauf einer Programmkopie erschöpft sich das Recht des Urhebers auf die Kontrolle über die Weiterverbreitung dieser Kopie".
shall exhaust the right of the author to control successive sales of the copy." (10).

15.6. The Italian delegation also asked whether rental should include loans.

16. Article 5(1)

16.1. The Working Party considered that Article 5(1) should apply in the absence of any contractual provisions to the contrary.

16.2. The Italian delegation proposed the following wording for this paragraph:

"1. In the absence of any contractual provisions to the contrary, the acts referred to in Article 4(a) and (b) shall not be subject to authorization by the author where they are necessary for the legitimate use of and as a back-up to the program."

16.3. Several delegations considered that the user should be able to make a back-up copy of the computer program. Other delegations were very wary of the idea of being able to make a back-up copy, but were prepared to envisage one copy, provided that it was used only if the original were destroyed.

(10) "(c) ogni atto di natura commerciale, quali la vendita, la licenza, il leasing, la locazione, nonché l'importazione ai medesimi fini. Salvo patto contrario, la prima vendita di una copia di un programma esaurisce il diritto dell'autore di controllare le successive vendite di tale copia."
The Danish delegation thought it might be necessary to make a number of copies for the program's normal use, especially where this was recommended in the program instructions; other delegations considered that such copies were permitted by the wording suggested in the Annex to 8395/89.

The French delegation proposed that the paragraph be worded as follows:

"1. Where a copy of a computer program has been properly supplied, the acts enumerated in Article 4(a) and (b) required for the program's normal use shall not, in the absence of any contractual provisions to the contrary, be subject to authorization by the right holder. However, for any one copy of the program only one back-up copy may be made."

17. Article 5(2) (new)

Most delegations felt that the new paragraph 2 suggested in the Annex to 8395/89 was unnecessary and favoured its deletion.

18. Article 5(3)

18.1. The Danish, German, French, Italian, Netherlands and United Kingdom delegations were opposed to paragraph 3 as suggested in the Annex to 8395/89, corresponding to Article 5(2) in the Commission proposal. Several of them opposed the implicit requirement in it
that libraries obtain permission from the right holder to rent or lend out computer programs.

18.2. The United Kingdom delegation could envisage the retention of paragraph 3 as suggested in the Annex to 8395/89, provided that the word "rental" was replaced by "reproduction". The Spanish delegation supported this suggestion.

19. New provision in Article 5

The Danish delegation proposed the insertion of a new paragraph in Article 5:

"Notwithstanding Article 4(a) and (b), Member States may authorize reproduction of a computer program in writing."

20. Article 6

20.1. The Spanish, French, Italian and United Kingdom delegations were in favour of the principle of this Article, subject to closer consideration of the wording.

The Danish, German, Greek and Netherlands delegations, however, felt that the Article had criminal-law implications; since the Community had no criminal-law powers, they were in favour of deleting the Article.
The Working Party Chairman pointed out that this Article was not a
criminal-law provision since it merely listed acts which infringed
the author's exclusive rights, without stating whether action
should be taken against such infringements under criminal law or
civil law and without laying down any penalties for such
infringements.

20.2. The Italian delegation proposed the addition of a new paragraph in
Article 6:

"3. Member States shall adopt all appropriate measures to
facilitate the detection of infringements of the rights
provided for in this Directive." (11)

21. Article 8(1)

The United Kingdom delegation suggested that the legal provisions to
which the Directive was without prejudice be given in a non-exhaustive
list annexed to the Directive rather than be listed exhaustively in this
paragraph. It also suggested stipulating that the Directive was without
prejudice to Member States' obligations under international Conventions.

22. Article 8(2)

Several delegations pointed out that this paragraph should not make
Article 2(3) and (4) applicable retroactively where the exercise of
rights was not dealt with in the contract concerned.

(11) "Gli Stati membri adotteranno tutte le misure idonee ad agevolare
l'accertamento della violazione dei diritti previsti alla presente
direttiva."
23. Article 9(2)

The Working Party Chairman reiterated his suggestion that the text of the relevant national provisions should have to be communicated not just to the Commission but also to the other Member States.
In order to facilitate discussion, delegations will find below suggestions for the drafting of a number of provisions discussed at the Working Party’s meeting held on 14 and 15 September 1989. These suggestions attempt to reflect the views expressed by the majority of delegations; they do not constitute an amendment of the Commission’s proposal and in no way commit the Commission or its services to amend its proposal accordingly.

Introductory provision

The provisions of this Directive apply exclusively to computer programs. No provision shall be interpreted as applying to other literary works protected under the Berne Convention unless the legislation of a Member State so provides. The existing provisions regarding the protection of literary works in Member States shall not be taken to apply to computer programs where such provisions go beyond the minimum protection granted by the Berne Convention to literary works and re-affirmed by this Directive.

1.1. [Member States shall protect computer programs by conferring exclusive rights to authors of programs in accordance with the provisions of this Directive.]

1.2. Member States shall grant copyright protection to computer programs as [literary] works within the meaning of the Berne Convention.

1.4.(a) A program shall be protected if it is the result of the author’s own [creative] [intellectual] effort. No other qualitative or aesthetic criteria shall be applied.

1.4.(b) Delete.

2.1. The author of a computer program shall be the natural person or group of natural persons who created the program. Where collective works are recognized by the legislation of a Member State, the natural or legal person who is considered by that legislation to have created the program shall be deemed to be the author.
2.2. In respect of a computer program created by a group of natural persons jointly, the exclusive economic rights shall be owned and exercised jointly unless otherwise provided by contract between the joint authors. Member States shall make appropriate provisions for the resolution of disputes arising between the joint authors as to the exercise of such rights.

2.3. [First variant: delete.]

[Second variant: Where a computer program is created under a contract for the provision of programming services, the natural or legal person for whom such services are provided shall be entitled to exercise the economic rights in the program only to the extent provided by contract.]

2.4. No change to the text in Annex 1 of document 8395/89.

2.5. Delete.

3.1. Add: "In accordance with the provisions of the Berne Convention.

3.2. Delete.

4. The exclusive rights of the author or his successor in title include the right to do or to authorize:

a) the reproduction and the communication to the public of a computer program by any means and in any form, in part or in whole. Whenever the acts of loading, displaying, running, transmission or storage of the computer program necessitate a reproduction of the program, such reproduction shall be considered a restricted act;

b) No change to the text in Annex 1 of doc. 8395/89

c) the distribution of a computer program or copies thereof. [The first sale of a copy of a program by the author or with his consent shall exhaust the right of the author to control further sale of that copy but shall not exhaust the right to control its rental or its loan.]
5.1. In the absence of any contractual provisions to the contrary, or where a copy of a computer program has been sold, performance of the acts enumerated in Article 4a) or 4b) which are technically necessary for the [continued] use of the program by its lawful acquirer for the purpose for which the program was made available shall not require the authorization of the right holder. [However, for any one copy of a program only one safeguard copy may be made; it may be used only in the event of the original being destroyed or damaged to the extent that it cannot be used.]

5.2. Delete the text of paragraph 2 in Annex 1 of doc. 8395/89.

5.3. [Where a copy of a computer program has been sold, the exclusive right of the right holder to authorize rental of that copy shall not be exercised to prevent that copy being made available for use as reference material only, without removal from the premises, of non-profit making libraries and research institutions.]

6.1. It shall be an infringement of the author’s exclusive rights in the computer program to import, possess or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

6.2. It shall be an infringement of the author’s exclusive rights in the computer program to make, import, possess or deal with articles intended specifically to facilitate the removal or circumvention of any technical means which may have been applied to protect a program.

6.3. Member States shall adopt all necessary measures to facilitate the identification of infringements of provisions of the present Directive.

7. [1st variant: Protection shall be granted for the life of the author and fifty years after his death.]

[2nd variant: Protection shall be granted for fifty years from the date of creation.]
The term of protection granted under this Directive shall be compatible with the provisions of the Berne Convention.

No change to the text in Annex 1 of doc. 8395/89.

Protection under the provisions of this Directive shall also be available in respect of works created prior to [date in Article 9].
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 September 1989
To the Members of the
Section for Industry, Commerce, Crafts and Services
N.B.: This document will be discussed at the meeting on 4 October 1989.
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


(COM(88) 816 final - SYN 183).

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:

*  

1. Summary of the Commission’s 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 welcomes the Commission’s proposal as a means of ensuring appropriate copyright protection for the Community’s computer and software industry and in eliminating barriers to trade in the Community.

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.
2.2. 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. The approach is intended to bring computer programs within the definition of “literary works” in the Berne Convention (this could be made more explicit in the directive). The 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.

   The Section recognizes that clauses designed for the purposes of “literary works” the Berne Convention may not be entirely appropriate for “computer programs” and that rules to take account of their specific characteristics will be needed.

   Nevertheless the Section stresses the importance of being as close to the Berne Convention as possible.

2.3. 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.

2.4. The Section believes that the Commission’s proposal will not restrict the spread and understanding of information technology. However, it stresses the importance of ensuring that no undesirable restrictions exist through the enforcement of the competition provisions of the Treaty.

2.5. 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.

2.6. 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 interfaces themselves, or the specifications for those interfaces.

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 interfaces 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 programs which are eligible for copyright protection 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. "Logic" and "algorithms" are not clear terms and are frequently interchangeable. In any event, in the current state of technology and of Member States' legislation, few would argue that "logic", "algorithms" and "programming languages" are within a definition of "computer programme". Consequently specific reference in this article to these terms as requiring exclusion from protection only serves to confuse and cause unnecessary debate. Consequently the Section believes they should be removed.

3.4.3. 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 interfaces 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 interfaces 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.

3.4.4. 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 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. 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. The Section believes that any clause defining "originality" should incorporate the following:

3.5.3.1. There should be no requirement that the program meets aesthetic, qualitative or quantative criteria.

3.5.3.2. There should be no requirement of a level of programming expertise.
3.5.3.3. The test for originality should be that to the extent the program has not been copied from another program it should be protected.

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."

3.6. Article 2: Paragraph 3

3.6.1. It is questionable whether the draft complies with the "moral rights" provisions of the Berne Convention. Nevertheless, 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 apply to more traditional forms of literary work. Furthermore, invariably these matters are covered expressly in a contract between commissioner and commissionee, especially where the commissionee is concerned about the intellectual property rights in the program commissioned.

3.7. Article 2: Paragraph 4

The Section supports the principle of this paragraph, but, for the sake of clarity, proposes that it be reworded as follows:

"Where a computer program is created in the course of employment and it is part of the employee’s job to create the program, the employer shall be entitled to exercise all rights in respect of the program unless otherwise provided by contract or by legally collective bargaining agreement."

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. "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."

Although the Commission has avoided including definitions in this Directive, the word "adaptation" is open to various interpretations and a definition in the Directive may be necessary.

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. The Commission has not placed any geographical restriction on exhaustion rights (such as a restriction to the Community). Whatever the merits of a geographical restriction the Section considers this a matter of trade and not copyright legislation, i.e. copyright law is not a vehicle to prohibit parallel importing from outside the Community. Consequently the Section supports the objective of this clause which makes clear in terms of copyright law 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;

c) the distribution of copies of a computer program by means of licensing, sale, 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 by the rightholder or with his consent."

(Plus a possible clause defining "adaptation").

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 valid 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". Further, the present text does not address the question of whether parallel processing of such a program is permitted. Accordingly, the Section recommends the addition of the following after ""... the use of the program">

"... on one processor by one user at any one time".

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 program, or of a computer program being an adaptation of that program, 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 ensuring that another copy of the program may be used by the owner of the original copy if one copy of the program 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 valid 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."

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. Although the number of programs to which this would apply is minimal, the Section considers that in order to comply as closely as possible with the Berne Convention (and particularly article 7(3) thereof) the following should be inserted (the existing clause 7 becoming clause 7.1.):

"2. In the case of anonymous or pseudonymous works, the terms of protection shall expire fifty years after copies of the program have been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, 7.1. above applies. If the author of an anonymous or pseudonymous work discloses his identity during the said fifty years, 7.1. shall also apply."

3.17. Article 8

The Section considers that the drafting would be clearer if

a) to be consistent with the Directive on the protection of semi-conductor topography - the phrase: "insofar ... Directive" were deleted; or

b) article 8.1. were replaced by:

"Legal protection for computer programs provided in addition to the law of copyright is not affected by this Directive."

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. The Section believes the effect of this legislation in terms of both the impact on the computer and software industry and on the development of information technology should be regularly assessed by the Commission, particularly when any changes in Community legislation is envisaged as a result of changes in the Berne Convention, and the Commission should consider giving a regular report on the effect of this legislation to the Council, the European Parliament and the Economic and Social Committee.

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.
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

Brussels, 6 October 1989
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


(COM(88) 816 final - SYN 183).

The Section for Industry, Commerce, Crafts and Services was instructed to prepare the work on this topic and adopted its Opinion on 4 October 1989. The Rapporteur was Mr MORELAND.

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

1. Summary of the Commission’s 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 welcomes the Commission’s proposal as a means of ensuring appropriate copyright protection for the Community’s computer and software industry and in eliminating barriers to trade in the Community.

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.

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2.2. 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. The approach is intended to bring computer programs within the definition of "literary works" in the Berne Convention (this could be made more explicit in the directive). The 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.

   The Section recognizes that clauses designed for the purposes of "literary works" the Berne Convention may not be entirely appropriate for "computer programs" and that rules to take account of their specific characteristics will be needed.

   Nevertheless the Section stresses the importance of being as close to the Berne Convention as possible.

2.3. 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.

2.4. The Section believes that the Commission's proposal will not restrict the spread and understanding of information technology. However, it stresses the importance of ensuring that no undesirable restrictions exist through the enforcement of the competition provisions of the Treaty.

2.5. 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.

2.6. 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 interfaces themselves, or the specifications for those interfaces.

3.1.2. There is no dispute that "ideas and principles" are outside the protection of the law of copyright. It is, therefore, superfluous to state that the ideas and principles behind the interfaces 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 programs which are eligible for copyright protection 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 - Object of protection

3.3.1. 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".

3.3.2. Article 1: Paragraph 3

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

3.3.2.2. "Logic" and "algorithms" are not clear terms and are frequently interchangeable. In any event, in the current state of technology and of Member States' legislation, few would argue that "logic", "algorithms" and "programming languages" are within a definition of "computer programme". Consequently specific reference in this article to these terms as requiring exclusion from protection only serves to confuse and cause unnecessary debate. Consequently the Section believes they should be removed.

3.3.2.3. 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 interfaces 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 interfaces 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.

3.3.2.4. 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 which underlie the program."

3.3.3. Article 1: Paragraph 4

3.3.3.1. 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. 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.

3.3.3.2. 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.

3.3.3.3. The Section believes that any clause defining "originality" should incorporate the following:

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3.3.3.3.1. There should be no requirement that the program meets aesthetic, qualitative or quantative criteria.

3.3.3.3.2. There should be no requirement of a level of programming expertise.

3.3.3.3.3. The test for originality should be that to the extent the program has not been copied from another program it should be protected.

3.3.3.4. 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."

3.4. Article 2 - Authorship of program

3.4.1. Article 2: Paragraph 3

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

3.4.1.2. 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 apply to more traditional forms of literary work. Furthermore, invariably these matters are covered expressly in a contract between commissioner and commissionee, especially where the commissionee is concerned about the intellectual property rights in the program commissioned.

3.4.2. Article 2: Paragraph 4

The Section supports the principle of this paragraph, but, for the sake of clarity, proposes that it be reworded as follows:

"Where a computer program is created in the course of employment and it is part of the employee’s job to create the program, the employer shall be entitled to exercise all rights in respect of the program unless otherwise provided by contract or by legally enforceable collective bargaining agreement."
3.4.3. **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."

3.5. **Article 4 - Restricted acts**

3.5.1. **Article 4(a)**

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

3.5.2. **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".

Although the Commission has avoided including definitions in this Directive, the word "adaptation" is open to various interpretations and a definition in the Directive may be necessary.

3.5.3. **Article 4(c)**

3.5.3.1. 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.

3.5.3.2. The Commission has not placed any geographical restriction on exhaustion rights (such as a restriction to the Community). Whatever the merits of a geographical restriction the Section considers this a matter of trade and not copyright legislation, i.e. Community copyright law would not be an appropriate vehicle to prohibit parallel importing from outside the Community. Consequently the Section supports the objective of this clause which makes clear in terms of copyright law that the position of EC individuals and companies taking licences of programs from copyright proprietors outside the Community is protected. However, the whole question of parallel importing of computer programs from outside the Community deserves further study by the Commission.

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

3.5.4. 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;

c) the distribution of copies of a computer program by means of licensing, sale, 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 that copy following the first sale of that copy to any person by the rightholder or with his consent."

(Plus a possible clause defining "adaptation".)

3. 6. Article 5 - Exceptions to the restricted acts

3.6.1. Article 5: Paragraph 1

3.6.1.1. 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 valid 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". Further, the present text does not address the question of whether parallel processing of such a program is permitted. Accordingly, the Section recommends the addition of the following after "... the use of the program":

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"... on one processor by one user at any one time".

3.6.1.2. 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 program, or of a computer program being an adaptation of that program, 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 ensuring that another copy of the program may be used by the owner of the original copy if one copy of the program is lost, destroyed or rendered unusable.

(b) Sub-clause (a) above does not apply if:

(i) 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.

or

(ii) there is a legally valid agreement to the contrary."

3.6.2. Article 5: Paragraph 2

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 valid 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 by the public on the premises of non-profit making organizations which make available programs as reference material for the public, such as public libraries."

3.7. Article 6 - Secondary infringement

The Commission should examine the translation in various languages of the word "infringement" to make sure that no criminal sanctions are necessarily implied.
3.8. Article 7 - Term of protection

3.8.1. 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.

3.8.2. 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.

3.8.3. Although the number of programs to which this would apply is minimal, the Section considers that in order to comply as closely as possible with the Berne Convention (and particularly article 7(3) thereof) the following should be inserted (the existing clause 7 becoming clause 7.1.):

"2. In the case of anonymous or pseudonymous works, the terms of protection shall expire fifty years after copies of the program have been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, 7.1. above applies. If the author of an anonymous or pseudonymous work discloses his identity during the said fifty years, 7.1. shall also apply."

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3.9. Article 8 - Continued application of other legal provisions

The Section considers that the drafting would be clearer if

a) to be consistent with the Directive on the protection of semi-conductor topography - the phrase: "insofar ... Directive" were deleted; or

b) article 8.1. were replaced by:

"Legal protection for computer programs provided in addition to the law of copyright is not affected by this Directive."

3.10. Article 9 - Final provisions

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. The Section believes the effect of this legislation in terms of both the impact on the computer and software industry and on the development of information technology should be regularly assessed by the Commission, particularly when any changes in Community legislation is envisaged as a result of changes in the Berne Convention, and the Commission should consider giving a regular report on the effect of this legislation to the Council, the European Parliament and the Economic and Social Committee.

4.3. It is clear that there is a serious problem across the Community of unauthorized access to computer programs and data ("hacking"). There is also the problem of "viruses", that is to say, the unlawful insertion of matter into computer programs which impairs their function. Of course, these are not issues of copyright as such but they are issues which affect the use of computer technology and have implications for the regulation of
the single market. The Section recommends that the Commission give these issues serious examination with a view to making legislative proposals.

Brussels, 4 October 1989.

The Chairman
of the Section for
Industry, Commerce, Crafts
and Services

Filotas KAZAZIS

The Secretary-General
of the Economic and
Social Committee

Jacques MOREAU
SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer Programs)
on: 12 and 13 October 1989

Nos prev. docs: 9304/89 PI 68, 9013/89 PI 64
No. Cion prop.: 5682/89 PI 25

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

Introduction

1.1. At its meeting on 12 and 13 October 1989, the Working Party held a third reading of the proposal for a Council Directive on the legal protection of computer programs (5682/89 PI 25), also basing itself on the Secretariat's drafting suggestions set out in the Annex to 9013/89.
1.2. On the basis of the Working Party's discussions and also taking account of its earlier meetings in July and September (1), the Presidency prepared a consolidated text of the proposal for a Directive which is set out in 9304/89 Pi 68.

1.3. The German delegation made the statement contained in the Annex.

**Introductory statements**

2. In the light of certain provisions of the Berne Convention for the Protection of Literary and Artistic Works and national laws based on that Convention, the Working Party agreed to stipulate in introductory statements that the Directive did not oblige Member States to grant to computer programs protection beyond the minimum protection under the Berne Convention and that it did not affect derogations provided for under national legislation in accordance with that Convention on points not covered by the Directive.

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(1) See 7938/89 Pi 53, 8395/89 Pi 58 and 9013/89 Pi 64.
Article 1 - Object of protection

3.1. Paragraphs 1 and 2 (9013/89, (Annex))

The Working Party agreed to delete paragraph 1 and replace it by a provision incorporating paragraph 2 (9013/89) and stating that the copyright protection provided for by this Directive covered computer programs and their preparatory design material (1) but did not apply to operating instructions and manuals.

In this context, most delegations were in favour of including the word "literary". The Spanish, Italian and Netherlands delegations were against inclusion. The French, Greek and Portuguese delegations expressed a preference for deletion of the term "literary" but indicated some flexibility on this point.

3.2. Paragraph 3 (5682/89)

This paragraph has become paragraph 2 in the new consolidated text (9304/89). A large majority of delegations was in favour of the following sentence: "Protection in accordance with this Directive shall apply to

(1) The Spanish delegation stated its preference for "technical or preparatory design material."
the expression in any form of a computer program." The last part of the sentence should therefore be deleted.

The Greek delegation was in favour of the original Commission proposal although it could support the majority.

The Commission representative stood by the original Commission proposal. It was suggested that the second sentence could be worded as follows: "Ideas and principles which underlie any aspect of a program, including interfaces, shall not be protected under this Directive."

3.3. Paragraph 4(a) (9013/89, (Annex))

This paragraph has become paragraph 3(a) in the new consolidated text.

The Belgian, French, Irish, Portuguese and United Kingdom delegations were in favour of deleting "creative".

The Danish, Spanish, Greek and Italian delegations were in favour of using the term "creative intellectual".
The German delegation, supported by the Danish delegation, was in favour of the term "personal intellectual effort".

The French delegation suggested replacing "intellectual effort" by "intellectual activity".

The Netherlands delegation suggested the following text: "A computer program shall be protected when it is original, in that it is the result of the author's own intellectual effort."

Most delegations suggested that the last sentence of this paragraph be deleted. The Commission representative, supported by the French delegation, suggested that this sentence be worded as follows: "No judgment must be passed on the merit of the result of the intellectual effort."

3.4. Paragraph 4(b) (5682/89)

This paragraph has become paragraph 3(b) in the new consolidated text.

Most delegations were in favour of deleting the paragraph on the grounds that it was premature at this stage to make a provision concerning computer generated programmes.
The Irish and United Kingdom delegations and the Commission representative wanted this paragraph to stand, the United Kingdom delegation having suggested examining a document submitted by interested circles on the existence of computer-generated programmes.

The German delegation reserved its position pending examination of the above document.

Article 2 - Ownership of rights

4.1. Paragraph 1 (9013/89)

The Netherlands delegation requested that the following text be added at the end of the first sentence: "or the natural or legal person deemed to be its author under national law."

4.2. Paragraph 2 (9013/89)

The Danish, Spanish, Italian, Netherlands and United Kingdom delegations were against the second sentence of this paragraph.

A compromise solution was found whereby the Member States which already had such provisions could retain them without obliging the other Member States to adopt such provisions.
4.3. **Paragraph 3**

A large majority of delegations was in favour of deleting this paragraph.

The Italian delegation was in favour of the text contained in the Annex to 8395/89.

The Commission representative stood by the original Community proposal (5682/89).

4.4. **Paragraph 4**

A large majority of delegations was in favour of the following text:

"Where a program is created by an employee in the execution of the duties entrusted to him or at the request of his employer, the employer ...." (remainder is unchanged in relation to the text of the Annex to 9013/89).

The Spanish delegation entered a reservation on this paragraph and suggested the following wording: "the exercise of these rights by the employer shall be limited to his usual activity at the time of the author's remittal of the work".

4.5. **Paragraph 5**

See positions on Article 1(4)(b) (point 3.4).
Article 3 (5682/89 + 9013/89) - Beneficiaries of protection

5.1. Paragraph 1

A large majority of delegations was able to accept the text put forward by the Commission.

Several delegations (DK/NL/UK) felt that adding "in accordance with the provisions of the Berne Convention" was not strictly necessary but was a useful message to third countries.

5.2. Paragraph 2

All delegations requested that this paragraph be deleted.

The Commission representative stood by his original proposal.

Article 4 (9013/89) - Restricted acts

6.1. Paragraph 4(a)

The Danish, French, Irish, Netherlands, Portuguese and United Kingdom delegations were in favour of a broad interpretation of the term "reproduction", i.e. including loading among other things.
The Belgian, Spanish, Greek and Italian delegations were in favour of a restrictive concept confined to the permanent reproduction of the program.

The German delegation reserved its position on this issue.

As a compromise solution, the Presidency suggested adopting the text tabled by the French delegation (9013/89, p. 10), with the addition suggested by the Netherlands delegation (9013/89, p. 10).

The German, Danish and Spanish delegations reserved their positions on this text.

The Commission representative expressed doubts on the expression "for whatever purpose".

6.2. Paragraph 4(b)

Most delegations were in favour of the text set out in 8395/89.

The Netherlands delegation gave a reminder of its position set out in point 14.2. of 9013/89.

6.3. Paragraph 4(c), first sentence

Most delegations were in favour of the text set out in 9013/89.
The Italian delegation requested that reference be made to commercial acts only.

The Belgian, Danish, Spanish, French, Netherlands, Portuguese and United Kingdom delegations wanted commercial and non-commercial acts to be covered.

The Danish, German and Greek delegations requested that it be made clear that the term "distribution" meant "distribution to the public".

6.4. Paragraph 4(c), second sentence

The German, Greek and Netherlands delegations were against including a rental or lending right in the last part of the sentence, the Netherlands delegation stating that in its view this Directive was not the appropriate context for introducing Community rules governing rental rights.

The Danish, Spanish, Italian, Irish and United Kingdom delegations were in favour of a rental right but against a lending right.

The Portuguese delegation reserved its position on a lending right.
Article 5 (9013/89) - Exceptions to the restricted acts

7.1. Paragraph 1, first sentence

The German, Danish, Italian and United Kingdom delegations requested the deletion of "or where a copy of a program has been sold" since this would prejudge the issue of whether "shrink-wrap" licences were binding contractual provisions.

The Greek and Netherlands delegations requested that the term "technically necessary" be specified. In this context the Netherlands delegation suggested adding "for loading, audit, archives, research and security purposes." (2) after "... correct use of the program by its lawful acquiror".

The United Kingdom delegation requested that it should either be stated in Article 4(b) that the user of a computer program may adapt his program to his personal requirements or that Article 5(1) should include a derogation along these lines to the rule laid down in Article 4(b).

(2) "ten behoefte van laad, audit, archief, studie en beveiligingsdoeleinden."
As a compromise solution, most delegations could agree to the text suggested by the Italian delegation on p. 13 of 9013/89.

The Spanish delegation and the Commission representative were against this text. The German delegation reserved its position.

7.2. Paragraph 1, second sentence

Most delegations were in favour of one or more back-up copies.

The German delegation did not think it was necessary to settle this problem in this text.

The Commission representative preferred the question to be settled in the licence agreements.

7.3. Paragraph 2 of the Commission proposal (paragraph 3 in the Annex to 9013/89)

Most delegations asked for this paragraph to be deleted.
The Portuguese delegation reserved its position.

The Commission representative stood by the Commission proposal, on the ground that if this provision were deleted, copyright holders could force libraries to get rid of their stocks of computer programs.

7.4. The Danish delegation reiterated its proposal that reproduction of the source code in writing be removed from the control of the author of the program.

This proposal was not supported by other delegations.

Article 6 (9013/89) - Other restricted acts

8.1. Paragraph 1

Several delegations could agree to this provision, provided that the following words were added: "Without prejudice to national provisions on combating piracy".

The German and Netherlands delegations entered reservations on this paragraph.
8.2. **Paragraph 2**

The Belgian, Spanish, French, Italian, Irish and United Kingdom delegations were in favour of this provision.

The German, Danish, Greek, Portuguese and Netherlands delegations entered reservations on the text.

8.3. **Paragraph 3**

A number of delegations (B/DK/E/IRL/UK) thought the content of this paragraph should be put in a statement.

**Article 7 (9013/89) - Term of protection**

9. The great majority of delegations were in favour of the third variant amended as follows: "The period of protection granted to computer programs and their preparatory design material shall be a term of protection compatible with the terms provided for the protection of literary works under the Berne Convention but such terms shall not exceed the life of the author and fifty years from the date of his death".

The German delegation was in favour of variant 3 in 9013/89, as it thought protection should be guaranteed at least fifty years after the author's death.
Article 8 (8395/89 and 9013/89) - Continued application of other legal provisions

10. The Danish, French, Italian, Netherlands and United Kingdom delegations were against retroactive effect of the Directive.

Article 9 (8395/89) - Final provisions

11.1. Paragraph 1

All delegations were able to agree from the outset to a two-year period for transferring the Directive into national law.

11.2. Paragraph 2

All delegations asked for addition of a duty to notify other Member States.
Statement by the German delegation

Today the Working Party is again due to discuss the proposal for a Directive on the legal protection of computer programs and also to examine some new variants on the text.

On Monday - three days before the start of the meeting - the German delegation received the summary of proceedings at the last meeting on 24 and 25 September in French, and the drafting proposals in English. German texts are as yet unavailable, so it has not been possible to make adequate preparation for today's meeting.

The German delegation understands that the Presidency wants to conclude the discussions quickly and is scheduling meetings at short intervals. However, speed should not be at the expense of the quality of results. Discussions so far have shown that there is a whole series of difficult questions still unsolved. The aim must not just be to solve them as quickly as possible: the solutions must be good ones.
When the Directive comes into force it will have major consequences for software manufacture throughout the Community. Its effectiveness will hinge largely on the solutions which the Working Party finds for the various problems. Provisions decided on in haste, without careful consideration of their effects, can do more harm than good. The advantages and disadvantages of the various texts therefore need to be examined carefully. This can only be done if:

1. working documents for meetings are available in all the official languages and

2. working documents and minutes of previous discussions are ready sufficiently in advance of meetings to allow adequate preparation.

The German delegation has been unable to make such preparation for today's meeting, and so it is unable to take part in the discussions. It will give its views on the new proposals when it has had an opportunity of examining the German texts.
The German delegation would ask the Chairman and the Council Secretariat to ensure that in future, the requisite working documents reach delegations in the appropriate official languages in good time for meetings. If this cannot be done, the meetings must be postponed.
Opinion on the proposal for a Council Directive on the legal protection of computer programs

(89/C 329/02)

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 abovementioned proposal.

The Section for Industry, Commerce, Crafts and Services was instructed to prepare the work on this topic and adopted its Opinion on 4 October 1989. The Rapporteur was Mr Moreland.

The Economic and Social Committee, at its 270th plenary session, meeting on 18 October 1989, adopted unanimously the following Opinion.

1. Summary of the Commission’s 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 Committee welcomes the Commission’s proposal as a means of ensuring appropriate copyright protection for the Community’s computer and software industry and in eliminating barriers to trade in the Community.

The Committee 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 Committee’s overall approval of the draft.

2.2. The Committee 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. The approach is intended to bring computer programs within the definition of ‘literary works’ in the Berne convention (this could be made more explicit in the directive). The 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 Committee, the ability of the Member States to influence the forthcoming discussions on the revision of the convention will be enhanced.

The Committee recognizes that clauses designed for the purposes of ‘literary works’ the Berne convention may not be entirely appropriate for ‘computer programs’ and that rules to take account of their specific characteristics will be needed.

Nevertheless the Committee stresses the importance of being as close to the Berne convention as possible.

2.3. 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.

2.4. The Committee believes that the Commission’s proposal will not restrict the spread and understanding of information technology. However, it stresses the importance of ensuring that no undesirable restrictions exist through the enforcement of the competition provisions of the Treaty.

2.5. The Committee 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.

2.6. Consequently the Committee 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 interfaces themselves, or the specifications for those interfaces.

3.1.2. There is no dispute that 'ideas and principles' are outside the protection of the law of copyright. It is, therefore, superfluous to state that the ideas and principles behind the interfaces 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 programs which are eligible for copyright protection 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—Object of protection

3.3.1. Article 1: Paragraph 2

As stated in part 2 above, the Committee 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'.

3.3.2. Article 1: Paragraph 3

3.3.2.1. The Committee supports the exclusion of ideas and principles from copyright protection as computer programs.

3.3.2.2. 'Logic' and 'algorithms' are not clear terms and are frequently interchangeable. In any event, in the current state of technology and of Member States' legislation, few would argue that 'logic', 'algorithms' and 'programming languages' are within a definition of 'computer programme'. Consequently specific reference in this article to these terms as requiring exclusion from protection only serves to confuse and cause unnecessary debate. Consequently the Committee believes they should be removed.

3.3.2.3. 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 interfaces are 'not copyrightable subject matter'. The second sentence could be deleted. The Committee understands and supports the concern that the proprietors of the copyright in interfaces may exercise their rights in an anti-competitive matter. The Committee, 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.

3.3.2.4. 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 which underlie the program.'

3.3.3. Article 1: Paragraph 4

3.3.3.1. 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. 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.
3.3.3.2. The Committee 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.

3.3.3.3. The Committee believes that any clause defining 'originality' should incorporate the following:

3.3.3.3.1. There should be no requirement that the program meets aesthetic, qualitative or quantitative criteria.

3.3.3.3.2. There should be no requirement of level of programming expertise.

3.3.3.3.3. The test for originality should be that to the extent the program has not been copied from another program it should be protected.

3.3.3.4. 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.'

3.4. Article 2—Authorship of program

3.4.1. Article 2: Paragraph 3

3.4.1.1. It is questionable whether the draft complies with the 'moral rights' provisions of the Berne convention. Nevertheless, these provisions are more relevant to the more traditional forms of literary works copyright, not to computer programs.

3.4.1.2. It is for this reason that the Committee supports this paragraph as drafted. The Committee 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 apply to more traditional forms of literary work. Furthermore, invariably these matters are covered expressly in a contract between commissioner and commissionee, especially where the commissionee is concerned about the intellectual property rights in the program commissioned.

3.4.2. Article 2: Paragraph 4

The Committee supports the principle of this paragraph, but, for the sake of clarity, proposes that it be reworded as follows:

'Where a computer program is created in the course of employment and it is part of the employee's job to create the program, the employer shall be entitled to exercise all rights in respect of the program unless otherwise provided by contract or by legally enforceable collective bargaining agreement.'

3.4.3. Article 2: Paragraph 5

The Committee 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 Committee 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.'

3.5. Article 4—Restricted acts

3.5.1. Article 4(a)

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

3.5.2. Article 4(b)

In order to conform as closely as possibly to the Berne convention, the Committee proposes that 4(b) reads:

'Verification, translation, modification and arrangement of a computer program and the reproduction of such adaptation, translation, modification or arrangement'.

Although the Commission has avoided including definitions in this Directive, the word 'adaptation' is open to various interpretations and a definition in the Directive may be necessary.

3.5.3. Article 4(c)

3.5.3.1. 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.

3.5.3.2. The Commission has not placed any geographical restriction on exhaustion rights (such as a restriction to the Community). Whatever the merits of
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a geographical restriction the Committee considers this a matter of trade and not copyright legislation, i.e. Community copyright law would not be an appropriate vehicle to prohibit parallel importing from outside the Community. Consequently the Committee supports the objective of this clause which makes clear in terms of copyright law that the position of EC individuals and companies taking licences of programs from copyright proprietors outside the Community is protected. However, the whole question of parallel importing of computer programs from outside the Community deserves further study by the Commission.

3.5.3.3. The word 'marketing' is difficult to define accurately. The Committee proposes certain changes to the drafting of 4(c) to overcome this difficulty.

3.5.4. 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;

c) the distribution of copies of a computer program by means of licensing, sale, 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 that copy following the first sale of that copy to any person by the rightholder or with his consent.'

(Plus a possible clause defining 'adaptation').

3.6. Article 5—Exceptions to the restricted acts

3.6.1. Article 5: Paragraph 1

3.6.1.1. 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 Committee proposes that the reference to written agreement signed by the parties be deleted and replaced by the words 'any valid 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'. Further, the present text does not address the question of whether parallel processing of such a program is permitted. Accordingly, the Committee recommends the addition of the following after '...the use of the program':

'...on one processor by one user at any one time'.

3.6.1.2. 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 program, or of a computer program being an adaptation of that program, 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 ensuring that another copy of the program may be used by the owner of the original copy if one copy of the program is lost, destroyed or rendered unusable.'

(b) Sub-clause (a) above does not apply if:

(i) 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, or

(ii) there is a legally valid agreement to the contrary'.

3.6.2. Article 5: Paragraph 2

The Committee 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 valid 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 by the public on the premises of non-profit making organizations which make available programs as reference material for the public, such as public libraries.'

3.7. Article 6—Secondary infringement

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

3.8. Article 7 - Term of protection

3.8.1. 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 Committee must emphasize the advantage of adhering closely to the Berne convention. Consequently, the Article should in the Committee'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.

3.8.2. 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 Committee 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.

3.8.3. Although the number of programs to which this would apply is minimal, the Committee considers that in order to comply as closely as possible with the Berne convention (and particularly Article 7(3) thereof) the following should be inserted (the existing clause 7 becoming clause 7.1.):

'2. In the case of anonymous or pseudonymous works, the terms of protection shall expire fifty years after copies of the program have been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, 7.1. above applies. If the author of an anonymous or pseudonymous work discloses his identity during the said fifty years, 7.1. shall also apply.'

3.9. Article 8—Continued application of other legal provisions

The Committee considers that the drafting would be clearer if

a) to be consistent with the Directive on the protection of semi-conductor topography—the phrase: 'insofar ... Directive' were deleted; or

b) Article 8.1 were replaced by:

'Legal protection for computer programs provided in addition to the law of copyright is not affected by this Directive.'

3.10. Article 9—Final provisions

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

In any event the Committee 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 Committee 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. The Committee believes the effect of this legislation in terms of both the impact on the computer and software industry and on the development of information technology should be regularly assessed by the Commission, particularly when any changes in Community legislation is envisaged as a result of changes in the Berne convention, and the Commission should consider giving a regular report on the effect of this legislation to the Council, the European Parliament and the Economic and Social Committee.

4.3. It is clear that there is a serious problem across the Community of unauthorized access to computer programs and data (‘hacking’). There is also the problem of ‘viruses’, that is to say, the unlawful insertion of matter into computer programs which impairs their function. Of course, these are not issues of copyright as such but they are issues which affect the use of computer technology and have implications for the regulation of the single market. The Committee recommends that the Commission give these issues serious examination with a view to making legislative proposals.

Done at Brussels, 18 October 1989.

The Chairman
of the Economic and Social Committee
Alberto MASPRONE
NOTE

from: the Presidency

to: Working Party on Intellectual Property (Computer programmes)

No. prev. doc.: 9013/89
No. Cion prop.: 5682/89 PI 25

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

The Working Party will find attached a consolidated text of the proposal for a Directive on the legal protection of computer programs, drawn up by the Presidency in the light of the proceedings of the Working Party at its meetings held on 10 July, 24 and 25 July, 14 and 15 September and 12 and 13 October 1989.
This text merely constitutes the basis for the Working Party's proceedings at its meeting scheduled for 30 and 31 October 1989. Delegations are invited to make known their observations and their preferences in respect of it.

Those drafts have been included which have met with general agreement or considerable support, square brackets indicating texts which have encountered stiff opposition. The texts of the Commission's original proposal have been included in square brackets where the Commission representatives have indicated that they maintained them in spite of reservations expressed against them.

**Statements**

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 literary works."

"The present Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive."
Article 1
Object of protection

1. Member States shall protect computer programs, including their preparatory design material, as literary works within the meaning of the Berne Convention.

2. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.]

Alternative proposal to replace the second sentence of this paragraph:

"Ideas and principles which underlie any aspect of a program, including interfaces, shall not be protected under this Directive."

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1 This paragraph would replace paragraphs 1 and 2 of the Commission's original proposal.
2 Paragraph 2 corresponds to paragraph 3 in the Commission's original proposal.
3. (a) A computer program shall be protected if it is the result of the author's own creative intellectual effort. No other criteria shall be applied to determine its eligibility for protection.

[(b) Programs generated by means of a computer shall be protected as literary works insofar as they satisfy the conditions laid down in subparagraph (a) above.]³ (Commission's original proposal)

Article 2
Ownership of rights

1. The author of a computer program shall be the natural person, group of natural persons, or where permitted by the legislation of Member States, the legal person who created the program. Where collective works are recognized by the legislation of a Member State, the natural or legal person who is considered by that legislation to have created the program shall be deemed to be the author.

2. Without prejudice to provisions in Member States concerning the settlement of disputes arising between joint authors, in respect of a computer program created by a group of natural persons jointly, the exclusive economic rights shall be owned and exercised jointly unless otherwise provided by contract between the joint authors.

³ Paragraph 3 corresponds to paragraph 4 in the Commission's original proposals.
3. Where a computer program is created under a contract, the natural or legal person who commissioned the program shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.) (Commission's original proposal)

4. Where a computer program is created by an employee in the execution of the duties entrusted to him or at the request of his employer, the employer shall be entitled to exercise all economic rights in the program in the absence of contractual provisions to the contrary.

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. (Commission's original proposal)

[2. In the case referred to in Article 2 paragraph 2 the computer program shall be protected in favour of all authors if at least one author is a beneficiary of protection in accordance with paragraph 1 of this article.] (Commission's original proposal)
Article 4
Restricted acts

The exclusive rights of the author or his successor in title include the right to do or to authorize:

(a) the reproduction of a computer program in whole or in part by any means, in any form and for whatever purpose, such as loading, displaying, running, transmission or storage of the computer program; (French proposal in 9013/89, page 10)

(b) the translation, adaptation, arrangement and any other modification of a program and the reproduction of the results thereof;

(c) the distribution of a computer program or copies thereof. The first sale of a copy of a program by the author or with his consent shall exhaust the right of the author to control further sale of that copy [but shall not exhaust the right to control its rental or its loan to the public];

(d) the communication to the public of a computer program in whole or in part.
Article 5
Exceptions to the restricted acts

1. Variant 1:

In the absence of any contractual provisions to the contrary, the acts referred to in Article 4(a) and (b) shall not be subject to authorization by the author where they are necessary for the legitimate use of and as a back-up to the program. (Italian proposal in 9013/89, page 13)

Variant 2:

In the absence of any contractual provisions to the contrary [or where a copy of a program has been sold], performance of the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right holder where such acts are necessary for the use of the program by its lawful acquiror, in accordance with the purpose for which it was made available by the right holder, or for the safety of the program.

[2. Where a copy of a computer program has been sold, the exclusive right of the right holder to authorize rental of that copy shall not be exercised to prevent that copy being made available for use as reference material only, without removal from the premises, of non-profit making libraries and research institutions.] (Text proposed by the Commission)
Article 6

Infringement of rights

1. It shall be an infringement of the author’s exclusive rights in the computer program to import, deal with, or possess an infringing copy of the program, knowing [or having reason to believe] it to be an infringing copy of the work.

2. It shall be an infringement of the author’s exclusive rights in the computer program to [make, import,] deal with or possess articles intended specifically to facilitate the removal or circumvention of any technical means which may have been applied to protect a program.

This provision could be supplemented by the following statement in the Council minutes:

"The Council requests that Member States adopt all necessary measures to facilitate the identification of infringements of provisions of the present Directive."

Article 7

Term of protection

1st variant:

Protection shall be granted for the life of the author and fifty years after his death.
2nd variant:

[Protection shall be granted for fifty years from the date of creation.] (Commission's original proposal)

3rd variant:

The period of protection granted to computer programs and their preparatory design material shall be a term of protection compatible with the terms provided for the protection of literary works under the Berne Convention but such terms shall not exceed the life of the author and fifty years from the date of his death.

Article 8

Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to other legal provisions such as patent rights, trade marks, unfair competition, trade secrets, the law of a contract, protection of semiconductor products.

2. Protection under the provisions of this Directive shall also be available in respect of works created prior to [date in Article 9], without prejudice to any contractual arrangements entered into before that date.
Article 9

Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to transpose this Directive at the latest two years after its notification.

2. Each Member State shall ensure that it communicates to the Commission and to the other Member States the provisions of national law which it adopts in order to transpose this Directive.

Article 10

This Directive is addressed to the Member States.
SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)
on: 30 and 31 October 1989

No. prev. doc.: 9475/89 PI 72
No. Cion prop.: 5682/89 PI 25

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

1. Introduction

At its meeting on 30 and 31 October 1989 the Working Party on Intellectual Property examined a consolidated text, drawn up by the Presidency, of the proposal for a Council Directive on the legal protection of computer programs (9304/89 PI 68). The Chairman of the Working Party announced that he would be submitting to the Permanent Representatives Committee, on the basis of this examination, a number of questions with a view to a policy debate by the Council (Internal Market) at its meeting on 23 November 1989. (1)

The present summary refers to the provisions of the proposed Directive as they appear in the consolidated text (9304/89), unless otherwise stated.

(1) This report was circulated under reference 9647/89 PI 73.
2. Article 1(1) (2)

2.1. With regard to whether the term "literary works" or "works" should be used, the Belgian, Danish, German, Irish and United Kingdom delegations and the Commission representative were in favour of the term "literary works"; the Greek, Spanish and Italian delegations were in favour of the term "works", and the French, Netherlands and Portuguese delegations expressed a preference for the term "works".

2.2. Several delegations supported a suggestion by the United Kingdom delegation specifying that any reference to computer programs in the Directive also covered their preparatory design material. This paragraph could therefore read as follows:

"Member States shall protect computer programs as [literary] works within the meaning of the Berne Convention. For the purposes of this Directive, the term "computer programs" shall include their preparatory design material."

3. Article 1(2) (3)

3.1. The Commission representative stated that he upheld the proposal as originally submitted by the Commission and was not in a position to

(2) Article 1(1) and 1(2) in the original Commission proposal.
(3) Article 1(3) in the original Commission proposal.
support the alternative proposal quoted in the consolidated text.

All delegations were against the part of this paragraph which appears in square brackets in the consolidated text, for reasons already put forward at previous Working Party meetings.

3.2. The Irish delegation, although it agreed with the other delegations on the deletion of the text in square brackets, wondered whether the problem of protecting the specification of interfaces should not be tackled by seeking a solution which would reconcile the principle of copyright protection of interface specification with the desire to achieve "open systems".

The Commission representative, although aware of the problem raised by the Irish delegation, stated that the Commission's intention in proposing the second sentence of this paragraph was to affirm that normal copyright rules applied to all parts of a computer program, including its interfaces; in other words, the Commission did not wish to propose any alteration of the status quo with regard to protection of interface specification in the framework of this Directive.
4. Article 1(3)(a) (4)

4.1. The Danish, German, Greek, Spanish and Italian delegations were in favour of the first sentence of this provision as proposed in the consolidated text.

The Belgian, French, Irish, Netherlands, Portuguese and United Kingdom delegations were against the inclusion of the adjective "creative".

The French delegation proposed replacing the expression "creative intellectual effort" by "personal intellectual effort".

The Netherlands delegation repeated the proposal it had made at the last meeting that this sentence be worded as follows:

"A computer program shall be protected if it is original, in that it is the result of the author's own intellectual effort.". (5)

(4) Article 1(4)(a) in the original Commission proposal.
(5) "Een computerprogramma wordt beschermd wanneer het oorspronkelijk is in die zin dat het het resultaat is van de eigen intellectuele inspanning van de maker."
The Italian and United Kingdom delegation stated that they could accept this last proposal by way of compromise: the Danish and German delegations entered a scrutiny reservation on it.

4.2. The Danish, Italian, Netherlands and United Kingdom delegations found the second sentence of this provision superfluous.

The German delegation would have preferred the wording of this sentence proposed in the Annex to 9013/89 ("No other qualitative or aesthetic criteria shall be applied").

The French delegation suggested the wording "No account shall be taken of merit in determining whether protection shall be granted.".

The United Kingdom delegation suggested as a compromise the wording "No assessment of its merit shall be applied in determining its eligibility for protection.". (6)

The Danish, Italian and Netherlands delegations were opposed to this suggestion.

The Chairman of the Working Party concluded that this sentence of the consolidated text should appear in square brackets.

(6) Suggestion incorporated in English above.
5. Article 1(3)(b)  (7)

The delegations confirmed the positions they had adopted at the last meeting (9475/89, point 3.4), with the German delegation falling in with the majority position.

6. Article 2(1)

The Working Party agreed to a proposal by the Netherlands delegation that the first sentence of this paragraph be worded as follows:

"The author of a computer program shall be the natural person or group of natural persons who created the program, or the legal person designated as the author by national legislation."  (8)

7. Article 2(2)

7.1. The Danish delegation proposed adding to this paragraph the possibility of one of the joint authors acting independently of the others in the event of infringement of copyright; this could be achieved if the start of this paragraph were to read as follows:

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(7) Article 1(4)(b) in the original Commission proposal.
(8) "De maker van het computerprogramma is de natuurlijke persoon of de groep van natuurlijke personen die het programma tot stand heeft gebracht of de rechtspersoon die door de nationale wetgeving als maker wordt aangemerkt."
"Without prejudice to provisions in Member States concerning copyright infringement and the settlement of disputes arising between joint authors, ..." (rest unchanged).

The Spanish, Italian and Netherlands delegations supported this proposal.

7.2. The German delegation suggested rewording this paragraph as follows:

"Where several persons have jointly created a computer program (joint authors) copyright shall be owned by them jointly. Without prejudice to provisions in Member States concerning the settlement of disputes, copyright shall be exercised jointly by the joint authors, unless otherwise provided by contract. [Each of the joint authors shall be entitled to bring proceedings for infringement of the joint copyright; however, he may only seek compensation in favour of all the joint authors.]" (9)

(9) "Haben mehrere Personen gemeinsam ein Computerprogramm geschaffen (Miturheber), steht ihnen das Urheberrecht gemeinsam zu. Die Urheberrechte werden von den Miturhebern - unbeschadet der für Streitfälle geltenden einzelstaatlichen Vorschriften - gemeinsam ausgeübt, sofern keine anderen vertraglichen Vereinbarungen getroffen werden. [Jeder Miturheber ist berechtigt, Ansprüche aus Verletzungen des gemeinsamen Urheberrechts geltend zu machen; er kann jedoch Leistung nur an alle Miturheber verlangen.]"
8. Article 2(3)

Only the Italian delegation supported the Commission proposal; all the other
deleagations were for the deletion of this paragraph.

9. Article 2(4)

9.1. The Belgian, Danish, German, French, Netherlands and United Kingdom
deleagations were in favour of the deletion of the phrase "or at the
request of his employer".

The Netherlands delegation also called for the deletion of the word
"exclusivement" ("bij uitsluiting") (which does not appear in the English
version).

9.2. The Spanish delegation maintained a scrutiny reservation on this
paragraph and pointed out that it would not be justifiable for the
employer to exercise all economic rights in certain cases, for example
where the employer markets a program which had been created by an
employee to satisfy the internal needs of the undertaking in question.

The Commission representative replied that the question of the employees' 
share in the profits resulting from their work lay outside the scope of
this Directive.
10. Article 2(5) (original Commission proposal)

This provision, as proposed by the Commission, should be in square brackets, as any decision on it is linked to that taken for Article 1(3)(b).

11. Article 3(1)

The Danish, French, Italian and Netherlands delegations voiced doubts as to the need for this paragraph, but were not opposed to its retention.

12. Article 3(2)

No delegation was in favour of retaining this paragraph.

13. Article 4(a)

13.1. A number of delegations expressed a preference for the Commission's original proposal, as against the version given in the consolidated text, and the Chairman therefore suggested that the Working Party restore the Commission's original proposal, specifying that the acts listed in the second sentence are only restricted insofar as they involve the reproduction of the program. This provision could read as follows:
"(a) the reproduction of a computer program by any means and in any form, in part or in whole. Insofar as the loading, viewing, running, transmission or storage of the computer program necessitate a reproduction of the program in part or in whole, they shall be considered restricted acts;".

13.2. The United Kingdom delegation proposed that this provision be limited to the following wording:

"(a) the reproduction of a computer program in whole or in part by any means, in any form, whether permanent or transient;". (10)

It added that if it was necessary for this Article to refer to the transmission of a program, this should appear in 4(d) rather than 4(a).

14. Article 4(b)

14.1. The Working Party accepted a proposal from the Danish delegation which would bring the terms used in this provision into line with those of Article 12 of the Berne Convention.

(10) Suggestion incorporated in English above.
"(b) the translation, adaptation, arrangement and any other transformation of a program and the reproduction of the results thereof;".

14.2. The United Kingdom delegation reserved its position on this provision, in conjunction with Article 5(1) (see point 17.5 below).

14.3. The Netherlands delegation referred to its position as set out in point 14.2 of 9013/89 and accordingly suggested adding the following to subparagraph (b):

"Without prejudice to the rights of the person who translates the program,"

The German delegation entered a scrutiny reservation on this addition.

15. Article 4(c)

15.1. The Danish and United Kingdom delegations asked for the term "distribution" to be changed to mean "distribution to the public": in the view of the United Kingdom delegation, the first sentence of this provision should refer to the first distribution to the public of one or more copies of a program.

15.2. The Netherlands delegation suggested that the right should not be exhausted until the first sale takes place in a Member State of the Community.
15.3. The Danish delegation considered that the exhaustion constituted a derogation from copyright and should therefore be dealt with in Article 5 rather than Article 4.

15.4. The Danish, Spanish, Irish, Italian, Portuguese and United Kingdom delegations were in favour of including the right to control rental in the Directive.

The Belgian, German, Greek, French and Netherlands delegations, on the other hand, thought that the question of introducing such a right should not be raised in the restricted framework of this Directive but should be examined in a wider framework covering other areas of copyright.

15.5. The Irish and United Kingdom delegations were in favour of the Commission proposal that the first sale of a copy of a program should not exhaust the right to control its loan to the public.

The Danish, German, Greek and Italian delegations opposed this proposal.

The Belgian, French and Netherlands delegations did not wish to resolve this question in the framework of the Directive.
15.6. The German delegation proposed the following wording for this provision:

"The placing on the market of the original or of a copy of a program by the author or with his consent shall exhaust the right of the author to control further distribution of that copy. The Member States may provide for exceptions to this principle." (11)

16. Article 4(d)

Some delegations voiced doubts as to the need for this provision, without expressly opposing it.

17. Article 5(1)

17.1. The French delegation proposed a modified version of variant 1 of this paragraph:

"In the absence of any contractual stipulations to the contrary, the acts set out in Article 4(a) and (b) shall not be subject to authorization by the right holder where they are necessary for the use

(11) "Mit dem Inverkehrbringen des Originals oder eines Vervielfältigungsstückes des Programms durch den Urheber oder mit seiner Zustimmung erschöpft sich das Recht des Urhebers auf die Kontrolle über die Weiterverbreitung dieses Vervielfältigungsstückes. Die Mitgliedstaaten können Ausnahmen von diesem Grundsatz vorsehen."
of the program in accordance with its intended purpose, or necessary as a back-up"

The Danish, Greek, Italian and Portuguese delegations supported this proposal. The Irish delegation was able to accept it by way of compromise.

17.2. The Spanish and Irish delegations were in favour of variant 2, provided the text in square brackets were retained and the phrase "in accordance with the purpose for which it was made available by the right holder" deleted.

17.3. The German and United Kingdom delegations expressed a preference for the second variant over the first, provided the text in square brackets were deleted, but these delegations both proposed new draftings on this paragraph.

The German delegation proposed replacing the phrase "the use of the program by its lawful acquiror" with "the use of the program in accordance with its intended purpose by its lawful user". (12)

The United Kingdom delegation proposed the following formulation:

(12) "die bestimmungsmässige Verwendung des Programms durch den rechtmässigen Benutzer".
In the absence of any contractual provisions to the contrary, the acts referred to in Article 4(a) and (b) shall not require the authorization of the owner of the rights where they are necessary for the use of the program by its lawful acquiror in accordance with the purpose for which it was made available by the owner of the rights [and for security purposes in connection with that use].

17.4. The German delegation expressed the opinion that Article 4(a) of the proposed Directive would not, without the authorization of the right holder, permit the analysis of a computer program in order to uncover the ideas and principles underlying it (decompiling, reverse engineering), even though copyright protection did not extend to those ideas and principles. To resolve this problem, the German delegation proposed that Article 5 should provide for a derogation from Article 4(a) whereby the authorization of the right holder would not be required where the acts set out in Article 4(a) are carried out for the sole purpose of analysing a computer program, or else that Article 4 and 5 should be worded in such a way that the Member States remain free to legislate on this matter.

(13) Suggestion incorporated in English above.
A number of other delegations and the Commission representative thought that the proposed Directive should not contain a specific provision relating to analysis, decompiling or reverse engineering, especially since this question is not specifically dealt with in the present legislation either of the Member States, or of the United States or Japan; consequently, the introduction of such a provision would be perceived as a modification of the present situation. Several delegations voiced the opinion that, insofar as the Directive makes no specific provision on this subject, the Member States remain free, under Article 9(2) of the Berne Convention, to permit the reproduction of a computer program for the purpose of analysis.

The German delegation entered a reservation on Articles 4 and 5, inasmuch as, in its opinion, the versions currently under discussion did not permit the analysis of a computer program without the authorization of the right holder.

17.5. The United Kingdom delegation repeated its request for a derogation from Article 4(b) which would allow the user of a computer program to adapt it to his personal needs, and to this effect proposed a new provision worded as follows:
"1a. In the absence of any contractual provisions to the contrary, the adaptation, modification or other alteration of the program by the lawful acquiror for his private use shall not require the authorization of the owner of the rights. This derogation from Article 4(b) does not permit any adaptation, modification or other alteration to remove or otherwise change elements of a program intended to limit or prevent reproduction of the program in whole or in part." (14)

18. Article 5(2)

The Working Party agreed to keep this paragraph in square brackets pending resolution of the question of the right of rental in Article 4(c) (point 15.4 above).

The Netherlands delegation pointed out that this provision was superfluous, whatever solution is adopted for the right of rental.

(14) Suggestion incorporated in English above.
19. Article 6(1)

19.1. The Belgian, Spanish, French, Irish, Italian and United Kingdom delegations were in favour of the principle of this paragraph.

The Portuguese delegation thought the acts listed were not infringements.

The Danish, German, Greek and Netherlands delegations upheld their reservations on this paragraph and stressed it should be based on objective criteria. The German delegation proposed the following text:

"The distribution and use of an infringing copy of a computer program shall constitute an infringement of the author's exclusive rights. The Member States shall adopt the appropriate provisions to prevent infringements of copyright with infringing copies, taking account of the legitimate interests of persons possessing or utilizing them in good faith." (15)
19.2. The Italian delegation, with the support of the Belgian, French and Irish delegations, suggested extending the list of acts to include acts such as leasing and hiring.

19.3. The United Kingdom and Irish delegations suggested deleting the reference to the author both in this paragraph and in paragraph 2.

19.4. The French delegation proposed the following wording:

"Possession of or participation in the distribution of a computer program knowing or unable not to know that it is an infringing copy shall be an infringement constituting liability in respect of the holder of the copyright."

20. Article 6(2)

20.1. The Belgian, Spanish, French, Irish, Italian, Portuguese and United Kingdom delegations were in favour of the principle of this paragraph.

The Danish, German, Greek and Netherlands delegations favoured its deletion.
The Chairman emphasized the importance the Presidency attached to this provision as well as to paragraph 1 of the Article so as to make an effective contribution to combating pirating in this sphere.

20.2. The United Kingdom and Irish delegations suggested supplementing paragraph 2 with the condition that the acts listed were carried out in the knowledge or having good reasons to believe what was the ultimate use of the articles concerned.

20.3. The French delegation suggested the following wording:

"Possession or involvement in the manufacture or distribution of means specifically intended to facilitate the suppression or neutralization of any technical device which may have been installed to protect a program shall be an infringement constituting liability in respect of the holder of the copyright".

21. Statement on Article 6

The Working Party agreed to forward this draft statement to the Permanent Representatives Committee.
22. Article 7

The Belgian, Greek, Spanish, Irish, Italian, Portuguese and United Kingdom delegations were able to accept the third variant of this Article.

The Danish, German, French and Netherlands delegations could accept this variant subject to the deletion of the phrase "but such terms shall not exceed the life of the author and fifty years from the date of his death".

The German delegation pointed out in this connection that German copyright legislation made provision for a period of protection for all literary works amounting to the author's lifetime and seventy years after his death which was permitted under Article 7(6) of the Berne Convention; it would not like to be obliged to provide for a period of protection for computer programs different from that provided for other literary works.

23. Article 8(2)

It was suggested that the phrase "without prejudice to any contractual arrangements entered into before that date" be replaced by "without prejudice to any acts concluded and rights legitimately acquired before that date".
24. Article 9(1)

The Working Party agreed on a two-year period for the transposal of this Directive into national law.

25. Article 9(2)

25.1. It was agreed that the wording of this paragraph would be amended to read as follows:

"Each Member State shall ensure that it communicates to the Commission the provisions of national law which it adopts in order to transpose this Directive. It shall forward a copy thereof to the other Member States."

25.2. The United Kingdom and Portuguese delegations entered a scrutiny reservation regarding the obligation to communicate such provisions to the other Member States.

25.3. The Chairman suggested that this obligation to communicate the national provisions to the other Member States should be extended to other Directives. The Spanish delegation, although willing to accept this obligation in the framework of the Directive under examination, reserved its position on the question of its extension to other Directives.

26. Statements (page 2 of 9304/89)

26.1. The Netherlands delegation suggested that the first statement be expressed in positive terms:
"The Council and the Commission confirm that the present Directive obliges Member States to grant to computer programs protection at least equivalent to the minimum protection granted under the Berne Convention".

26.2. The Netherlands delegation suggested that the second statement should refer not only to the derogations already provided for under national legislation but also to those which might be provided for in the future. The Commission representative entered a scrutiny reservation on this suggestion.

26.3. The German delegation suggested that the second statement should refer to national provisions rather than to derogations provided for under national legislation.

26.4. The Danish delegation wanted it confirmed that "points not covered by this Directive", on which Member States' national legislation could accordingly continue to provide for derogations, included for instance the reproduction in writing of the source code of a program, the reproduction of program extracts in a book or specialist magazine and "reverse engineering".
In this context several delegations expressed the wish that the Commission prepare a text indicating clearly which were the points not covered by the Directive.
REPORT

from: Presidency

to: Permanent Representatives Committee

No. prev. doc.: 9304/89 PI 68
No. Com prop.: 5682/89 PI 25

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

1. Introduction

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 (5682/89 PI 25). This proposal is based on Article 100a of the Treaty establishing the European Economic Community.
The Working Party on Intellectual Property has met on five occasions (1) to examine the Commission proposal and has identified a number of problems which it hereby submits to the Permanent Representatives Committee in preparation for a policy debate by the Council (Internal Market) at its meeting on 23 November 1989. The latest reading of the proposal was carried out on the basis of a consolidated text drawn up by the Presidency and contained in 9304/89 PI 68.

2. Protection given

The Commission proposes that computer programs should be protected as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works (Article 1(2) in 9304/89). The Belgian, Danish, German, Irish and United Kingdom delegations support this proposal.

The Greek, Spanish and Italian delegations, however, take the view that computer programs should be protected as works within the meaning of the Berne Convention without specifying that they are literary works. The French, Netherlands and Portuguese delegations expressed a preference for the latter position, but were prepared to be flexible.

(1) On 10 July, 24 and 25 July, 14 and 15 September, 12 and 13 October and 30 and 31 October 1989.
The Permanent Representatives Committee is asked to decide whether computer programs should be protected as literary works or simply as works without the description "literary".

3. Extent of protection

The Commission proposes that it be stipulated that protection under the Directive shall not extend to the ideas, principles, logic, algorithms or programming languages underlying the program and that where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter (Article 1(3) in the original Commission proposal; Article 1(2) in 9304/89).

All delegations wanted these stipulations deleted on the grounds that it was a general principle of copyright that ideas and principles could not be protectable.

The Permanent Representatives Committee is asked to decide whether or not the more detailed form of this provision as proposed by the Commission should be retained.
4. **Programs generated by means of a computer**

The Commission has proposed a provision concerning the protection of programs generated by computer (Article 1(3)(b) in 9304/89).

A large majority of delegations thought such a provision was premature at the present state of the art.

Only the Irish and United Kingdom delegations shared the Commission's view that it would be useful to include such a provision at this stage.

The Permanent Representatives Committee is asked to state whether it would be useful to include a provision of this kind in the Directive.

5. **Computer programs created under a contract**

The Commission proposes that where a computer program is created under the terms of a contract, the person who commissioned it shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract (Article 3(2) in 9304/89). The Italian delegation supports this proposal.

The other delegations wanted this provision deleted, arguing that this matter should be settled in the contract between the author of the program and the person who commissioned it.
The Permanent Representatives Committee is asked to state whether such a provision would be useful.

6. Beneficiaries of protection where the computer program is created by a group of persons jointly

The Commission proposes that where a computer program is created by a group of persons jointly, the program shall be protected in favour of all authors if at least one author is a beneficiary of such protection as a national of a State party to the Berne Convention or as a national of another State which grants reciprocal treatment to nationals of the Member State concerned (Article 3(2) in 9304/89).

All delegations were against this provision, arguing that it would be unreasonable to extend protection to all the members of a team of programmers where only one of them satisfied these conditions.

The Permanent Representatives Committee is asked to state whether such a provision would be useful.

7. Right of rental

The Commission proposes introducing by means of the Directive an author's right to control the rental of his computer program (Article 4(c) in 9304/89).
It also intends to introduce a right of rental in respect of other works covered by copyright in future proposals.

The Danish, Spanish, Irish, Italian, Portuguese and United Kingdom delegations supported the proposal to introduce such a right in the Directive.

The Belgian, German, Greek, French and Netherlands delegations, however, take the view that the question of introducing a right of rental should not be discussed in the narrow context of this Directive but should be considered in a broader framework encompassing other areas of copyright.

The Permanent Representatives Committee is asked to state whether the right to rent a computer program should be dealt with in the context of this Directive or whether it should be deferred until a broader examination is made of the question of a right of rental in general.

8. Measures to combat piracy

The Commission proposes in Article 6 of the Directive provisions to combat computer program piracy by stipulating that certain acts involving trade in illicit copies of computer programs and trade in articles intended specifically to facilitate the circumvention of technical devices installed to
protect a program shall constitute infringements of exclusive rights in the program. Several delegations were in favour of such provisions.

Other delegations were against this Article, considering that it impinged on criminal law and that such acts did not constitute infringements of copyright, and that consequently this Article should not be included in the Directive.

The Presidency emphasizes the need for a provision of this kind in order to contribute effectively to combating piracy in this field. The Permanent Representatives Committee is asked to confirm the need for such a provision.

9. Term of protection

With regard to the term of protection of literary works, Article 7 of the Berne Convention states that:

- where the author is an identified natural person, the term shall cover the lifetime of the author and fifty years after his death;

- in the case of anonymous works written under pseudonyms, that term shall expire fifty years after the work has been made legally accessible to the public;
the Member States have the option of granting a term of protection longer than those referred to above.

It is proposed in Article 7 of the Directive that the period of protection granted to computer programs shall be a term compatible with the terms provided for the protection of literary works under the Berne Convention, but shall not exceed the lifetime of the author and fifty years from the date of his death (Article 7, 3rd variant in 9304/89). The majority of delegations were in favour of this proposal.

However, the Danish, German, French and Netherlands delegations were against the stipulation that this period must not exceed the lifetime of the author and fifty years after his death. It should be pointed out that under the legislation of the Federal Republic of Germany such protection lasts for the lifetime of the author and seventy years after his death in the case of all literary works, and that the German delegation would not wish to be obliged to grant a period of protection for computer programs different from that for other literary works.

The Permanent Representatives Committee is asked to state whether the period of protection should be harmonized throughout the Community, or whether Member States might remain free to stipulate a period longer than the minimum under the Berne Convention.
10. **Communication to other Member States of the provisions of national law adopted by a Member State**

The Presidency proposes that this Directive should stipulate not only that each Member State shall communicate the provisions of national law which it adopts in order to transpose the Directive to the Commission but also that it shall send a copy of them to the other Member States (Article 9(2) in 9304/89); in addition the Presidency proposes that this practice be extended to other directives in future. Most delegations welcomed this proposal.

However, the Portuguese and United Kingdom delegations entered scrutiny reservations on this proposal. The Spanish delegation supported the proposal in the case of the present Directive but reserved its position on its extension to later directives.

The Permanent Representatives Committee is asked to confirm the inclusion of this obligation in the Directive and state whether such a practice should be extended.
EUROPEAN PARLIAMENT

COMMITTEE ON ENERGY RESEARCH AND TECHNOLOGY

OPINION

for the Committee on Legal Affairs and Citizens' Rights
(COM(88) 816 final - SYN 183)
on the legal protection of computer programmes

Draftsman: Mr TURNER

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15 November 1989

PE 134.239/fin.
OPINION
(Rule 120 of the Rules of Procedure)
of the Committee on Energy, Research and Technology

Draftsman: Mr A. TURNER

At its meeting of 30 August 1989, the Committee on Energy, Research and Technology appointed Mr TURNER draftsman.

The committee considered the draft opinion at its meetings of 26 October 1989 and 8 November 1989.

It adopted the conclusions contained therein on 8 November 1989 by six votes for, three against and seven abstentions.

The following took part in the vote: Mr SÄLZER, Vice-Chairman and acting Chairman; Mr LANNOYE, Vice-Chairman; Mr ADAM, Vice-Chairman; Mr TURNER, draftsman (deputizing for Mr SELIGMAN); Mr ANGER, Mr BETTINI, Mrs BREYER, Mr GASOLIBA I BÖHM, Mr GÖRLACH (deputizing for Mr LAGORIO), Mr LINKOHR, Mr PIERROS, Mr POMPIDOU, Mr PORRAZZINI, Mrs QUISTHOUDT-ROWOH, Mr REGGE, Mr ROVSING, Mr SCHLEE, Mr VERWAERDE and Mr WEST.
The proposal for a Directive submitted to the European Parliament aims to strengthen and make uniform throughout the Member States of the European Community legal protection for computer programmes.

The proposal in its present form will not help to create a legal environment capable of eliminating any disparities with regard to the free movement of computer programmes within the Community and will certainly not create conditions favourable to the establishment of a strong European industry in this field.

2. A remarkable feature of the present proposed Draft Directive is that copyright protection would be given to a computer programme as a 'literary work' (which is in fact exactly what it is when first created) but that this 'work' is something which the public can neither read, appreciate or understand. This is a remarkable departure from principle. The basic rule of copyright is that copyright protection is only given to the actual literary 'form of expression' which an author of a work, for instance a novel, has created but that the ideas (for instance, the plot underlying the 'work') are not. Thus for instance a literary work describing a new solution to some problem (which might for instance be a political, social, economic or technical problem) is only protected in so far as the actual 'literary form of expression' is concerned, while the ideas and solutions or principles which the author is putting forward are not protected.

3. For this reason the Draft Directive under Article 1.3 quite correctly excludes protection from the ideas, principles, logic algorithms or programming languages underlying a software programme. However, in the case of computer software programmes the public cannot find out what these ideas, principles, logic, algorithms or programming languages underlying the programme are except by decompiling the 'object code' (that is the machine code comprising an apparently meaningless, immensely long series of zeros and ones) by means of a decompiler which is capable of analyzing the 'object code' and investigating and interrogating it in order to discover the 'source code' which lies behind the 'object code'. The originator of the programme will have written his novel programme in source code and it will have been translated into object code. A member of the public who is attempting to study the programme will decompile or translate the object code into a source code which he will be able to study to see what the ideas, principles and logic of the original source code are. The source code into which the member of the public translates the object code will not be identical to the original source code which the originator wrote, but it will be very similar. The process is rather like translating an original novel from French into English and then re- translating the English back into French. The English version and the second French version will infringe the copyright of the first version but the last will not be identical to the first.

4. The critical fact to recognize is that because of the terms of Article 4, all the above steps undertaken by a person who has bought a copy of the original programme (in object code) from the originator will be infringement, and each of the above acts will be forbidden acts. This would be a novel development in copyright law, because it would be
analogous to saying that copyright protection of a book prevented the purchaser of a book from reading it. It would have, of course, a serious restrictive effect on innovation and competition within the EC because protection given to programmes would be such that others entering or developing in the same field would be in the dark as to the state of the art. In the case of patent protection a protective monopoly is given preventing use of an invention but the invention itself is published so that competitors and the public in general gain knowledge of it. It would seem proper, if possible, to obtain a similar balance between the rights of industrial property on the one hand and the public on the other in the field of copyright relating to computers as exists in other industrial fields.

5. If this balance were achieved so that the public knew the subject of the copyrighted programme, the fact that the public had this knowledge would not mean that they were entitled to obtain economic benefit by copying the programme, because the whole purpose of the protection is to give commercial protection to copyrighted programmes against copying. Protection of the form of expression of a programme should not require that the public should be kept from seeing what the subject matter protected is and be prevented from appreciating the principles, ideas, logic and algorithms underlying it (which are not protected) so long as they do not copy the subject matter when designing their own programmes. As the draft now stands, under Article 4 the operating of a computer programme so as to show it on the screen or to print out the programme would be an infringement, as would be the operation of the computer in such a way as to use the programme to direct the actions of the computer such as by loading the programme, viewing, running, transmitting or storing it. As will be seen, the present proposal would not only keep knowledge of the protected form of expression of the programme from the public, but would prevent them knowing its unprotected features, i.e. the underlying principles, ideas, logic and algorithms.

6. If the Directive provided that the public could 'read' the programme by decompiling it without committing infringement it could be difficult for a member of the public who had read and studied it to claim if he subsequently wrote a similar programme, that he had not in fact copied it. In order to prove that he had not copied he would have to show that his programme was substantially different in its 'form of expression' from the original, although, of course, he would be entitled to use the ideas, principles, logic, algorithms or programming languages underlying the original programme as these are not protected by copyright. There have been methods developed in industry making it quite clear that copying of the 'form of expression' has not taken place, such as the so-called 'clean room' procedure whereby a company divides its operations which are directed towards studying a competitor's programmes, from its creative operations in making its own programmes. The ideas, principles, logic, algorithms or programming languages discovered by studying a competitor's programme can be freely used in the creative operations of the company, but the latter employees will have these passed on to them by the employees who have decompiled the original programme without any information as to the form of expression used by the originators. In this way the chain of information is broken proving that copying of the form of expression has not taken place. From a technical and economic point of view it is essential that computer programmes should not be kept secret for the public in Europe, more especially as in American law decompiling has not been prevented by
Statute or by the Courts, and in a number of cases the fact that decompilation has taken place has not given rise to any legal objection. Decompilation for the purposes of research and study is also permitted, and in Japan a right of private study is recognised. In both cases, of course, it is a condition of the law that no copies of a programme are reproduced for commercial use or sale and no commercial use may be made of the programme to help in the design of the form of expression of another programme. Nor, of course, can a copy made for the purposes of decompilation be reproduced for any purpose other than research or study. Thus, for instance, it could not be published free as this would be highly damaging to the copyright owner. As a consequence the Directive should provide for fair use of the subject matter of the copyright for the purposes only of study and research.

If in Europe decompilation were not permitted, US and Japanese industrial competitors could decompile European companies' programmes in their own country, but European companies could not decompile US or Japanese (or other European) programmes in Europe. This would quite obviously have a very serious effect on European competitivity, and a European law which set up such a situation could only be regarded with very considerable concern and surprise.

Explanatory Note on the Nature of Interfaces

7. Programme interfaces are programmes or parts of programmes which enable one computer to operate with another or with some other facility or with a piece of exterior software, or to enable two pieces of independent software to operate together. Thus interfaces may be the connection between a piece of hardware and a piece of software, or between two pieces of hardware connected by a piece of software, or between two pieces of software. Programmes whether they are 'interface' programmes or not should be and are protected by copyright. When a user of a computer or software wishes to connect a piece of his own hardware or software to another piece of hardware or software he will need to know sufficient details of the interface programmes involved to be able to make the connection. It is normal for suppliers of software to provide a written 'specification' of the interfaces so that the customer can do this. Indeed IBM gave an undertaking to the Commission (1984) to provide such information to companies in the EC in the celebrated action. Such specifications are written literary works and as such are protected by copyright just like any written literary work. Needless to say, any ideas, principles, logic or algorithms underlying such specifications are not protected by copyright any more than they would be for any other literary work.

If written specifications of interfaces are not provided by the seller of a piece of hardware or software, or if the written specification provided is insufficient, it will be necessary for the purchaser or a person wishing to design an independent piece of soft- or hard-ware to interact with the programme to study the software of the interface. To do this he will need to decompile the original programme, and to be entitled to do so as explained, in relation to software programmes in general, in paragraph 6 and following, above. There should be no distinction in this respect between interface programmes and other software programmes.
The proposals suggested above, therefore, and the amendments proposed below for dealing with the problems of paragraph 6 will equally deal with the problems of interface programmes.

Furthermore, the provision of an interface programme to mesh in with the interface of an existing piece of hard- or soft-ware will not normally infringe the copyright in the first interface programme, because it will be the "mate" of the first - in the same way that the male plug of a domestic electric appliance is not the "same design" as the female plug in the wall, the one meshing in with the other but being of different shape. Thus copyright in interface programmes will not prevent those wishing to design interfaces to them from doing so, so long as there is no bar on decompiling to enable the first programme to be understood.

Relationship to Community law on competition

It has been said that elements of Community competition law should not be included in this Directive and that the Directive should be confined to copyright law per se. This is correct. However, it is a misleading and elementary error of Community law to suggest (as has indeed been done) that the setting out of the exclusive rights in Article 4 to reproduce by "loading, viewing (or more correctly 'displaying'), running, transmission and storage of the complete programme" or "adaptation" of it do not in any way limit the power of the competition Directorate of the Commission in carrying out its responsibilities in the field of competition law. If such exclusive rights are to be given by Article 4, it is within the monopoly of the copyright owner to grant or withhold simpliciter any one or more of these rights. Against such a limited licence, granting some but withholding other of these rights by the copyright owner to the purchaser, the competition Directorate would have no jurisdiction to act because it is not possible for the Directorate to allege that the simple withholding of a portion of a monopoly right is contrary to the EEC competition law. Thus if the copyright owner gave the right to the purchaser only of the "loading, viewing (more properly 'displaying'), running, transmission or storage" for the purpose of operating his computer (thus excluding the right to do so for the purpose of reading, studying or researching a programme or the ideas, principles, algorithms, logic or programming languages underlying them) the Commission would be powerless to object. Competition law cannot therefore protect the public right to see and study a programme and the ideas, principles, algorithms, logic or programming languages lying behind it unless specific conditions are inserted in this Directive along the lines proposed below.

Specific reference to ideas, principles, logic, algorithms, and programming languages underlying a programme

It has been suggested that a specific reference to the ideas, principles, logic, algorithms, and programming languages underlying a programme is unnecessary because it is inherent in part of copyright law. It would be unwise not to make this specific reference because such a specific reference is made by a Statute in Japan specifically with regard to computer programmes and this was done to accord with the effect of US case law. If in Europe we did not include specific reference in the context of computer programmes to these exclusions, it would be possible to argue that
European law gave greater protection against the study and research into the uncopyrighted characteristics of a computer programme than is accorded in the US or in Japan which would of course have the same deleterious effect on European competitors vis-a-vis the US and Japan on exactly the same lines as set out above with regard to the question of decompilation and interfaces.

Necessary amendments to meet the above issues include:

**Article 1.** Paragraph 1, add at the end.
"The exclusive rights shall not include the right to prevent any act done exclusively and necessarily for the study and research of the expression in any form of a computer programme, or any act necessary to study or research the ideas, principles, logic, algorithms, or programming language underlying a programme.

**Article 4(a).** Delete.
"Viewing."

Add, after "reproduction", the words "other than temporary copying, moving and storage operations which leave no trace once the operation has terminated."

**Article 5.** Add new paragraph 3.
"The reproduction of a computer programme by any means and in any form, and the adaptation of a computer programme, shall be permitted for the purposes of study and research of the form of expression of the programme and of the ideas, principles, logic, algorithms, and programming languages underlying the programme, provided that no use is made of such reproduction which conflicts with a normal exploitation of the work by the author or unreasonably prejudices the interests of the author."

**Article 6(2).** Add at end.
"... except for the sole purpose of studying or researching the expression of the programme or the ideas, principles, logic, algorithms or programming language underlying it."

Alternatively, in accordance with the Berne Convention we could replace all amendments to Articles 1, 5 and 6 by

**5 (new) Subject to contractual arrangements to the contrary, the rights enumerated in Articles 4a and 2 above shall not be exercised to prevent any act done exclusively and for no other purpose than for the study and research of the expression in any form of a computer programme or any act necessary solely for the study and research of the ideas and principles underlying a program. If the results of such studies and research are used in a way which prejudices the rightholder's legitimate economic interests, such analyses will still be deemed to be an infringement."

Note the Berne Convention refers to "private study and research". The word "private" could be retained so long as it is made clear expressly that this does not preclude study and research by companies so long as this does not conflict with the normal exploitation of the work by the author or unnecessarily prejudice the interests of the author.
Subject: Preparation for the meeting of the Council (Internal Market) on 23 November 1989

- Right of residence
PREPARATION FOR THE MEETING OF THE COUNCIL (INTERNAL MARKET) ON 23 NOVEMBER 1989

Right of residence
9805/89 CRS/CRP 39 DS 33 EXT 4
9829/89 DS 32

The Committee resumed examination of this question on the basis of suggestions from the Presidency regarding the major outstanding issues. The Presidency reported on steps taken by it to obtain the Opinion of the European Parliament.

The Commission representative stated that the Commission would state its position on the matter on 22 November 1989.

The Committee's discussions centred on the following topics and may be summarized as follows:

A. Resources (retired persons/persons who are not occupationally active, persons who are not occupationally active/non-retired persons)

The Committee was in favour of the following text, which it had amended in the light particularly of the comments from the United Kingdom delegation:

"Article 1(1), second subparagraph

The resources of the person concerned shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account their personal circumstances and, where appropriate, the personal circumstances of their dependents."
While agreeing to this approach, the Spanish delegation stated that this text was for the time being inapplicable in Spain since there was no social assistance system there for all categories of person. A bill on the introduction of social assistance for certain categories had been submitted to the Cortes. The present old age pension for retired persons or persons who were not occupationally active stood at 37,205 pesetas.

B. Extinction of the right of residence (retired persons and persons receiving a pension; persons who are not occupationally active, students)

The Committee agreed on the following Article:

"Article [ ]

The right of residence shall remain for as long as beneficiaries of that right fulfill the conditions laid down in Article 1."

C. "Glaubhaftmachung" (students)

Eleven delegations confirmed their agreement to the following text submitted by the Presidency and amended at the meeting:

"Article 1(1)

(...). Accordingly (the Member States) shall recognize the right of residence of any student who is a national of a Member State ... where the student vouches to the national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, for having sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence."
The Greek delegation entered a scrutiny reservation on this text.

D. Vocational training (students)

The Committee confirmed its agreement of principle to the following text:

"Article 1

... provided that the student is enrolled in a recognized educational establishment for the principal purpose of following vocational or professional training courses there ...".

E. Maintenance grants (students)

Eleven delegations agreed to

- the following recital:

"Whereas assistance granted to students, as established by the case law of the Court of Justice, does not come under the scope of application of the EEC Treaty within the meaning of Article 7 thereof;"

- the inclusion in the Directive of the following Article:

"This Directive shall not establish any entitlement to the payment of maintenance grants on the part of students."
The Portuguese delegation entered a scrutiny reservation.

F. Other questions

- The Belgian delegation asked that the deadline for the transposition of this Directive into national law be set at 31 December 1991 instead of 31 December 1990.

- Several delegations reiterated their reservations on the legal bases proposed by the Commission.

Winding up the proceedings, the Presidency said that this topic would be placed on the agenda for the Internal Market Council on 23 November 1989.
RESUMÉ DES TRAVAUX

du : Groupe "propriété intellectuelle" (programmes d'ordinateur)
en date des : 27 et 28 novembre 1989

n° doc. préc. : 9840/89 PI 75
n° prop. Cion. : 5682/89 PI 25

Objet : Proposition de directive du Conseil concernant la protection juridique
des programmes d'ordinateur

A. INTRODUCTION

1. Lors de sa réunion des 27 et 28 novembre 1989, le groupe "propriété
intellectuelle" a réexaminé les articles 4 et 5 de la proposition de
directive du Conseil concernant la protection juridique des programmes
d'ordinateur et notamment le problème de la décompilation d'un programme
d'ordinateur, appelé également ingénierie inverse (reverse engineering).
B. SITUATION ACTUELLE DANS LES ETATS MEMBRES

2. Le président a d'abord posé aux délégations un certain nombre de questions afin de constater la situation juridique actuelle dans les Etats membres en ce qui concerne la décompilation des programmes d'ordinateur. Les réponses peuvent se résumer comme suit :

2.1. Dans certains Etats membres il existe des dispositions spécifiques ayant pour effet de protéger les programmes d'ordinateur au titre du droit d'auteur, alors que dans d'autres Etats membres on présume que la législation en matière de droit d'auteur s'étend aux programmes d'ordinateur sans qu'il soit nécessaire d'arrêter des dispositions explicites à cet égard.

2.2. Dans aucun Etat membre la législation nationale ne réglemente spécifiquement la décompilation des programmes d'ordinateur.

2.3. Dans aucun Etat membre il n'existe de jurisprudence portant spécifiquement sur la décompilation de programmes d'ordinateur.

2.4. Quant à la question de savoir si les délégations estimaient que l'état actuel de leur législation nationale permettait la décompilation d'un programme d'ordinateur sans l'accord du titulaire :

   a) la délégation grecque a répondu que cela serait en principe autorisé, mais que le résultat de la décompilation serait le facteur décisif ;
b) les délégations danoise, française et italienne ont estimé que cela ne serait pas autorisé en principe ;

c) les délégations irlandaise, luxembourgeoise, néerlandaise, portugaise et la délégation du Royaume-Uni ont estimé que cela ne serait pas autorisé en principe mais qu'une autorisation pourrait être accordée dans certaines circonstances ; la délégation irlandaise et la délégation du Royaume-Uni ont indiqué que le concept d'"utilisation équitable" (fair dealing) pourrait être utilisé pour justifier la décompilation, par exemple à des fins de recherche ou d'étude privée ; les délégations luxembourgeoise, néerlandaise et portugaise ont indiqué que la décompilation était autorisée pour la recherche ou l'usage privé ;

d) la délégation allemande a estimé que cette question restait ouverte et que la réponse dépendrait du but de la décompilation.

2.5. Quant à la question de savoir si les délégations étaient d'avis que la décompilation sans l'accord du titulaire, en vue de découvrir les idées et les principes qui se trouvent à la base d'un programme d'ordinateur, serait autorisée aux termes de leur législation nationale, aucune délégation n'a estimé que la législation de son pays apportait une réponse claire à cette question ; les avis personnels suivants ont été émis :

a) la délégation grecque a estimé que cela serait autorisé, puisque la protection par le droit d'auteur ne s'étend pas aux idées ni aux principes ;
b) la délégation belge a estimé qu'il serait raisonnable de permettre, à des fins de recherche, l'accès aux idées et aux principes qui sont à la base d'un programme ;

c) les délégations italienne et néerlandaise ont estimé qu'une décompilation effectuée à des fins commerciales ne serait pas autorisée ;

d) les délégations irlandaise et luxembourgeoise ont estimé que la réponse à cette question dépendait de la manière dont l'accès aux interfaces était obtenu ;

e) les délégations danoise et française ainsi que la délégation du Royaume-Uni ont estimé que le fait que la protection par le droit d'auteur ne s'étende pas aux idées et aux principes n'implique pas nécessairement que l'utilisateur d'un programme d'ordinateur ait le droit de procéder à la décompilation en vue de découvrir les idées et les principes qui se trouvent à la base du programme ;

f) la délégation allemande a indiqué que dans son pays l'opinion était divisée sur cette question.

3. Le représentant de la Commission a indiqué que les mêmes questions avaient été posées à l'ambassade des États-Unis et à celle du Japon en ce qui concerne la situation juridique actuelle dans chacun de ces pays et que les services de son Institution informeraient le groupe lorsque les réponses leur auraient été transmises.
C. APPROCHE À ADOPTER DANS LA DIRECTIVE

4. Le Groupe a ensuite examiné de quelle manière il conviendrait d’aborder la question de la décompilation de programmes d’ordinateur dans le cadre de la directive proposée. Il a été constaté qu’il se trouvait devant un choix fondamental : fallait-il essayer de régler cette question dans la directive ou, la directive restant neutre à cet égard, s’en remettre aux législations nationales pour résoudre cette question ?

4.1. Dans l’hypothèse où la question serait réglée dans la directive, la plupart des délégations seraient favorables à une formule n’autorisant pas la décompilation de la totalité d’un programme d’ordinateur car cela pourrait aboutir à l’élaboration d’un programme concurrent ; mais cette formule devrait comporter des dispositions permettant l’accès aux interfaces d’un programme dans la mesure nécessaire à la création indépendante d’un nouveau programme compatible avec le premier. Plusieurs suggestions ont été formulées quant à la manière d’introduire cette formule dans la directive proposée.

4.1.1. Une délégation a suggéré que le titulaire pourrait permettre un accès justifié aux interfaces au moyen de licences contractuelles. Toutefois, plusieurs délégations ont objecté que cela comporterait le risque de voir le titulaire établir une discrimination entre les personnes avec lesquelles il accepterait de négocier de telles licences et celles auxquelles il opposerait un refus.
4.1.2. Une autre suggestion a été avancée par la délégation du Royaume-Uni. Elle vise à prévoir à l'article 5 une exception au droit de reproduction prévu à l'article 4 a) de la directive, qui permettrait de décompiler un programme dans la mesure nécessaire à la détermination de ses interfaces en vue de la création d'un programme compatible. Il a été objecté que dans l'hypothèse où cette exception permettrait de produire un programme concurrent, il serait difficile, voire impossible, de prouver si la décompilation a été ou non effectuée simplement dans la mesure nécessaire à la détermination des interfaces du programme.

4.1.3. La délégation allemande a proposé une variante de la suggestion avancée par le Royaume-Uni : le titulaire serait tenu d'autoriser l'accès aux interfaces de son programme mais il pourrait empêcher que cet accès se fasse par décompilation, en fournissant sur demande la spécification des interfaces de son programme. Cette suggestion soulève toutefois des problèmes de reciprocité quant au traitement applicable aux producteurs de programmes d'ordinateur établis en dehors de la Communauté.

4.2. Dans leur grande majorité, les délégations ont indiqué qu'elles préféraient que la question de la décompilation soit réglée par les législations nationales et donc que la directive reste neutre sur ce point, ou qu'elles pouvaient se rallier à cette formule. Seules les délégations espagnole, grecque et italienne préféreraient que cette question soit réglée dans le cadre de la directive pour des raisons d'harmonisation. La délégation néerlandaise a réservé sa position.
4.2.1. Les principales raisons invoquées pour que cette question ne soit pas résolue dans la directive sont les suivantes :

a) il s'agit d'une question extrêmement complexe pour laquelle aucune législation d'aucun État membre ne prévoit de dispositions spécifiques et les efforts déployés pour trouver une solution dans le cadre de la directive risqueraient d'en retarder indûment l'adoption ;

b) plusieurs délégations ont estimé qu'il serait possible dans la plupart des cas de déterminer les idées et principes qui sont à la base des interfaces d'un programme d'ordinateur sans procéder à la décompilation de ce programme, et que les efforts requis pour trouver une solution aux cas relativement peu nombreux dans lesquels cela ne serait pas possible seraient disproportionnés par rapport à l'importance de ce problème ;

c) la Commission n'a pas essayé de régler cette question dans sa proposition, estimant qu'il serait prématuré de le faire à l'heure actuelle ; elle pourrait continuer de suivre cette question et proposer une réglementation au moment opportun.

4.2.2. Plusieurs délégations ont fait observer que la proposition de directive, dans sa version actuelle, n'était pas neutre par rapport à la décompilation : le libellé de l'article 4 a), tant dans la proposition de la Commission (doc. 5682/89 PI 25) que dans le texte consolidé (doc. 9304/89 PI 68) exclurait toute décompilation de programmes d'ordinateur, même pour déterminer les spécifications des interfaces. Si la directive devait
être neutre à cet égard, il faudrait soit modifier l'article 4 a) soit prévoir une exception explicite à l'article 5 (cf. point 12 ci-après).

D. ARTICLES 4 ET 5

5. Le groupe a ensuite examiné les articles 4 et 5 de la proposition de directive sur la base du texte consolidé figurant dans le document 9304/89 PI 68.

6. Article 4 a)

6.1. La délégation allemande a émis une réserve sur l'article 4 a), tant en ce qui concerne la proposition de la Commission que le texte consolidé. Elle a déclaré que même l'insertion à l'article 5 d'une exception explicite à la disposition précitée, précisant que la directive n'autorise ni n'interdit la décompilation mais s'en remet sur ce point à la législation nationale, ne constituerait pas une solution satisfaisante, étant donné que la législation allemande ne réglemente pas cette question et que, dès lors, l'article 4 a) resterait applicable, ce qui aurait pour effet que la décompilation serait interdite en Allemagne. La délégation allemande propose que l'article 4 énonce simplement le principe que les droits exclusifs de l'auteur ou de son ayant-cause comportent le droit de faire ou d'autoriser la reproduction, la traduction, l'adaptation et la distribution d'un programme d'ordinateur, sans essayer de définir ce qu'on entend par reproduction ou n'importe quel autre de ces actes.
Les délégations danoise, française, irlandaise, néerlandaise et la délégation du Royaume-Uni se sont opposées à la proposition de la délégation allemande, estimant qu'elle ne permettrait pas d'atteindre un degré suffisant d'harmonisation en ce qui concerne le droit de reproduction.

6.2. Sans préjudice de la réserve émise par la délégation allemande, le groupe a décidé de retenir pour l'article 4 a) le libellé de la proposition de la Commission plutôt que celui du texte consolidé, étant entendu que la première phrase s'alignerait davantage sur le libellé de l'article 9 paragraphe 1 de la Convention de Berne pour la protection des œuvres littéraires et artistiques (1).

6.3. En outre, la délégation du Royaume-Uni a proposé d'ajouter les termes "permanente ou transitoire" à la fin de la première phrase de l'article 4 a) telle qu'elle venait d'être modifiée (cf. point 6.2. ci-dessus).

7. Article 4 b)

7.1. Le groupe a confirmé sa décision prise lors de sa précédente réunion d'aligner les termes utilisés dans cette disposition sur ceux de l'article 12 de la Convention de Berne (cf. doc. 9840/89 PI 75, point 14.1).

(1) La phrase serait libellée comme suit : "la reproduction d'un programme d'ordinateur, en tout ou en partie, de quelque manière et sous quelque forme que ce soit".
7.2. Le Groupe a accepté en outre l'ajout suggéré par la délégation néerlandaise lors de la précédente réunion (cf. doc. 9840/89 PI 75, point 14.3).

8. Article 4 c)

8.1. Le Groupe est convenu, sauf une réserve d'examen formulée par la délégation allemande, de libeller la première phrase de l'article 4 c) comme suit : "la distribution au public d'un programme d'ordinateur ou de copies d'un programme".

8.2. Le Groupe n'a pas retenu la suggestion de la délégation néerlandaise, à savoir que la "première vente" visée dans la deuxième phrase ne se réfère qu’à la première vente dans un des Etats membres (cf. également doc 9840/89 PI 75, point 15.2.).

8.3. Le Groupe a noté que le Comité des Représentants permanents était actuellement saisi de la question du droit de location. La question du droit de prêt au public sera réexaminée une fois résolue la question du droit de location.

9. Article 4 d)

La délégation néerlandaise a présenté un projet de modification du texte néerlandais (2).

(2) Ce projet de modification figure dans la version remaniée du texte consolidé diffusé sous la cote 9304/1/89 REV I PI 58.
10. **Article 5 paragraphe 1**

Le Groupe a accepté une solution de compromis qui consiste à modifier la variante 1 du texte consolidé dans le sens suggéré par la délégation française (cf. doc. 9840/89 PI 75, point 17.1.) en tenant compte de la mise au point proposée par la délégation du Royaume-Uni (3).

11. **Article 5 paragraphe 2**

L'examen de ce paragraphe a été reporté en attendant le résultat des discussions du Comité des Représentants permanents sur le droit de location à propos de l'article 4 c) (cf. point 8.3. ci-dessus).

12. **Article 5 paragraphe 3 (nouveau)**

Le Groupe a examiné comment l'adjonction d'un paragraphe 3 à l'article 5 permettrait de rendre la directive neutre à l'égard de la décompilation de programmes d'ordinateur.

12.1. Il a été suggéré de prévoir une disposition ayant pour effet d'éviter que l'article 4 ne s'oppose à ce que les législations des Etats membres comportent une disposition concernant l"utilisation équitable".

(3) Le texte de l'article 5 paragraphe 1 issu du compromis figure dans le document 9304/1/89 REV 1 PI 68.
12.2. On a également suggéré de prévoir dans ce paragraphe que les actes visés à l'article 4 a), lorsqu'ils sont réalisés à des fins de recherche ou d'étude privée, puissent être admis en tant que "cas spéciaux" au sens de l'article 9 paragraphe 2 de la Convention de Berne.

12.3. La délégation danoise a proposé le texte suivant:

"3. Nonobstant les dispositions de l'article 4 a) ou b), les États membres peuvent autoriser la reproduction écrite de programmes d'ordinateur à des fins de recherche ou à des fins d'étude ou d'exploitation privées."

Plusieurs délégations ont émis des réserves d'examen sur ce texte, estimant qu'il était trop restrictif.

12.4.1. La délégation irlandaise et la présidence ont proposé le texte ci-après qui reproduit partiellement les termes de l'article 9 paragraphe 2 de la Convention de Berne:

"3. La présente directive n'interdit pas aux États membres d'autoriser la reproduction d'un programme d'ordinateur à des fins d'analyse en vue de déterminer les interfaces, pourvu qu'une telle reproduction ne porte pas atteinte à l'exploitation normale de l'oeuvre ni ne cause un préjudice injustifié aux intérêts légitimes de l'auteur."

12.4.2. Un certain nombre de délégations se sont déclarées en principe favorables à l'adoption de ce nouveau paragraphe, mais elles ont réservé leur position définitive.
12.4.3. La délégation danoise a estimé qu'il conviendrait de compléter ce texte pour permettre la reproduction écrite d'un code source publié, dans des revues spécialisées ou dans des ouvrages didactiques par exemple.

13. Le Groupe a noté que la proposition de nouveau paragraphe 1 bis présentée par la délégation du Royaume-Uni pour l'article 5 (cf. doc. 9840/89 PI 75, point 17.5.) était toujours sur la table.

E. FUTURS TRAVAUX

14. Le Président a informé le Groupe qu'un rapport complémentaire (4) sur la question de la décompilation de programmes d'ordinateur serait transmis au Comité des Représentants permanents. La présidence a l'intention d'inscrire un certain nombre de questions relatives à la proposition de directive, à l'ordre du jour du Conseil "Marché intérieur" du 21 décembre 1989 en vue d'un débat sur la politique à suivre.

(4) Le Groupe a déjà transmis un rapport au Comité des Représentants permanents (doc. 47/89 PI 73). Le rapport complémentaire a été diffusé sous la cote 10376/89 PI 85.
NOTE

from: Presidency
to: Permanent Representatives Committee

No. prev. doc.: 9013/89 PI 64
No. Cion prop.: 5682/89 PI 25

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

The Permanent Representatives Committee will find attached a revised version of the consolidated text of the proposal for a Directive on the legal protection of computer programs, drawn up by the Presidency in the light of the proceedings of the Working Party at its meetings held on 30 and 31 October and 27 and 28 November 1989.
Those drafts have been included which have met with general agreement or considerable support, square brackets indicating texts which have encountered stiff opposition. The texts of the Commission's original proposal have been included in square brackets where the Commission representatives have indicated that they were maintaining them in spite of reservations expressed against them.

**Statements**

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 Literary 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."

**Article 1**

**Object of protection**

1. 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 design material. (1)

2. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject-matter] (2).

3. (a) A computer program shall be protected if it is the result of the author's own creative intellectual effort. [No other criteria shall be applied to determine its eligibility for protection.]

(b) Programs generated by means of a computer shall be protected as literary works insofar as they satisfy the conditions laid down in subparagraph (a) above. (3) (Commission's original proposal)

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(1) This paragraph would replace paragraphs 1 and 2 of the Commission's original proposal.
(2) Paragraph 2 corresponds to paragraph 3 in the Commission's original proposal.
(3) Paragraph 3 corresponds to paragraph 4 in the Commission's original proposal.
Article 2  
Ownership of rights

1. The author of a computer program shall be the natural person or group of natural persons who created the program, or the legal person designated as the author by national legislation. Where collective works are recognized by the legislation of a Member State, the natural or legal person who is considered by that legislation to have created the program shall be deemed to be the author.

2. Without prejudice to provisions in Member States concerning the settlement of disputes arising between joint authors, in respect of a computer program created by a group of natural persons jointly, the exclusive economic rights shall be owned and exercised jointly unless otherwise provided by contract between the joint authors.

[3. Where a computer program is created under a contract, the natural or legal person who commissioned the program shall be entitled to exercise all rights in respect of the program unless otherwise provided by contract.]  
(Commission's original proposal)

4. Where a computer program is created by an employee in the execution of the duties entrusted to him or at the request of his employer, the employer shall be entitled to exercise all economic rights in respect of the program in the absence of contractual provisions to the contrary.
5. In respect of programs which are generated by the use of a computer program, the natural or legal person who causes the generation of subsequent programs shall be entitled to exercise all rights in respect of the program unless otherwise provided by contract. (Commission's original proposal)

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. (Commission's original proposal)

2. In the case referred to in Article 2(2) the computer program shall be protected in favour of all authors if at least one author is a beneficiary of protection in accordance with paragraph 1 of this Article. (Commission's original proposal)

Article 4
Restricted acts

The exclusive rights of the author or his successor in title 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.
viewing, running, transmission or storage of the computer program shall be considered restricted acts;

(b) the translation, adaptation, arrangement and any other alteration of a program and the reproduction of the results thereof, without prejudice to the rights of the person who translates the programme;

(c) the distribution to the public of a computer program or copies thereof. The first sale of a copy of a program by the author or with his consent shall exhaust the right of the author to control further sale of that copy (but shall not exhaust the right to control its rental or its loan to the public);

(d) the communication to the public of a computer program in whole or in part.

Article 5
Exceptions to the restricted acts

1. In the absence of any contractual stipulations to the contrary, the acts referred to in Article 4(a) and (b) shall not require the authorization by the right holder where they are necessary for the use of the program in accordance with its intended purpose, or necessary as a back-up in connection with such use.
12. Where a copy of a computer program has been sold, the exclusive right of the right holder to authorize rental of that copy shall not be exercised to prevent that copy being made available for use as reference material only, without removal from the premises, of non-profit making libraries and research institutions. (Text proposed by the Commission)

3. This Directive does not prohibit Member States from authorizing the reproduction of a computer program for analysis in order to determine interfaces, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Article 6
Infringement of rights

1. It shall be an infringement of the author's exclusive rights in the computer program to import, deal with or possess an infringing copy of the program, knowing [or having reason to believe] it to be an infringing copy of the work.

2. It shall be an infringement of the author's exclusive rights in the computer program to [make, import,] deal with or possess articles intended specifically to facilitate the removal or circumvention of any technical means which may have been applied to protect a program.
This provision could be supplemented by the following statement in the Council minutes:

"The Council requests that Member States adopt all necessary measures to facilitate the identification of infringements of provisions of this Directive."

**Article 7**

**Term of protection**

1st variant:

Protection shall be granted for the life of the author and fifty years after his death.

2nd variant:

[Protection shall be granted for fifty years from the date of creation.]

(Commission's original proposal)

3rd variant:

The period of protection granted to computer programs shall be a term of protection compatible with the terms provided for the protection of literary works under the Berne Convention [but such terms shall not exceed the life of the author and fifty years from the date of his death].
Article 8
Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to other legal provisions such as patent rights, trade marks, unfair competition, trade secrets, the law of contract and protection of semi-conductor products.

2. Protection under the provisions of this Directive shall also be available in respect of works created prior to [date in Article 9], without prejudice to any acts concluded and rights acquired before that date.

Article 9
Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to transpose this Directive not later than two years after its notification.

2. Each Member State shall communicate to the Commission the provisions of national law which it adopts in order to transpose this Directive. It shall forward a copy thereof to the other Member States.
Article 10

This Directive is addressed to the Member States.
REPORT

from: Working Party on Intellectual Property (Computer programs)

to: Permanent Representatives Committee

Nos prev. docs: 9304/89 PI 68, 9647/89 PI 73
No. Cion prop.: 5682/89 PI 25

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

1. As briefed by the Permanent Representatives Committee on 15 November 1989, the Working Party on Intellectual Property has re-examined Articles 4 and 5 of the above proposal for a Directive with particular reference to the problem of the analysis (reverse engineering or decompiling) of computer programs.
This report supplements the one contained in 9647/89, in preparation for a policy debate in the Council (Internal Market) meeting on 21 December 1989.

2. The Working Party considered whether the Directive should regulate the problem of analysis of computer programs.

Only the Spanish, Greek and Italian delegations felt that, for reasons of harmonization, the analysis of computer programs should be dealt with in this Directive.

Conversely, the great majority of delegations held that the Directive should remain neutral on this point and should not anticipate future developments in legal doctrine and jurisprudence, given that at present there were no specific relevant provisions in the legislation of any of the Member States. Those delegations thought that although the user of a program ought not, in principle, to be allowed to analyse it with the aim of making a competing program, the Directive should not prevent Member States from allowing users, under reasonable conditions, to make an analysis confined to determining interfaces (for example, to create a new program compatible with the first).
3. However, a number of delegations felt that Article 4(a) of the proposal for a Directive, both in the text proposed by the Commission (5682/89 PI 25) and in the consolidated text (9304/1/89 PI 68), was not neutral on the issue of analysis, in that it made reproduction of a computer program subject to authorization by the author and specifically mentioned certain acts necessary for analysis (running, for example) in this context.

To solve this problem, it was suggested that Article 5 of the Directive, on exceptions to the restricted acts, be supplemented by the following new paragraph 3, which in part reproduces Article 9(2) of the Berne Convention:

"3. This Directive shall not prevent Member States from authorizing reproduction of a computer program for the purposes of analysis to determine interfaces provided that such reproduction does not conflict with a normal exploitation of the works and does not unreasonably prejudice the legitimate interests of the author."

A number of delegations viewed the principle of this new paragraph favourably, but reserved their final positions.
4. The Permanent Representatives Committee should decide whether the problem of the analysis of computer programs should be regulated in this Directive or left to national legislation. In the latter case, the Committee should state its views on the compromise solution proposed in paragraph 3 above.
EXTRACT
from the
DRAFT SUMMARY RECORD
of the 1412th meeting of the PERMANENT REPRESENTATIVES COMMITTEE
held in Brussels on Friday 15 December 1989

Subject: AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE ON THE APPROXIMATION OF THE LAWS OF THE MEMBER STATES RELATING TO ACTIVE IMPLANTABLE ELECTROMEDICAL EQUIPMENT
AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE ON THE APPROXIMATION OF THE LAWS OF THE MEMBER STATES RELATING TO ACTIVE IMPLANTABLE ELECTROMEDICAL EQUIPMENT 8389/89 ECO 123, 10617/89 ECO 217 and 10618/89 ECO 218

The main conclusions reached by the Committee are set out in 10957/89.

The GR delegation submitted two specific requests relating to devices manufactured to order, namely that

- such devices should also carry the CE mark;

- the manufacturer should make the declaration referred to in Annex 5 before placing such devices on the market.

These two requests were not, however, supported by the other delegations and the Commission said it was unable to accept them.
REPORT

from: Permanent Representatives Committee

to: Internal Market Council

No. prev. docs: 9647/89 PI 73
10376/89 PI 85
No. Cion prop.: 5682/89 PI 25

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

1. The Commission sent the Council the above proposal for a Directive on 11 January 1989. The proposal is based on Article 100a of the Treaty establishing the European Economic Community.
The Working Party on Intellectual Property referred to the Permanent Representatives Committee a number of questions which had emerged from a first reading of the Commission proposal (9647/89 and 10376/89). The Committee proposed to give the problems submitted to it by the Working Party close consideration at a later stage. It nonetheless felt that the following two basic questions could now usefully be placed before the Internal Market Council for a policy debate:

- reverse engineering of computer programs,
- interface protection.

2. Reverse engineering of computer programs

In its proposal, the Commission submitted no specific provision designed to settle the question of the extent to which a user could analyse a computer program without the right holder's consent. Views on this question differ widely even within the computer program industry. Accordingly, the Commission preferred at this stage not to endeavour to introduce harmonization on this
point via the Directive, preferring to let doctrine and case law produce an appropriate approach.

Some delegations believed that the question of reverse engineering of computer programs should be dealt with in the Directive, so that harmonization regarding this key feature of protection could be carried through from the outset.

Other delegations, however, preferred a neutral arrangement which would not anticipate the course of events as regards both doctrine and case law. To this end, they wanted all the provisions of the Directive to be genuinely neutral vis-à-vis this problem. From this viewpoint, the question of access to interface specifications takes on special importance, as it is on this question that the degree of accessibility of program analysis depends.

The Council is called upon to decide between the following options:

- work out in future proceedings a solution harmonizing the rules governing reverse engineering of computer programs, or
- adopt a Directive which is entirely neutral as regards this issue, so as not to prejudge the development of doctrine and case law on this point.

3. **Interface protection**

Article 1 of the Commission proposal provides that computer programs are to enjoy copyright protection as literary works. This principle involves protecting the expression in any form of a computer program, without going as far as the ideas or principles underlying the program. This rule applies to all parts of a program, particularly to interface specifications (Article 1(3) of the Commission proposal).

Discussions within the Council's subordinate bodies have revealed a trend towards deletion of this clarification concerning interfaces, on the grounds that it would be superfluous to reaffirm the general principle of copyright, under which ideas and principles do not qualify for protection.
The Commission has pointed out, however, that such a solution would fail to respond to one of the fundamental problems raised by the Directive, viz. the need to strike an appropriate balance between:

- protection of computer program manufacturers against excessively easy access by competitors to analysis of their programs and, hence, to copying and counterfeiting, and

- the advisability of encouraging the interconnection of programs available to the public, which necessarily involves some freedom as regards access to interface specifications.

It has suggested that a suitable wording be sought for Article 1(3) so as to resolve this problem.

The Council is asked to adopt a position on the approach suggested by the Commission.
PRESS RELEASE

1382nd Council meeting
- INTERNAL MARKET -
Brussels, 21 and 22 December 1989

President: Mrs Edith CRESSON

Minister for European Affairs
of the French Republic
The Governments of the Member States and the Commission of the European Communities were represented as follows:

**Belgium:**
Mr Paul DE KEERSMAEKER State Secretary for European Affairs and Agriculture

**Denmark:**
Mrs Anne-Birgitte LUNDHOLT Minister for Industry

**Germany:**
Mr Helmut HAUSSMANN Federal Minister for Economic Affairs
Mr Otto SCHLECHT State Secretary, Federal Ministry of Economic Affairs

**Greece:**
Mr THEOFANOUS Secretary-General, Ministry of Trade

**Spain:**
Mr Pedro SOLBES State Secretary for Relations with the European Communities

**France:**
Mrs Edith CRESSON Minister for European Affairs
Mrs Véronique NEIERTZ State Secretary for Consumer Affairs

**Ireland:**
Mr Desmond O'MALLEY Minister for Industry and Commerce
Italy:
Mr Pierluigi ROMITA
Minister for Community Policies

Luxembourg:
Mr Thierry STOLL
Deputy Permanent Representative

Netherlands:
Mr Ch. R. van BEUGE
Deputy Permanent Representative

Portugal:
Mr Vitor MARTINS
State Secretary for European Integration

United Kingdom:
Mr John REDWOOD
Parliamentary Under-Secretary of State, Department of Trade and Industry

Mr David MacLEAN
Parliamentary Secretary, Ministry of Agriculture, Fisheries and Food

Commission:
Mr Martin BANGEMANN
Vice-President

Sir Leon BRITTAN
Vice-President

Mr Antonio CARDOSO E CUNHA
Member
CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS

The Council adopted a Regulation on the control of concentration operations between undertakings.

One of the objectives for the establishment of the common market which the Treaty sets the Community is "the institution of a system ensuring that competition is not distorted". That system is essential for the completion of the internal market planned for 1992, given that the dismantling of internal borders is resulting and will continue to result in major corporate restructuring in the Community, particularly in the form of concentrations.

This Regulation treats this development as a healthy one in principle, since it meets the requirements of dynamic competition and is capable of increasing the competitiveness of European industry, improving the conditions of growth and in the long run raising the standard of living in the Community.

Nevertheless, the Council considers it essential to ensure that the process of restructuring does not result in lasting damage to competition. To this end, it is laying down provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it. The new legislation also takes account of the fact that Articles 85 and 86 of the EEC Treaty are not sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty.

The Regulation gives the Commission the power to take decisions establishing whether or not concentrations with a Community dimension are compatible with the common market.
A concentration, whether a merger of several undertakings or the gaining of control of a number of undertakings, has a Community dimension when:

(a) the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 000 million, and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 000 000,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

The thresholds, as well as certain other instruments in the Regulation, will be revised by the Council on a proposal from the Commission before the end of the fourth year following that of the adoption of this Regulation.

The Commission's appraisal of whether or not a concentration is compatible will be based on criteria laid down by the Regulation. The Commission must declare compatible with the common market those concentrations which do not create or strengthen a dominant position as a result of which the maintenance or development of effective competition would be significantly impeded in the common market or in a substantial part of it; if the opposite is true, then it must declare them incompatible with the common market.

In order to ensure effective monitoring, undertakings will be obliged to give prior notification of concentrations with a Community dimension. If there is no doubt about their compatibility with the common market, the Commission will formally declare them compatible. If, however, it finds that a concentration
which has been notified raises serious doubts as to its compatibility with the common market, it will decide to initiate proceedings, which should normally be completed within a maximum of four months.

National authorities will have the power to authorize operations which do not have a Community dimension. However, under this Regulation a Member State may ask the Commission to intervene in respect of such an operation in order to guarantee effective competition on its territory.

In addition, the Commission may refer a notified concentration with a Community dimension to the competent authorities of the Member State concerned in certain circumstances, namely when a concentration threatens to create barriers to competition on a specific market within a Member State, be it a substantial part of the common market or not.

The Regulation also makes provision for the Commission to make proposals to the Council for measures in relation to third countries, if on the basis of information from the Member States the Commission finds that Community undertakings are encountering general difficulties on the markets of third countries.

In order to protect legitimate interests, Member States may apply national legislation on competition under certain circumstances. Legitimate interests means public security, caution rules and the plurality of the media.

The Regulation will enter into force nine months after the adoption of the position, that is on 21 September 1990, in order to allow the undertakings concerned, the authorities and the social partners enough time to become familiar with the new system.
RIGHT OF RESIDENCE

Subject to further consultation of the European Parliament, the Council arrived at a political agreement on the content of the three Directives on right of residence. The Directives, which should enter into force by 30 June 1992, represent a crucial step towards the free movement of citizens throughout the Community.

Their main provisions are as follows:

Right of residence for non-active persons

Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social security system of the host Member State during their period of residence.

The right of residence shall remain for as long as beneficiaries of that right fulfil the conditions laid down in this Directive.

Right of residence for employees and self-employed persons who have ceased their occupational activity

Member States shall grant the right of residence to nationals of Member States who have pursued in the Community an activity as an employee or self-employed person and to members of their families provided that they are recipients of an invalidity or early retirement pension, or old age benefits, or of a pension in respect of an industrial accident or disease of an amount sufficient to avoid
becoming a burden on the social security system of the host Member State during their period of residence and are covered by sickness insurance in respect of all risks in the host Member State.

The right of residence shall remain for as long as beneficiaries of that right fulfil the conditions laid down in this Directive.

Right of residence for students

The Member States shall take the necessary measures to facilitate the exercise of the right of residence in order to guarantee access to vocational or professional training in a manner free from discrimination. Accordingly they shall recognize the right of residence of any student who is a national of a Member State and who does not enjoy this right under other provisions of Community law, and of the student's spouse and dependent children, where the student vouches to the relevant national authority by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social security system of the host Member State during their period of residence provided that the student is enrolled in a recognized educational establishment for the principal purpose of following vocational or professional training courses there and that they are covered by sickness insurance in respect of all risks in the host Member State.

The right of residence shall be restricted to the duration of the course of studies in question.

This Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence.
MAJOR TRANS-EUROPEAN NETWORKS

At the close of its discussions on this item of the agenda, the Council reached agreement on the following Resolution:

RESOLUTION ON TRANS-EUROPEAN NETWORKS

Having regard to the Treaty,

Considering the conclusions of the Strasbourg European Council on 8 and 9 December 1989 with regard to this area,

Considering that the process of the completion of an area without frontiers provided for in Article 8a of the Treaty has reached a stage of irreversibility,

Considering that citizens, businesses and administrations must be able to use communication infrastructures which enable them to encourage free movement within the Community,

Considering that the development of trade and the movement of persons and the requirements of economic and social cohesion may necessitate the improvement and extension of communication networks, including the creation of networks where none at present exist,

Considering that, insofar as infrastructures are currently planned and developed principally at national level it is necessary to solve the problems of compatibility and inter-operability which may affect their efficiency, inter alia by the development, where appropriate, of standards,

Considering that, in a number of sectors, infrastructure networks are provided by competing private sector operators, and that the Commission should take account of this in its proposals,
Considering that particular infrastructure projects need to be evaluated against firm criteria, including their economic viability, respect for the natural environment, the special attention which needs to be paid to the situation of the peripheral regions in the context of economic and social cohesion and the possible effects on free circulation,

Considering that Community projects which have already been adopted or are being implemented should not be impaired,

the Council has adopted the following Resolution:

1. The Council considers that special priority should be given, paying particular attention to situations arising at the Community's limits in the context of economic and social cohesion, to the development and inter-connection of trans-European networks, notably in the areas of air traffic control, energy distribution, transport infrastructure and in particular the most efficient surface communications links, and telecommunications, in particular the linking of the main Community conurbations by broad-band telecommunications networks, and the implementation of existing Community training programmes.

2. The Council invites the Commission to submit to it, before the end of 1990, a work programme and proposals for appropriate measures, taking into account the possibility of extending such action to the whole of the Community and without prejudice to the distribution of work among the various formations of the Council. The Commission will submit an initial progress report during the first half of 1990.

The Council notes that the Commission intends to organize its future work programme around the following points:
- verification as to whether Community intervention is justified or whether projects should rather be carried out by other public or private bodies;

- the establishment of a timetable for completion;

- the identification of any obstacles and shortcomings;

- the evaluation of financing problems; and

- the provision, if needed, of a consultation procedure to precede the establishment of projects.

3. The Commission will convene, whenever necessary, a working party comprising the persons responsible designated by each Member State to co-ordinate the work on the realization of trans-European networks.

The Council considers that the preparation of this programme entails broad consultation with a view to drawing up the report which the Commission is to submit before the end of the first half of 1990.
IMPLEMENTATION OF THE LEGAL ACTS REQUIRED TO BUILD THE SINGLE MARKET

The Council held an exchange of views on the Commission communication concerning the implementation of the legal acts required to build the single market, at the close of which it drew the following conclusions:

"THE COUNCIL

- considers that the completion of the single market in accordance with the objectives laid down in the Treaty presupposes not only the adoption of all the Community measures planned for that purpose but also the adoption, within the prescribed time-limits, of implementing measures in the Member States;

- notes the concern expressed by the Commission in its communication of 7 September 1989 at delays in adopting these measures;

- welcomes the additional information which the Member States have supplied, at the Commission's request, on the stage reached in their respective timetables;

- welcomes, too, the exchange of views and experience to which the Commission's enquiries gave rise on the general problems arising and the solutions found to them in the various Member States;

- considers it desirable that all the Member States continue this clarification and exchange of experience in their dialogue with the Commission so that constant track can be kept, in particular, of the enactment of Directives in national law, also taking account of implementation of the judgments of the Court of Justice, in order to obviate any delay in completion of the single market;

- welcomes the Commission's intention to take all necessary steps to that end, and in particular:
to ensure, for the benefit of the Member States and businesses, constant transparency of measures to enact Community rules in national law;

The Council considers in particular that systematic dissemination of such measures is necessary.

Here it notes with satisfaction the creation of the INFO 92 base and hopes that it will be made more easily accessible to the widest possible public.

to co-operate as necessary with Member States in examining plans for national measures for the enactment of Community legislation in national law in good time.

In the areas covered by the "new approach" this co-operation would include a look at the progress made in adopting European standards and setting up at national level, where necessary and possible, a system of certification, monitoring and market surveillance.

- proposes, at least once a year on the basis of regular information from the Commission, to:

  = examine the stage reached in implementing the various instruments for completing the internal market;

  = hold further exchanges of views and experience on the problems arising in this area and the solutions to be applied."


Under the proposals, the adoption of the Statute, while remaining optional, would give undertakings the opportunity of resorting to a structure directly based on Community law. Provision has been made for extensive reference to the Directives already adopted in connection with companies or to those on which negotiations appear to be well advanced, and to the law of the State of registered office.

After noting that discussions had been proceeding at a steady rate and in a constructive spirit, the Council instructed the Permanent Representatives Committee to step up the pace so that it could make progress on this dossier at its forthcoming meetings.
BUSINESSES IN THE "ECONOMIE SOCIALE" SECTOR AND EUROPE'S FRONTIER-FREE MARKET

The Council held an exchange of views on the Commission communication entitled "businesses in the Economie Sociale sector and Europe's frontier-free market".

This communication:

- defines and describes the Economie Sociale sector by giving a brief overview of the branches in which its enterprises are active in all Member States

- identifies the prospects opening up for enterprises in this sector in the Europe of 1992 and shows to what extent they are taken into account in Community policies

- adumbrates the framework for Community action to ensure that enterprises in this sector enjoy access to the frontier-free market on the same footing as other enterprises.
PROCUREMENT PROCEDURES OF ENTITIES OPERATING IN THE WATER, ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS

On the basis of an overall compromise proposal by the Presidency, the Council held an in-depth discussion on essential questions arising with regard to this important Directive opening up markets hitherto excluded from Community legislation on public contracts to genuine competition throughout the Community.

The discussions centred in particular on the scope and the provision made for different treatment for certain areas because of their specific nature, the dates of transposition and application accompanied by transitional provisions for some Member States, and the external aspect, namely the possible introduction of special provisions for the award of supply contracts when the bid includes products manufactured outside the Community or originates from a third country which does not allow Community businessmen access to its market.

At the close of the discussion, the President noted that clarifications had been made and substantial progress achieved on all the above issues thanks to the extremely constructive co-operation of all the delegations, but that some delegations still needed to consider in particular the content of the Article on the external aspect.

The Council will therefore be able to continue its discussions on the matter under the Irish Presidency on the basis of the guidelines which emerged on this occasion, deriving from the compromise proposals submitted by the Presidency and the Commission. With this in view, the Permanent Representatives Committee was instructed to press on swiftly with its preparation of the dossier.
APPROXIMATION OF THE LAWS ON ACTIVE IMPLANTABLE ELECTROMEDICAL DEVICES

The Council arrived at a common position on the substance of an initial proposal on medical devices, aiming to contribute to the achievement of a single market in these devices.

The proposal relates to medical devices using a source of energy and implanted in the human body, of which the best known example is the pacemaker.

CERTIFICATION

The Council held a discussion on harmonizing conformity assessment. At the close of the discussion, the Council:

- adopted a resolution on a global approach to conformity assessment (set out below),

- arrived at a joint guideline on the substance of a draft Decision on which the Opinion of the Parliament is awaited.

The Decision stipulates that the procedures for conformity assessment which are to be used in the technical harmonization directives relating to the marketing of industrial products will be chosen from among the modules listed in the Decision and in accordance with the criteria set out therein.

The Decision considers that the introduction of harmonized methods for the assessment of conformity and the adoption of a common doctrine for their implementation are likely to facilitate the adoption of future technical harmonization directives concerning the placing on the market of industrial products and thus be conducive to the completion of the internal market by 31 December 1992.
COUNCIL RESOLUTION on a global approach to conformity assessment

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

RECALLING its Resolution of 7 May 1985 on a new approach to technical harmonization and standards in which it stated that the new approach should be accompanied by a policy on the assessment of conformity;

RECALLING the objectives of the Single European Act, including the strengthening of economic and social cohesion;

STRESSES the importance of a global approach in this area, as outlined by the Commission in its communication of 15 June 1989, with the aim of creating the conditions which will enable the principle of mutual recognition of proofs of conformity to operate in both the regulatory and the non-regulatory sphere;

TAKING INTO CONSIDERATION the basic lines of that approach;

HEREBY ADOPTS the following guiding principles for a European policy on conformity assessment:

- a consistent approach in Community legislation should be ensured by devising modules for the various phases of conformity assessment procedures and by laying down criteria for the use of those procedures, for the designation and notification of bodies under those procedures, and for use of the CE mark;

- generalized use of the European standards relating to quality assurance (EN 290000) and to the requirements to be fulfilled by the abovementioned bodies concerned (EN 450000), the setting up of accreditation systems and the
use of techniques of intercomparison should be promoted in all Community Member States as well as at Community level;

- the promotion of mutual recognition agreements on certification and testing between bodies operating in the non-regulatory sphere is essential for the completion of the internal market; the setting-up of a flexible, unbureaucratic testing and certification organization at European level with the basic role of promoting such agreements and of providing a prime forum within which to frame them should significantly contribute to the furtherance of that objective;

- possible differences in levels of development in the Community and in industrial sectors with regard to quality infrastructure (especially calibration and metrology systems, testing laboratories, certification and inspection bodies, and accreditation systems) such as are likely to have an adverse effect on the operation of the internal market should be studied with a view to the preparation of a programme of Community measures, possibly including budgetary measures, as soon as possible;

- in its relations with third countries the Community will endeavour to promote international trade in regulated products, in particular by concluding mutual recognition agreements on the basis of Article 113 of the Treaty in accordance with Community law and with the Community's international obligations, while ensuring in the latter case that:

  - the competence of the third country bodies is and remains on a par with that required of their Community counterparts;
The mutual recognition arrangements are confined to reports, certificates and marks drawn up and issued directly by the bodies designated in the agreements;

in cases where the Community wishes to have its own bodies recognized, the agreements establish a balanced situation with regard to the advantages derived by the parties in all matters relating to conformity assessment for the products concerned.

The Commission is requested to submit recommendations to the Council as soon as possible for detailed negotiating directives under Article 113 of the Treaty.

The Council also calls on the Commission to prepare the measures necessary to put this Resolution into practice.

DIRECT LIFE ASSURANCE

On the basis of an overall compromise proposal, the Council reached a policy agreement, subject to the Opinion of the European Parliament, on the whole of the second Directive on the co-ordination of rules governing direct life assurance.

The purpose of this Directive is to supplement the "first" Directive on life assurance (Directive 79/267/EEC) and to facilitate the effective exercise of the freedom to provide services in this area, thereby granting policy-holders the full freedom to have recourse to as wide a market as possible. This proposal for a Directive is the counterpart to the "other than life" Directive adopted by the Council on 22 June 1988.

As for the main content of the Directive, it:
lays down specific provisions relating to the taking-up and pursuit of activities by way of freedom to provide services, providing for two different sets of rules according to whether the initiative comes from the insurer or the policy-holder;

- stipulates the powers and means of supervision available to the supervisory authorities with regard to activities by way of provision of services;

- in order to protect the policy-holder, provides for a right to cancel the contract during a fixed period after its conclusion;

- given the extension of its field of application to group assurance and the need to guarantee the independence of brokers in all the Member States, provides for the possibility of differential application as between group assurances on the one hand and the free provision of services through brokers on the other;

- in order to avoid sources of distortion of competition, the tax rules applicable are those of the Member State of the commitment, i.e. that of the policy-holder.

Specific transitional provisions are laid down for certain Member States for which the Directive is particularly onerous, in view of their economic situation.

LEGAL PROTECTION OF COMPUTER PROGRAMS

The Council had a policy debate on a proposal for a Directive on the legal, protection of computer programs.

This proposal provides that the Member States shall grant copyright protection to computer programs as literary works.
Points raised in the discussion were concerned with:

- the extent of protection with regard to the specification of interfaces, and

- the analysis of programs without the consent of the right holder (reverse engineering).

The Council instructed the Permanent Representatives Committee to proceed with its discussions.

With regard to the two specific points above, it asked the Commission to carry out an in-depth study to provide full information on which it could base its decision.
The Council adopted a common position on the substance of an amended proposal for a Directive on package travel including package holidays and package tours.

This proposal harmonizes national provisions on essential aspects of this subject, with the aim of encouraging the free circulation of packages and avoiding distortions of competition between operators established in different countries, thereby also improving consumer protection; in particular, it provides that:

- the description of the package given in the brochure supplied by the organizer or the retailer to the consumer must indicate in an understandable and accurate manner both the price and certain key information. These particulars are binding on the organizer or the retailer;

- the contract must contain all the clauses which are essential for the package under consideration; a list of such clauses, which are to be supplied to the consumer before the conclusion of the contract, is annexed to the Directive.

The prices laid down in the contract shall not be subject to revision except on the conditions stipulated by the Directive and under no circumstances any later than 20 days before departure;

- the organizer and/or retailer party to the contract must be responsible to the consumer for ensuring the satisfactory fulfilment of the obligations arising from the contract whether such obligations are to be fulfilled by themselves or by other providers of services,

- the organizer and/or retailer party to the contract must provide sufficient evidence of ability, in the event of insolvency, to refund money paid over and to repatriate the consumer.
The Member States will have to comply with the provisions of the Directive by 31 December 1992.

NUTRITION LABELLING

The Council reached a substantive agreement on a common position concerning a proposal for a Directive on nutrition labelling rules for foodstuffs intended for sale to the ultimate consumer.

The proposal follows on from the "Communication on the completion of the Internal Market: Community legislation on foodstuffs" and is intended to improve consumer information and prevent barriers to trade caused by differences in nutrition labelling in the different Member States.

The proposal introduces specific rules which must be applied by manufacturers when they employ nutrition labelling and which would:

- provide a uniform and stable framework for national information and education programmes

- prevent consumers from being misled

- contribute, through general compatibility with the Codex, to a reduction in the costs borne by manufacturers exporting to non-member countries.

The Council instructed the Permanent Representatives Committee to continue studying a second Directive on the introduction of compulsory nutrition labelling of foodstuffs intended for sale to the ultimate consumer.
FOODS AND FOOD INGREDIENTS TREATED WITH IONIZING RADIATION


The proposal is intended to ensure the free movement of products treated with ionizing radiation while guaranteeing a high degree of protection to the consumer.

To achieve this, it is based on the following principles:

- only categories of foods which appear on a positive list may be subjected to treatment with ionizing radiation,

- the ionization units for foods must be subject to prior authorization by the responsible authorities, as designated by each Member State,

- the installations and procedure and the foods treated with ionizing radiation must be subject to official controls,

- irradiated foods must comply with specific labelling rules requiring detailed information,

- irradiated foods from third countries may be admitted into the Community provided that they comply with the provisions of the Directive.

After noting that there were still differences of opinion over the substance and the whole principle of the Directive, the Council instructed the Permanent Representatives Committee to continue its discussions with the aim of finding a basic compromise for future deliberations in the Council.
VETERINARY MEDICINAL PRODUCTS

Pending receipt of the European Parliament's Opinion, the Council noted that there was a general policy position in favour of a proposal for a Regulation laying down a Community procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of animal origin.

The proposal is intended to set limits for residues considered to be without any toxicological hazard for human health as expressed by the acceptable daily intake (ADI), or on the basis of a temporary ADI that utilizes an additional safety factor. It also takes into account other relevant public health risks as well as food technology aspects.
RECOGNITION OF PROFESSIONAL EDUCATION AND TRAINING

The Council reviewed the progress of discussions on the proposal for a Directive on a second general system for the recognition of professional education and training.

The proposal concerns all regulated professions which are not covered by a specific Directive or by the first general system for the recognition of higher education diplomas (Directive 89/48/EEC).

The Presidency stated that it attached great importance to this proposal as it was a key element in the completion of the internal market and the People's Europe.

The Council instructed the Permanent Representative Committee to expedite the examination of this dossier.
The Representatives of the Governments of the Member States which had not hitherto signed the instruments opened for signing in Luxembourg on 15 December 1989 at the conclusion of the Conference on the Community Patent signed them at the present meeting. The instruments involved were:

- the Agreement relating to Community patents
- the Protocol on a possible modification of the conditions of entry into force of the Agreement relating to Community Patents
- a Joint Declaration by the Governments of the Member States.

(See Press Release 10901/89 Presse 247)
MISCELLANEOUS DECISIONS

Relations with the German Democratic Republic

The Council adopted a Decision authorizing the Commission to negotiate an Agreement between the EEC and the GDR on trade and commercial and economic co-operation.

Relations with the EFTA countries

The Council adopted Decisions concluding agreements between the EEC, the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation on trade electronic data interchanging using the communications networks (TEDIS).

Relations with Czechoslovakia

The Council adopted a Regulation implementing certain provisions of the EEC-Czechoslovakia Agreement with a view to transferring Annexes I, II and III to the Combined Nomenclature and abolishing certain quantitative restrictions under Articles 4 and 5 of the Agreement.

Relations with Yugoslavia

The Council adopted Regulations implementing

- Decision No 3/89 of the EEC-Yugoslavia Co-operation Council of 27 November 1989 amending, as a consequence of the introduction of the Harmonized System, Protocol No 3 concerning the definition of the concept of "originating products" and methods of administrative co-operation

11045/89 (Presse 255 - G)
Decision No 4/89 of the EEC-Yugoslavia Co-operation Council of 27 November 1989 amending, on account of the accession of Spain and Portugal to the European Communities, Protocol No 3 concerning the definition of the concept of "originating products" and methods of administrative co-operation.

Chernobyl accident - Imports of agricultural products

The Council decided to extend for three months Regulation No 3955/87 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power-station, which expired on 30 December 1989.

Other decisions concerning the Internal Market

Technical barriers

The Council adopted


- a Directive amending for the eighth time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations

- a Directive amending Directive 76/769/EEC relating to restrictions on the marketing and use of certain dangerous substances and preparations (Committee procedure)
- a Directive amending for the fifth time Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products (Committee procedure)

- a Directive on the approximation of the laws of the Member States relating to personal protective equipment. This Directive aims to lay down the conditions for placing on the market and free movement within the Community together with the essential requirements which PPE must satisfy in order to preserve the health and ensure the safety of users. This is the sixth Directive based on the Resolution of 3 May 1985 on a new approach to technical harmonization

- Directives:

  - amending Directive 77/536/EEC on the approximation of the laws of the Member States relating to the roll-over protection structures of wheeled agricultural or forestry tractors

  - amending Directive 87/402/EEC on roll-over protection structures mounted in front of the driver's seat on narrow-track wheeled agricultural and forestry tractors

  - amending Directive 86/298/EEC on rear-mounted roll-over protection structures for narrow-track wheeled agricultural and forestry tractors

- common positions with a view to the adoption of Directives:

  - on the approximation of the laws of the Member States relating to appliances burning gaseous fuels (see Internal Market Press Release of 23/24.XI.89 - 10023/89 Presse 218)

  - on the harmonization of the laws of the Member States relating to non-automatic weighing instruments (see Internal Market Press Release of 23/24.XI.89 - 10023/89 Presse 218 - agreement as to substance)
Public contracts

The Council adopted a Directive on the co-ordination of the laws, regulations and administrative provisions relating to the application of rules on procedures for the award of public supply and public works contracts.

The aim of the Directive is to ensure compliance with Community provisions relating to public contracts with a view to such contracts being opened to Community competition.

The Directive provides for contractors and suppliers to have effective review procedures making it possible to punish, at any stage in the procedure for awarding the contract, any illegalities which may be committed in relation to Community rules on public contracts by a contracting authority.

Company law

The Council adopted

- the eleventh Directive on the harmonization of disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another Member State

In order to protect persons who deal with companies through the intermediary of branches, the Directive regulates the disclosure required in the State where the branch is located. In addition to the basic information on the branch itself, including address and activities, the Directive refers in respect of the other information - entry in the commercial register, name and legal form of the company, its representation, accounting documents, etc. - to the data to be published by the parent company in accordance with the rules applying to companies under Directive 68/151/EEC.
- the twelfth Directive on company law concerning single-member private limited-liability companies

The aim of the Directive is to encourage the creation and development within the Community of small and medium-sized undertakings through the introduction at Community level of single-member limited-liability companies or single-member limited-liability undertakings.

French overseas departments

- Decisions

  = establishing a Programme of options specific to the remote and insular nature of the French overseas departments - POSEIDOM

  = on the DOCK DUES arrangements in these departments

Commercial policy

The Council adopted

- the common positions with a view to the adoption of Regulations

  = on the information provided by the customs authorities of the Member States concerning the classification of goods in the Combined Nomenclature

  = amending Regulation (EEC) No 1031/88 determining the persons liable for payment of a customs debt

- a Regulation on the security to be given to ensure payment of a customs debt
This Regulation lays down the provisions on the security which may be required of persons by whom a customs debt has been or may be incurred with a view to ensuring payment of the debt.

Among other things it lays down the rules on the manner in which the security may be given, the forms of security and the conditions for releasing the security. It thus completes the whole range of measures already adopted at Community level concerning customs debt: definition of the customs debt of the person making the customs declaration, the debtor, the entry of the debt in the accounts.

**Economic and financial questions**

Following the substantive agreement reached by the ECOFIN Council on 18 December 1989, the Council adopted a Decision adopting the 1989-1990 annual report on the economic situation in the Community and establishing economic policy guidelines to be followed in the Community in 1990.

The Council went on to adopt a Decision authorizing the French Republic to apply the sixth Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes.

**Agriculture**

The Council adopted Regulations

- fixing, for 1990, the quota (312 tonnes) applicable for imports into Portugal of certain live swine from the Community as constituted on 31 December 1985.

- on scrutiny by the Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and
Guarantee Fund and repealing Directive 77/435/EEC. A policy guideline was established on this subject at the last Agricultural Council meeting on 11 and 12 December (see Press Release 10482/89 Presse 238).


**Telecommunications**

The Council adopted its common position on the Directive on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP) (see Telecommunications Press Release of 7.XII.89 - 10479/89 Presse 235 - political agreement).

**Transport**

The Council adopted Regulations

- on the elimination of controls performed at the frontiers of Member States in the field of road and inland waterway transport (see Internal Market Press Release of 23/24.XI.89 - 10023/89 Presse 218 - agreement as to substance)

- on the fixing of rates for the carriage of goods by road between Member States

- laying down the conditions under which non-resident carriers may operate road haulage services within a Member State (cabotage) (see Transport Council Press Release of 4/5.XII.89 - 10311/89 Presse 230 - agreement on substance)
and

- the Directive on vocational training for certain drivers of vehicles carrying dangerous goods by road (see Transport Council Press Release of 4/5.XII.89 - 10311/89 Presse 230 - Adoption as to substance)

Health

The Council and the Ministers for Health of the Member States of the ECSC adopted the Resolution on the fight against AIDS.

ECSC

The Representatives of the Governments of the Member States adopted Decisions on

- certain measures to be applied, in respect of State-trading countries, to trade in iron and steel products covered by the ECSC Treaty

- the opening of two zero-duty tariff quotas for flat-rolled products of silicon-electrical steel for Spain

- the opening of a zero-duty tariff quota for flat-rolled products of silicon-electrical steel for the Federal Republic of Germany

- the opening of a zero-duty tariff quota for flat-rolled products of silicon-electrical steel for Benelux

Assent

The Council gave its assent pursuant to Article 56(2)(a) of the ECSC Treaty to
- Mediocredito Lombardo (Italy)
- Coca-Cola & Schweppes Beverages Ltd (United Kingdom)
- Welsh Development Agency (United Kingdom)
- Investors in Industry (United Kingdom)
- Banque Bruxelles Lambert (Belgium)
- Barclays Bank PLC (United Kingdom)
- Bank für Gemeinwirtschaft A.G. (FRG).

Appointments

The Council appointed Mr ANDROUTSOPOULOS, Mr CAREY, Mr FRIEDMANN, Mr MIDDELHOEK, Mr STRASSER, Mr THOSS as members of the Court of Auditors for the period from 21 December 1989 to 20 December 1995 inclusive.

The Council then replaced

- three members of the ECSC Consultative Committee
- an alternate member of the Committee of the European Social Fund, and
- two full members of the Advisory Committee on Vocational Training.
SUMMARY OF PROCEEDINGS

of : Working Party on Intellectual Property (Computer programs)
on : 25 January 1990

No. prev. doc.: 4344/90 PI 4
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. At its meeting on 25 January 1990 the Working Party on Intellectual Property (Computer programs) gave a further reading to the proposal for a Council Directive on the legal protection of computer programs on the basis of the consolidated text contained in document 9304/1/89 PI 68 REV 1, leaving aside the questions on which the Council, at its 1382nd meeting held on 21 and 22 December 1989, had asked the Commission to provide an in-depth study (see doc. 11018/89 EXT 1 + COR 1 PV/CONS 89 PI 97 (Marché Intérieur)). Consequently, the Working Party postponed examination of the two statements set out on page 2 of the consolidated text and Articles 1(2), 4(a) and 5.

1 The Belgian and Luxembourg delegations were not represented at this meeting.
2. **Article 1(1)**

Subject to a reservation by the Spanish delegation, the Working Party agreed to remove the square brackets from the term "literary".

3. **Article 1(3)(a)**

3.1.1. **With regard to the first sentence of Article 1(3)(a), the German delegation suggested returning to the text originally proposed by the Commission for Article 1(4)(a) with slight modifications.**

The French, Netherlands and United Kingdom delegations opposed this suggestion on the grounds that this text used the term "original" without attempting to define it, whereas it had been pointed out at previous meetings that originality in relation to copyright was assessed in different ways in different Member States; these delegations considered that some attempt should be made in the Directive to harmonize the concept of originality with regard to computer programs. The Danish delegation also pointed out that the term "original" was not used in this sense in the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).

3.1.2. **The French delegation suggested replacing the terms "own creative intellectual effort" by the terms "personalized intellectual activity" ("activité
intellectuelle personnalisée"). The German, Spanish and Portuguese delegations were prepared to accept this suggestion.

Several delegations, on the other hand, drew attention to the advisability of not introducing terminology which differed from that used in the Berne Convention.

3.1.3. The Spanish, Italian and United Kingdom delegations were prepared to accept the consolidated text of the first sentence.

3.1.4. The Italian delegation suggested adding to the consolidated text of the first sentence the idea that any computer program should be considered to be original until proof was provided to the contrary.

The German delegation considered that it was unnecessary to make such an addition if the first sentence contained the criterion that the program was the result of the author's own creative intellectual effort.

3.1.5. The Netherlands delegation, while defending its proposal that the first sentence be worded "A computer program shall be protected if it is original in that it is the result of the author's own intellectual effort", was prepared to consider any proposal which attempted to harmonize the concept of originality.

2 See doc. 9840/89 PI 75, point 4.1.
3.1.6. The Chairman noted that several delegations considered that a mere reference to originality would be insufficient, and that some attempt should be made to harmonize this concept. He pointed out that the idea of "personalized" suggested by the French delegation was already contained in the word "own" appearing in the English version of the consolidated text. He also pointed out that the term "intellectual creation" was used in Article 2(5) of the Berne Convention. The Chairman therefore proposed that the Working Party continue its work on the basis of the following wording for the first sentence of Article 1(3)(a):

"A computer program shall be protected if it is original in the sense that it is its author's own intellectual creation."

3.2.1. With regard to the second sentence of Article 1(3)(a), the United Kingdom delegation considered that the wording of the consolidated text was inaccurate, as at least the criterion of Article 3 should be applied in determining whether a computer program was eligible for protection. In the view of the United Kingdom delegation, it should be made clear that criteria such as the degree of inventiveness should not be taken into account; the United Kingdom delegation had therefore proposed the wording "No assessment of its merit shall be applied in determining its eligibility for protection." 3

3 See doc. 9840/89 PI 75, point 4.2., fourth paragraph.
The Danish and German delegations considered that the criterion of Article 3 concerned the eligibility of the author for protection, whereas Article 1(3)(a) was concerned with the substantive criteria which a computer program must meet; they therefore disagreed with the criticism of the consolidated text made by the United Kingdom delegation. Moreover, these delegations and the Netherlands delegation considered that the wording proposed by the United Kingdom delegation was misleading, as in their view some assessment of merit would be involved in applying the first sentence of this paragraph.

3.2.2. The Danish, Italian, Netherlands and Portuguese delegations considered that the second sentence was superfluous; however, the Netherlands and Portuguese delegations were prepared to accept it as proposed in the consolidated text if a consensus emerged in favour of it.

3.2.3. The Greek and Spanish delegations considered that this sentence as set out in the consolidated text contained a useful clarification and were in favour of maintaining it, while the German, French and United Kingdom delegations and the Commission representative were in favour of a sentence expressing the idea that beyond the requirement of an intellectual creation no criteria of quality or aesthetics should be applied.

3.2.4. In the light of the discussion, the Chairman concluded that no delegation was fundamentally opposed to the principle of a second sentence and, taking up an earlier
suggestion, which had been supported by the German delegation and the Commission representative, proposed the following wording: "No other qualitative or aesthetic criteria shall be applied to determine its eligibility for protection."

4. Article 1(3)(b)

The Working Party agreed to delete Article 1(3)(b).

The Irish and United Kingdom delegations and the Commission representative entered a reservation with regard to this deletion.

5. Article 2(1)

The Working Party agreed to this paragraph as proposed in the consolidated text, subject to details of drafting.

6. Article 2(2)

A consensus emerged in favour of the principles behind the first two sentences of the suggestion made by the German delegation in document 9840/89 PI 75, point 7.2., namely that the moral and economic rights in a program created jointly should be owned jointly and that the rights should be exercised jointly, unless agreed otherwise between the joint authors by contract. In view of the different provisions in force in the

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4 See doc. 9013/89 PI 64, Annex, suggestion for Article 1(4)(a) and doc. 9840/89 PI 75, point 4.2., second paragraph.
various Member States, it was agreed not to adopt the solution contained in the last sentence of the suggestion made by the German delegation, but to leave to national law the ways in which the joint rights were exercised.

It was further agreed that, as joint exercise of the rights was to be subject to national provisions, it was not necessary to include a statement to this effect in the Directive; it was therefore sufficient to limit this paragraph to the following text:

"In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly."

7. Article 2(3)

The Working Party agreed to delete Article 2(3).

The Italian delegation and the Commission representative entered a reservation with regard to this deletion.

8. Article 2(4)

8.1. The Working Party agreed to delete the words "or at the request of his employer".
8.2. The Working Party further agreed to make drafting changes in order to make it clear that, in the absence of contractual provisions to the contrary, the employer alone would be entitled to exercise the economic rights in respect of the program.

9. **Article 2(5)**

   The Working Party agreed to delete Article 2(5).

   The Irish and United Kingdom delegations and the Commission representative entered a reservation with regard to this deletion.

10. **Article 3(1)**

    The Working Party agreed to this paragraph as proposed.

11. **Article 3(2)**

    The Working Party agreed to delete this paragraph.

    The Commission representative entered a reservation with regard to this deletion.
12. **Article 4(b)**

12.1. The German and Netherlands delegations entered a reservation on this paragraph in conjunction with Article 4(a).

12.2. The United Kingdom delegation reserved its position on this provision in conjunction with Article 5(1).  

13. **Article 4(c)**

13.1. The Working Party agreed that the first sentence of Article 4(c) should be worded "the distribution to the public of the original computer program or of copies thereof".

13.2.1. With regard to the second sentence, the Netherlands delegation, supported by the German delegation, raised the question whether exhaustion of rights should result from the first sale anywhere in the world or solely from the first sale in one of the Member States (see document 4344/90 PI 4, point 8.2.).

The United Kingdom delegation and the Commission representative pointed out that the doctrine that the first sale in the Community by the right holder or with his consent exhausts the right in the Community is an established principle of Community law, and it would

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5 See doc. 9840/89 PI 75, points 14.2 and 17.5.
therefore not be necessary to restate this doctrine in the Directive; this provision affirmed rather that the first sale of a computer program by the right holder or with his consent anywhere in the world would exhaust his right to control further sale. However, the Commission representative stated that the main purpose of this provision was to establish a right to control the rental of a computer program which would not be exhausted by the first sale.

13.2.2. The Spanish and Irish delegations expressed their support for a rental right in respect of computer programs.

The German, French and Netherlands delegations drew attention to the request made to the Commission at the informal meeting of Ministers of Culture held in Blois on 2 November 1989 to draw up a work programme for measures to be taken in the field of copyright and considered that the question of a rental right should be dealt with in this broader context of copyright protection in general, rather than in the context of this specific Directive.

The United Kingdom delegation, while indicating that its national law provided for a rental right, stated that it was prepared to accept the majority view on whether or not this Directive should provide for a rental right.

13.2.3. The Working Party agreed that the Permanent Representatives Committee would be asked to decide whether the Directive should provide for a rental right for
computer programs or whether the question of rental right should be dealt with in the wider context of copyright protection in general; if it were to decide in favour of a rental right in this Directive, the Committee would also be asked whether this should take the form of a right of complete control over rental, or whether it should be limited to a right of remuneration for rental. In the light of the answers given, the Working Party would re-examine the exhaustion aspects of this provision.

14. **Article 4(d)**

Several delegations questioned what was intended by the terms "communication to the public of a computer program". The Netherlands delegation pointed out that the term "communication to the public" was used in several provisions of the Berne Convention (Articles 2bis(2), 10bis, 11(1), 11bis, 11ter, 14(1), 14bis(2)(b)); it was intended to cover ephemeral communication to the public, for instance by broadcasting, as opposed to the material distribution to the public referred to in Article 4(c).

In the light of these explanations, the United Kingdom delegation asked whether it would be clearer to refer specifically to broadcasting and cable distribution, rather than use the term "communication to the public". The German delegation considered that, in addition to the acts mentioned by the United Kingdom delegation, this provision
should also cover the showing of a computer program on a screen to an audience in a room, and expressed a preference for the wording proposed by the Netherlands delegation.

The Greek, French and Italian delegations considered that the acts referred to were already covered by Article 4(a), (b) and (c), and that there was therefore no need for a separate provision.

The Danish delegation considered that if this provision were to be maintained, exceptions would have to be provided for in Article 5.

The Working Party agreed to put this provision in square brackets and to continue to reflect on it.

15. Article 6(1)

15.1. The Spanish, French, Italian, Portuguese and United Kingdom delegations confirmed that they were in favour of the principle of this provision.

15.2. The Danish, Greek and Netherlands delegation expressed reservations with regard to the terms "infringement of the author's exclusive rights" being used in relation to the acts mentioned in this provision.

The French delegation drew attention in this respect to the wording it had proposed at a previous meeting: "an offence constituting liability in respect of the holder of
the copyright" ("une faute constitutive de responsabilité à l'égard du titulaire du droit")\(^6\). The Portuguese delegation expressed a preference for this wording.

15.3. Several delegations drew attention to the difficulty of expressing adequately in other languages the English term "deal with".

The German delegation expressed a reservation with regard to the acquisition aspects of this term, and suggested replacing it with "distribution and use"\(^7\). The Italian delegation similarly suggested referring to "acts of distribution", and the French delegation had previously suggested "participation in the distribution" ("participation à la circulation")\(^8\).

15.4. The German delegation expressed a reservation with regard to the term "possess".

15.5. The Spanish and United Kingdom delegations argued in favour of keeping the words "or having reason to believe", while the Portuguese delegation entered a reservation with regard to these words, expressing a preference for the wording proposed by the French delegation: "or unable not to know" ("ou en ne pouvant ignorer")\(^9\).

\(^6\) Doc. 9840/89 PI 75, point 19.4.
\(^7\) These terms occur in a suggestion for rewording the whole of Article 6(1): see doc. 9840/89 PI 75, point 19.1.
\(^8\) Doc. 9840/89 PI 75, point 19.4.
\(^9\) Doc. 9840/89 PI 75, point 19.4.
16. **Article 6(2)**

16.1. The observations under points 15.1., 15.2., 15.3. and 15.4. above also apply in respect of this paragraph.

16.2. The Danish, German, Greek and Netherlands delegations maintained a reservation on this provision.

17. **Article 7**

The Chairman proposed that this Article should state specifically that the term of protection would be the life of the author and fifty years after his death or, where the author is not an identifiable natural person, fifty years from the date when the computer program was first made available to the public.

The Danish, Greek, French, Irish, Netherlands, Portuguese and United Kingdom delegations supported this proposal.

The Spanish delegation expressed a preference for the second variant in the consolidated text, but was prepared to join the majority.

The Italian delegation expressed a preference for the third variant in the consolidated text.
The German delegation stated that under the legislation of the Federal Republic of Germany, copyright protection lasts for the lifetime of the author and seventy years after his death for all literary works; since all authors have to be treated alike under the German Constitution, the German delegation wished to be allowed to keep this term of protection for computer programs by using the words "at least fifty years" in the Chairman's proposal, despite the fact that it was highly unlikely that protection would be claimed so long after the death of the author of a program.

The Chairman concluded that he would maintain and formalize his proposal and noted the reservations expressed.

18. Article 9(2)

The Greek, Netherlands, Portuguese and United Kingdom delegations maintained reservations in respect of the second sentence of this provision.

It was agreed that this question would be submitted to the Permanent Representatives Committee, as its implications extended beyond the scope of this Directive.
NOTE

from: Presidency

to: Working Party on Intellectual Property (Computer programs)

No. prev. doc.: 9304/1/89 PI 68  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
- consolidated text

The Working Party on Intellectual Property (Computer programs) will find attached a revised version of the consolidated text of the proposal for a Directive on the legal protection of computer programs, drawn up by the Presidency in the light of the proceedings of the Working Party at its meeting held on 25 January 1990.
Statements

The two statements to clarify the scope of the Directive stand as in document 9304/1/89, pending review in the light of any developments in Articles 4 and 5.

Article 1
Object of protection

1. 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 design material.

2. [To be reviewed. In the interim this clause stands as in document 9304/1/89.]

3. (a) A computer program shall be protected if it is original in the sense that it is its author's own intellectual creation. No other qualitative or aesthetic criteria shall be applied to determine its eligibility for protection as an original work.

(b) Deleted.\(^2\)

\(^1\)Reservation by the Spanish delegation on the term "literary".

\(^2\)Reservation by the Irish and United Kingdom delegations and the Commission representative on the deletion of this subparagraph.
Article 2
Ownership of rights

1. The author of a computer program shall be the natural person or group of natural persons who created the program, or the legal person designated as the author by national legislation. Where collective works are recognized by the legislation of a Member State, the natural or legal person who is considered by that legislation to have created the program shall be deemed to be the author.

2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

3. Deleted.³

4. Where a computer program is created by an employee in the execution of the duties entrusted to him, the employer exclusively is entitled to exercise the economic rights in respect of the program in the absence of contractual provisions to the contrary.

5. Deleted.⁴

³ Reservation by the Italian delegation and the Commission representative on the deletion of this paragraph.

⁴ Reservation by the Irish and United Kingdom delegations and the Commission representative on the deletion of this paragraph.
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.\(^5\)

Article 4

Restricted acts

The exclusive rights of the author or his successor in title include the right to do or to authorize:

(a) \(\)\(\) stands as in document 9304/1/89 pending further consideration \(\);

(b) the translation, adaptation, arrangement and any other alteration of a program and the reproduction of the results thereof, without prejudice to the rights of the person who translates the program;\(^6\)

\(^{5}\) Reservation by the Commission representative on the deletion of this paragraph.

\(^{6}\) Reservations by the German, Netherlands and United Kingdom delegations on this provision in connection with Articles 4(a) and 5.
(c) [ The issue of rental right is to be discussed at other levels in the Council. In the interim the text in document 9304/1/89 stands, with the proviso that there is provisional agreement on the following wording of the first sentence:

"the distribution to the public of the original computer program or of copies thereof." ]

(d) [ the communication to the public of a computer program in whole or in part. ]

Article 5

Exceptions to the restricted acts

[ This Article stands as in document 9304/1/89 pending further consideration. ]

Article 6

Infringement of rights

1. It shall be an infringement of the author's exclusive rights in the computer program to import, distribute, deal with or possess an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

2. It shall be an infringement of the author's exclusive rights in the computer program to make, import, distribute, deal with or possess articles [ the sole intended purpose of
which is to facilitate the removal or circumvention of any technical means which may have been applied to protect a program.

[ In the light of the reservations on the above text of this Article, consideration might be given to the alternative wording suggested by the French delegation:

"1. Possession of or participation in the distribution of a computer program knowing or unable not to know that it is an infringing copy shall be an offence constituting liability in respect of the holder of the copyright.

2. Possession or involvement in the manufacture or distribution of means [ specifically intended ] [ the sole intended purpose of which is ] to facilitate the suppression or neutralization of any technical device which may have been installed to protect a program shall be an offence constituting liability in respect of the holder of the copyright."

This Article could be supplemented by the following statement in the Council minutes:

"The Council requests that Member States adopt all necessary measures to facilitate the identification of infringements of provisions of this Directive."

Reservations by the Danish, German, Greek, Netherlands and Portuguese delegations on the text of this Article.
Article 7

Term of protection

Protection shall be granted for the life of the author and fifty years after his death; where the computer program is published anonymously or pseudonymously the term of protection shall be fifty years from the time that the computer program is first lawfully made available to the public. 8

Article 8

Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to other legal provisions such as patent rights, trade marks, unfair competition, trade secrets, the law of contract and protection of semi-conductor products.

2. Protection under the provisions of this Directive shall also be available in respect of works created prior to [date in Article 9], without prejudice to any acts concluded and rights acquired before that date.

8 Reservation by the German delegation which considers that Member States should have the option of granting a longer term of protection.
Article 9
Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to transpose this Directive not later than two years after its notification.

2. Each Member State shall communicate to the Commission the provisions of national law which it adopts in order to transpose this Directive. It shall forward a copy thereof to the other Member States.

Article 10

This Directive is addressed to the Member States.

9 Reservation by the Greek, Netherlands, Portuguese and United Kingdom delegations on the second sentence, which is to be considered by the Permanent Representatives Committee.
SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)
on: 1 and 2 March 1990

No. prev. doc.: 4490/90 PI 6
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. At its meeting on 1 and 2 March 1990 the Working Party on Intellectual Property (Computer programs) re-examined Articles 1(2), 1(3)(a), 4(d), 5(3), 6 and 7 of the proposal for a Council Directive on the legal protection of computer programs on the basis of the consolidated text contained in doc. 4533/90 PI 7 and 9304/1/89 PI 68. It was agreed that the issues concerning rental right (Article 4(c)) and communication of provisions of national law to the other Member States (Article 9(2)) were to be discussed at other levels in the Council.
Article 1 (2)

2.1. The Commission representative said that the Commission services, in accordance with the Council mandate of 21 December 1989, had made an in-depth study concerning the issues of interfaces and reverse engineering, and that on the basis of this study, they felt that it should be explicitly stated in the text of the Directive that ideas underlying interfaces are not copyrightable. He added that the entire industry, manufacturers as well as users of computer programs, are in favour of mentioning this principle in the text of the Directive and that, especially in the light of the objective of free competition in the Community, access to interfaces would be essential for software industries to be able to continue their activities.

2.2. All delegations maintained their position, i.e. that it would not be necessary to repeat a basic principle of copyright law in the text of this Directive. They feared that this might lead to a contrario interpretations causing confusion for national legislators and for industry. Consequently, they asked that this paragraph be limited to the following sentence:

"Protection in accordance with this Directive shall apply to the expression in any form of a computer program" (see first part of first sentence in doc. 9304/1/89).
They underlined that big computer firms might abuse copyright law to develop marketing strategies which are forbidden under competition law. In this context they referred to the complaints of a number of small software firms which are afraid that, because of copyright protection, they would no longer have access to the interfaces produced by big computer firms and this lack of access would hinder them in their activities.

In order to avoid abuse of copyright protection, some delegations suggested application of the Anglo-Saxon concept of "fair use" for access to interfaces.

Other delegations felt that this concept would be difficult to apply in the commercial field.

2.3. With a view to reaching a compromise solution, the Chairman proposed the following text for Article 1(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."
The following recital would have to be added in the Preamble:

"Whereas to the extent that logic, algorithms or programming languages constitute ideas and principles which underlie a computer program, they are also not protected by copyright under this Directive."

The French, Greek, Italian, Irish, Luxembourg, Portuguese and United Kingdom delegations felt that this text proposal constituted an improvement on the text contained in doc. 9304/1/89.

The Luxembourg delegation, however, considered that the problem of access to interfaces was not clearly settled.

The German, Spanish, Netherlands and United Kingdom delegations were in favour of ending Article 1(2) after the first sentence. In addition, the German delegation, supported by the Spanish and Netherlands delegations, suggested replacing the second sentence by a statement in the Preamble that the normal principles of copyright apply.

The Italian delegation reserved its position on the text of Article 1(2) until the problem of reverse engineering (Article 5(3)) had been resolved.
The Belgian, Danish and German delegations asked for a period of reflection before taking a final position on this new text proposal.

Article 1(3)(a)

3.1. The Working Party agreed to remove the square brackets and to delete the words "other" and "as an original work" from the text contained in doc. 4533/90, so that this provision reads as follows:

"A computer program shall be protected if it is original in the sense that it is its author's own intellectual creation. No qualitative or aesthetic criteria shall be applied to determine its eligibility for protection."

The Belgian, Danish and German delegations felt that the reference to "original" in the first sentence was redundant.

Article 4(d)

4.1. The Working Party agreed to delete Article 4(d) considering that communication to the public was covered by Article 4(a).

The Netherlands delegation reserved its position on the deletion of this provision arguing that immaterial communication was not covered by Article 4(a).
**Article 5(3)**

5.1. On the basis of a study concerning the problem of reverse engineering carried out in accordance with the Council mandate of 21 December 1989, the Commission services proposed the following text for Article 5(3):

"Notwithstanding the provisions of Article 4(a), the lawful acquiror of a copy of a program shall be entitled, without the authorization of the right holder, to observe, study or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright if he does so while loading, displaying, running, transmitting or storing the program in execution of his contract."

The Commission representative explained that the right-holder of a copyright should not be entitled to prevent, by means of any contractual stipulations (Article 5(1)), the lawful acquiror of a copy of a program from carrying out the acts mentioned in this paragraph.

It was suggested that the words "lawful acquiror" be replaced by "legitimate user" and that the words "in execution of his contract" be deleted.

5.2. The French and the United Kingdom delegations considered that this text proposal was more acceptable than the text contained in doc. 9304/1/89. However, they thought that only a
carefully circumscribed form of reverse engineering should be allowed. They felt that they needed more reflexion on the question where to draw the limit between non-protected ideas and principles underlying a computer program and the expression of these ideas and principles which should be copyrightable.

The German delegation felt that there should be no provision in the Directive which would specifically permit reverse engineering. It argued that it would not be possible to allow observing, studying or testing the functioning of a computer program in order to determine the ideas underlying this program without risking the copying of the whole program which could then be commercialized.

The Danish, Italian and Irish delegations suggested introducing a general clause into the Directive referring to the principle of fair use for research activities, which would not cover commercial production activities (cf. Section 107 of United States Copyright Act).

While reserving its position, the Netherlands delegation felt that the text of this paragraph should distinguish between normal users of a computer program and manufacturers who want to produce software which is compatible with other programs.
5.3. The Chairman suggested that the Working Party consider introducing a mechanism whereby the operation of Articles 4 and 5 of the Directive and any problems for interoperability, etc. could be monitored and reviewed within 3 to 5 years. He also asked the Commission to respond to his assessment.

Delegations were asked to consider the following questions put forward by the Commission services in preparation for the next meeting of the Working Party:

(a) What is the purpose of reverse engineering?
(b) Which persons should be allowed to perform reverse engineering?
(c) Should there be remuneration of the right holder?
(d) Should reverse engineering be limited to the extent necessary to achieve the purpose?
(e) What use should be made of the information gained?
(f) Should it be possible to publish or communicate the results of reverse engineering to third parties?
(g) Could the information being sought be obtained by published material, standards bodies, contractual means or in other non-infringing ways?

Article 6

6.1. In the light of the reservations on the Commission text (doc. 4490/90, pages 12 and 13), the Chairman proposed that consideration be given to the alternative wording suggested by
the French delegation (doc. 4533/90, p.6) and to a new paragraph to be added concerning seizure (cf. Berne Convention, Article 16).

The French delegation explained that its proposal would leave Member States free to choose between civil, administrative or criminal provisions of national law to combat piracy.

6.2. The United Kingdom delegation could accept the French proposal but suggested adding the word "importation" in both paragraphs.

The Belgian delegation considered that possession of an infringing copy is not forbidden according to Article 4(a) of the Directive but could, nevertheless, accept the French proposal.

The German delegation, supported by the Danish and Netherlands delegations, felt that although the possession of an infringing copy could lead to its distribution, mere possession as such is not one of the restricted acts mentioned in Article 4 of the Directive and it could therefore not accept the French proposal. It suggested either that only the distribution of an infringing copy should be mentioned as an infringement of the author's exclusive rights, or that it

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1 It was also suggested that this new paragraph might be added to Article 4 rather than to Article 6.
should be left to the Member States to determine which acts constitute an infringement of the author's rights according to Article 4 and therefore should be forbidden.

The Italian and Spanish delegations could not accept the French proposal because they felt that it did not maintain a link with Article 4 of the Directive. The Italian delegation could not accept the element of guilty knowledge contained in the French proposal because it would introduce a subjective qualifying element into the Directive. It thought that it should be left to Member States to establish penalties and that it would be unacceptable if these penalties were to be dictated by a Directive. Therefore the Italian delegation was in favour of the text of Article 6 contained in doc. 9304/1/89.

The Netherlands delegation was in favour of the proposal by the German delegation in document 9840/89, page 18.

The Greek delegation could accept either the German proposal contained in doc. 9840/89, p. 18 or the French proposal.

6.3. On the basis of the comments on the French proposal, the Commission services and the German delegation proposed alternative texts (cf. Annex).

Both text proposals provide the possibility of seizure of an infringing copy in accordance with Article 16 of the Berne Convention.
The United Kingdom delegation felt that the possession of an infringing copy should be considered as an act against which Member States should provide appropriate remedies. It also attached great importance to remedies against persons committing the acts mentioned in sub-paragraph (c) of the Commission proposal. It therefore considered that the German proposal was too general and that the Commission proposal could be accepted subject to some minor drafting points.

The Italian delegation considered that the Commission proposal was more complete than the German one, because the German proposal does not provide remedies against the possession of an infringing copy or against the acts mentioned in sub-paragraph (c) of the Commission text. This delegation also suggested adding remedies against acts of selling or buying of infringing copies. Although the Italian delegation thought that the Commission proposal was a more helpful step forward than the German proposal, it expressed a preference for the text of Article 6 contained in doc. 9304/1/89.

The French, Irish and Spanish delegations thought that the German proposal did not add anything to Article 4(a) of the Directive. They also considered that the provision contained in sub-paragraph (c) of the Commission proposal should be maintained. They therefore expressed a preference for the Commission proposal. The French delegation suggested starting paragraph 2 with the wording "Without prejudice to the provisions of Article 4 of the Directive ...".
6.5. The Netherlands and Greek delegations felt that the possession of an infringing copy and the acts mentioned in sub-paragraph (c) of the Commission proposal do not constitute an infringement of copyright law. They considered that these acts should be dealt with in criminal law. They therefore expressed a preference for the German proposal.

6.6. The Belgian delegation could not accept the element of guilty knowledge contained in the Commission text. It felt that it would be difficult for a person who had acted in good faith to prove that he had had no reason to believe that the copy concerned was an infringing copy. On the other hand, it felt that the provision contained in sub-paragraph (c) of the Commission proposal should be maintained. This delegation therefore expressed a preference for the German proposal but had an open mind concerning the Commission proposal and suggested putting the first paragraph of this proposal at the end of it.

6.7. The Danish delegation considered that both proposals constituted progress. It therefore could accept either of them. It suggested, however, adding the provision contained in Article 16(3) of the Berne Convention according to which seizure shall take place in accordance with the legislation of each country.
6.8. The Commission representative agreed to add a sub-paragraph (d) providing remedies against the selling or buying of infringing copies, as suggested by the Italian delegation. He also agreed on the drafting suggestions made by the Belgian, Danish and French delegations.

The Presidency concluded that a majority of delegations was in favour of the Commission proposal and suggested looking for a consensus on the basis of the Commission text.

Article 7

7.1. All delegations maintained their positions concerning this Article as contained in doc. 4490/90, page 14.

It was agreed that the wording of the second sentence be adapted to the wording of Article 7(3) of the Berne Convention.
Article 6
Enforcement of Protection

First Variant (Commission proposal)

1. An infringing copy of a computer program shall be liable to seizure.

2. Member States shall provide appropriate remedies against a person committing acts listed in sub-paragraphs (a), (b) and (c) below:

   (a) the 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 of a copy of a computer program knowing or having reason to believe that it is an infringing copy;

   (c) the putting into circulation of articles the sole intended purpose of which is to facilitate the removal or circumvention of any technical means which may have been applied to protect a program.
**Second Variant** (Proposal by German delegation)

1. Member States shall provide appropriate remedies against a person who reproduces a computer program without the consent of the right holder or who brings into circulation or distributes such copies.

2. An infringing copy of a computer program shall be liable to seizure.
1. Introduction

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 (5682/89 PI 25). This proposal is based on Article 100a of the Treaty establishing the European Economic Community.

The Working Party on Intellectual Property has met on eight occasions to examine the Commission proposal and already submitted a number of problems to the Permanent Representatives Committee on 15 November 1989 (doc. 9647/89 PI 73) and 6 December 1989 (doc. 10376/89 PI 85). The Presidency hereby
submits two questions to the Committee that were not discussed at the above-mentioned dates and that the Working Party is not able to resolve at its level. The latest reading of these questions was carried out on the basis of a consolidated text drawn up by the French Presidency and contained in doc. 9304/1/89 PI 68.

2. Right of rental

The Commission proposes introducing by means of the Directive an author's right to control the rental of his computer program (Article 4(c) in doc. 9304/1/89).

It also intends to introduce a right of rental in respect of other works covered by copyright in future proposals.

The Danish, Spanish, Irish, Italian, Portuguese and United Kingdom delegations supported the proposal to introduce such a right in the Directive.

The Belgian, German, Greek, French and Netherlands delegations drew attention to the request made to the Commission at the informal meeting of Ministers of Culture held in Blois on 2 November 1989 to draw up a work programme for measures to be taken in the field of copyright. They take the view that the question of introducing a right of rental should not be discussed in the narrow context of this Directive but should be considered in a broader framework encompassing other areas of copyright.
The Presidency considers that a provision to this effect should be included in the Directive in view of the economic importance of a rental right to the industry.

The Permanent Representatives Committee is asked to state whether the right to rent a computer program should be dealt with in the context of this Directive or whether it should be deferred until a broader examination is made of the question of a right of rental in general.

3. Communication to other Member States of the provisions of national law adopted by a Member State

The Presidency proposes that this Directive should stipulate not only that each Member State shall communicate the provisions of national law which it adopts in order to transpose the Directive to the Commission but also that it shall send a copy of them to the other Member States (Article 9(2) in 9304/89); in addition the Presidency proposes that this practice be extended to other directives in future. Most delegations welcomed this proposal.

However, the Portuguese and United Kingdom delegations entered scrutiny reservations on this proposal. The Spanish delegation supported the proposal in the case of the present Directive but reserved its position on its extension to later directives.
The Presidency considers that the Permanent Representatives Committee should examine this issue, since its implications extend far beyond the scope of the Directive under discussion.

The Permanent Representatives Committee is asked to confirm the inclusion of this obligation in the Directive and state whether such a practice should be extended.
COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS AND INDUSTRIAL POLICY

OPINION

for the Committee on Legal Affairs and Citizens' Rights

on

the proposal for a Council directive on the legal protection of computer programs
(COM(88) 816 final - SYN 183 - Doc. C 3-56/89)

Draftsman: Mr K. PINXTEN

22 March 1990
OPINION

of the Committee on Economic and Monetary Affairs and Industrial Policy

Draftsman: Mr K. Pinxten

The Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr Pinxten draftsman on 20 September 1989.

It considered the draft opinion at its meeting of ............... and at the latter meeting adopted the opinion's conclusions by ...........

The following took part in the vote: Beumer, Chairman; Desmond and de Montesquiou, Vice-Chairmen; Pinxten, draftsman; Barton, Bernard-Reymond, Cassidy, Caudron, Cox, Falconer (for Crawley), Fitzgerald (for Ruiz Mateos), Herman, McCartin (for Hoppenstedt), Mattina, Megret, Merz, Metten, Patterson, Porto (for Visentini), Read, Roth (for Ernst de la Graete), Siso Cruellas, Smith, A. (for Seal), van der Waal (for Lataillade) and von Wogau.
1. There can be no doubt as to the importance of computer software for the EC economy. The Commission's Green Paper on copyright estimated the Western European market for system software at US $ 9.5 billion in 1985. Our main suppliers of software, however, are American in origin; in 1985 American companies accounted for between 65% and 85% of the Western European market for system software, and about 55% of the market for application software. US imports of software, by contrast, are minimal. As a result of the 'computerization' of our society this sector is still expanding, and the demand for software within the EC is greater than that in the US at the moment. The development of the Community software industry is therefore of great importance for the economy of the European Community, and particularly for its industrial and technological future. To this end it is essential to create an appropriate legal framework within which the sector can develop. In this respect European producers of software have hitherto been at a disadvantage as regards competition with countries with a long-standing computer industry (particularly the US), which have had appropriate legal measures for the protection of their software industry for some considerable time now. After all, the authors of computer programs are very vulnerable without legal protection for their creations, given the lack of technical anti-copying devices. In view of the considerable investments and the creativity and research to which computer programs owe their existence, the lack of proper legal protection against unlawful copying severely hinders and discourages the marketing of such programs. Accordingly a number of Member States have taken statutory measures for the legal protection of computer programs, while others are in the process of developing similar initiatives.

2. The purpose of the directive in question is to establish the necessary legal protection for computer programs throughout the Community. Naturally the Committee on Economic and Monetary Affairs and Industrial Policy gives its fullest support to this aim. The present opinion will examine the extent to which the proposal for a directive provides for the necessary legal protection for the software industry in the Community, while maintaining enough flexibility to promote innovation through competition.

3. In theory there are a number of different ways of protecting computer programs: patent protection, contracts, legal protection tailored specifically to computer programs, and protection by copyright. If the software industry in the Community is to be given the legal security which it needs, then protection measures must be made as uniform as possible throughout the Community. Discrepancies in the legislation of the various Member States could lead to distortion of competition and thus have an adverse effect on the operation of the internal market. However, the choice of an appropriate form of legal protection should also take into account the need for protection outside the Community. After all, a form of legal protection confined to the EC, with no legal force beyond the borders of the Community, would be limited in its field of application and ineffective, given that it could be circumvented outside the EC. It is therefore important to bear in mind the need to guarantee a certain degree of reciprocity. In view of this, copyright protection would seem to be the best solution. Copyright protection is laid down in the Berne Convention, which has now been ratified by 89 countries, a recent accession being that of the US. This Convention provides for the protection of the works of authors who are nationals of one of the states party to the Convention, who are normally resident there or who first published their work there. Such a choice would guarantee maximum international protection, while avoiding potential trade policy problems.
4. The decision to opt for copyright protection as laid down in the Berne Convention will, however, involve a number of problems. A number of terms relating to copyright are inadequately defined and may give rise to differences of interpretation and hence to discrepancies in the administration of justice and the enforcement of the Convention in the various Member States. Efforts should therefore be made to define the technical terms and measures as precisely as possible in the directive, in order to ensure that the law is administered as uniformly as possible. It is important to limit the scope for variations in interpretation as far as possible, although it is inevitable, given the decision to opt for copyright protection, and the powers of the national courts, that the courts of the various Member States will to some extent put their stamp on the mode of enforcement in each country.

5. Article 1(2) of the proposal for a directive confers copyright protection on computer programs as literary works. This means that - as stated in paragraph 3 of the same Article - protection is accorded to the expression, but not to the ideas and principles. Paragraph 3 lists other exclusions: logic, algorithms, programming languages and interface specifications, inasmuch as these represent ideas and principles. These do not, in fact, add anything to the general exclusion of 'ideas and concepts'. However, reactions already received to the proposal for a directive indicate that these terms are susceptible of different interpretations, so that their inclusion may result in discrepancies in the administration of justice. It is for this reason that one of the amendments proposed deletes these additional exclusions.

6. A big advantage of applying copyright protection to computer programs as literary works is that it enables a balance to be maintained between, on the one hand, necessary protection against unlawful reproduction through protection of the means of expression and, on the other, innovation which is a product of competition, as no protection is conferred upon ideas and principles. However, the precise definition of the terms 'expression' and 'ideas and principles' is also open to different legal interpretations.

7. Refusal to make available the information regarding the interfaces and access protocols needed in order to produce a compatible system and to guarantee interoperability is not generally in the interest of hardware and software producers. This accounts for the prevailing policy of openness and the companies' willingness to introduce certain sections of their programs into the public domain, in order to achieve greater compatibility between the various systems. A genuine internal market will not exist until the best possible provision has been made to ensure the compatibility of hardware and software. With this aim in mind, every effort should be made to advance progress towards standardization under the auspices of the International Organization for Standardization (ISO), to whose activities the producers make a voluntary contribution. In the light of efforts to achieve compatibility and interoperability, then, the introduction of more thorough protection specifically for interfaces and access protocols is quite out of the question. However, those interfaces and access protocols which consist of computer programs must enjoy the protection for which provision is made in the present directive. As no specific protection for interfaces is included in the directive, the general rule on the protection of computer programs being applicable to those consisting partly of such a program, there is no reason to refer specifically to interfaces in the directive. It is therefore proposed that the specific reference in question be deleted.
Those producers who enjoy a position of power in the fields of software and hardware alike have a particular interest in keeping information about interfaces secret. However, if they were to abuse the protection accorded to them under the copyright, the regulations on fair competition would come into play and an investigation would need to be held to ascertain whether they were abusing their dominant position.

8. Paragraph 4 of Article 1 stipulates that protection be made conditional upon the criterion of originality as it applies to literary works. The interpretation in law of the concept of ‘originality ... (as it applies to) ... other literary works’ varies considerably at international level and between the various Member States. In this connection the Commission observes in its explanatory memorandum that ‘the only criterion which should be applied to determine the eligibility for protection is that of originality, that is, that the work has not been copied. No other aesthetic or qualitative test should be applied’. Although we can agree with this interpretation, the interpretation of the term in law is far more restrictive in certain cases (such as the Inkasso case). It therefore seems advisable to incorporate a more precise definition of the term ‘originality’ in the directive, in order to avoid differences of interpretation under the law.

9. The inclusion in paragraph 4(b) of Article 1 of specific provisions for programs generated by computers does not add anything of substance. Since the result would be the same without this specific provision, it is proposed that it be deleted.

10. Article 4 contains provisions governing restricted acts. The second sentence of paragraph (a) of Article 4, ‘in so far as they necessitate a reproduction of the program in part or in whole, loading, viewing, running, transmission or storage of the computer program shall be considered restricted acts’, adds nothing to the general rule and should therefore be deleted. Opinions on restricted acts vary widely. Certain parties are very much in favour of authorizing reverse engineering under certain circumstances. If this is made legal, however, legal protection for computer programs will virtually cease to exist.

11. Article 5 deals with exceptions to the restricted acts described in Article 4. The aim of this article is to enable users to use their computer programs in the normal ways. As the only article in the directive whose purpose is to protect users, it ought to ensure that all users who have acquired a computer program in a legal manner can carry out all the operations associated with the normal use of a computer program without having to obtain authorization. Such operations include making a back-up copy and adapting a program to some degree to the user’s particular needs. The draft directive draws a distinction between computer programs issued on licence and those which the user has acquired in some other legal manner, such as purchase of a copy of a program with or without a written contract, lease, hire, etc. It is only for users who have not concluded a written licence agreement in respect of the computer program which they have acquired that the directive guarantees the right to carry out all the operations necessarily associated with the normal use of a computer program, without the need to obtain authorization for such use. The users of computer programs which are subject to a written licence agreement are not protected in any way by the directive, nor are they guaranteed the right to use their computer programs in the normal ways. The Commission itself acknowledges in its explanatory memorandum that: ‘... in some areas, the balance of power between producers and users of computer
programs may not permit the latter to negotiate equitable contract conditions, due to the market strength of some software suppliers'. To protect users against the dominant position of some suppliers of software, the directive should therefore incorporate provisions guaranteeing the right to normal use of computer programs supplied on the basis of licence agreements and prohibiting the incorporation into licence agreements of clauses under which acts associated with the normal use of a computer program are made subject to authorization from the rightholder.

12. The right to use computer programs in public libraries must not be restricted to programs acquired other than by a written licence agreement; it should be extended to all computer programs acquired in a legal manner.

In the light of these considerations the rapporteur proposes that Article 5 be amended.

13. Article 6, which relates to secondary infringements, states, inter alia, that a person who knows or has reason to believe that he is in possession of an infringing copy of a program is guilty of infringement. However, if such a person was genuinely unaware of this at the time he acquired the program and did not learn that the program was an infringing copy until it was in his possession, he cannot be said to be guilty of infringement and cannot be punished for that offence. An amendment to rectify this situation is accordingly proposed.

14. Article 7 proposes that protection be accorded for a period of fifty years; this is the period of copyright protection laid down for literary works in the Berne Convention. It may be argued that a shorter period of protection might be more appropriate for computer programs. However, the period of protection laid down in the Berne Convention must, of necessity, be respected. A change in the length of the period of protection laid down in this Convention may be considered in the near future, and it would therefore be preferable to refer to the period of protection laid down in the Convention rather than to stipulate an absolute period of time. The Commission's proposal that the period of protection should start on the date of creation of the computer program should likewise be taken up. In the case of computer programs it would be inappropriate for the period of protection to start on the date of the author's death, and this would unnecessarily prolong the period of protection.

CONCLUSIONS

15. In view of the above considerations the Committee on Economic and Monetary Affairs and Industrial Policy requests the Committee on Legal Affairs and Citizens' Rights, as the committee responsible, to make the following amendments to its report:
3. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

Amendment No. 1

3. 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 and principles. (Delete rest of paragraph).

ARTICLE 1(4)

4(b) Programs generated by means of a computer shall be protected in so far as they satisfy the conditions laid down in 4(a) above.

Amendment No. 2

Delete 4(b)

ARTICLE 4(a)

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

Amendment No. 3

(a) the reproduction of a computer program by any means and in any form, in part or in whole. (Delete rest of paragraph).
ARTICLE 5(1)

1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the rightholder, in so far as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purpose of its use shall require the authorization of the rightholder.

Amendment No. 4

1. Where a computer program has been made available to the public in a legal manner, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the rightholder, in so far as they are necessary for the use or scientific analysis or testing of the program. (Delete second sentence).

ARTICLE 5(2)

2. Where a computer program has been sold or made available to the public by means other than a written licence agreement signed by both parties, the exclusive right of the rightholder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.

Amendment No. 5

2. Where a computer program has been made available to the public in a legal manner, the rightholder may not prevent the normal use of the program by the public in public libraries.

Amendment No. 6

Article 5(3): add the following new paragraph:

3. A licence agreement or other written agreement must not contain any clauses which conflict with the provisions laid down in paragraphs 1 and 2.
ARTICLE 6(1)

Amendment No. 7

1. It shall be an infringement of the author's exclusive rights in the computer program to import, acquire or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

ARTICLE 7

Amendment No. 8

Protection shall be granted for fifty years from the date of creation.

The period of protection shall be that for which provision is made in the Berne Convention, from the date of creation.
NOTE

from: Presidency

to: Working Party on Intellectual Property (Computer programs)

No. prev. doc.: 9304/1/89 PI 68 4533/90 PI 7
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
- consolidated text

The Working Party on Intellectual Property (Computer programs) will find attached a revised version of the consolidated text of the proposal for a Directive on the legal protection of computer programs, drawn up by the Presidency in the light of the proceedings of the Working Party at its meeting held on 1 and 2 March 1990.
Statements

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 Literary 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."

Article 1

Object of Protection

1. 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 design material.

1 Reservation by the Spanish delegation on the term "literary".
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.]² ³ ⁴

3. (a) A computer program shall be protected if it is original in the sense that it is its author's own intellectual creation. No qualitative or aesthetic criteria shall be applied to determine its eligibility for protection.

(b) Deleted.⁵

**Article 2**

**Ownership of rights**

1. The author of a computer program shall be the natural person or group of natural persons who created the program, or the legal person designated as the author by national legislation. Where collective works are recognized by the legislation of a Member

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² The Commission services reserved their position on this paragraph.
³ The Chairman proposed, subject to further consideration, that the following recital be added:

"Whereas to the extent that logic, algorithms or programming languages constitute ideas and principles which underlie a computer program, they are also not protected by copyright under this Directive."

⁴ In order to avoid over-interpretation of this paragraph, the German delegation suggested ending it after the first sentence and stating in the preamble that the normal principles of copyright apply.

⁵ Reservation by the Irish and United Kingdom delegations and the Commission representative on the deletion of this sub-paragraph.
State, the natural or legal person who is considered by that legislation to have created the program shall be deemed to be the author.

2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

3. Deleted. 6

4. Where a computer program is created by an employee in the execution of the duties entrusted to him, the employer exclusively is entitled to exercise the economic rights in respect of the program in the absence of contractual provisions to the contrary.

5. Deleted. 7

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. 8

6 Reservation by the Italian delegation and the Commission representative on the deletion of this paragraph.
7 Reservation by the Irish and United Kingdom delegations and the Commission representative on the deletion of this paragraph.
8 Reservation by the Commission representative on the deletion of this paragraph.

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Article 4
Restricted Acts

The exclusive rights of the author or his successor in title 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, viewing, running, transmission or storage of the computer program shall be considered restricted acts;

(b) the translation, adaptation, arrangement and any other alteration of a program and the reproduction of the results thereof, without prejudice to the rights of the person who translates the program; 9

9 Reservations by the German, Netherlands and United Kingdom delegations on this provision in connection with Articles 4(a) and 5.
(c) [the distribution to the public of the original computer program or of copies thereof. The first sale of a copy of a program by the author or with his consent shall exhaust the right of the author to control further sale of that copy but shall not exhaust the right to control its rental or its loan to the public.]^{10}

(d) Deleted.^{11}

**Article 5**

**Exceptions to the restricted acts**

1. In the absence of any contractual stipulations to the contrary, the acts referred to in Article 4(a) and (b) shall not require the authorization by the right holder where they are necessary for the use of the program in accordance with its intended purpose, or necessary as a back-up in connection with such use.

2. Where a copy of a computer program has been sold, the exclusive right of the right holder to authorize rental of that copy shall not be exercised to prevent that copy being made available for use as reference material only, without removal from the premises, of non-profit making libraries and research institutions.]

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{^10} There is provisional agreement on the first sentence of subparagraph (c). The issue of rental right is to be discussed at other levels in the Council.

{^11} Reservation by the Netherlands delegation on the deletion of this paragraph.
[3. Notwithstanding the provisions of Article 4(a), the legitimate user of a copy of a program shall be entitled, without the authorisation of the right holder, to observe, study or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright if he does so while loading, displaying, running, transmitting or storing the program.]

Article 6
Enforcement of Protection

First Variant 12

[1. Without prejudice to the provisions of Article 4(a), Member States shall provide, in accordance with their national legislations, appropriate remedies against a person committing the acts listed in sub-paragraphs (a), (b), (c) and (d) below:

(a) participation in 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 of a copy of a computer program knowing or having reason to believe that it is an infringing copy;

12 Proposal by the Commission services as altered in discussion in the Working Party.

5223/90 prk EN - 7 -
(c) participation in any act of putting into circulation of articles the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical means which may have been applied to protect a program;

(d) participation in any act of selling or buying of infringing copies.

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

Second Variant 13

[1. Member States should provide appropriate remedies against a person, reproducing a computer program without the consent of the right owner or who brings into circulation or distributes such copies.

2. An infringing copy of a computer program shall be liable to seizure.]

13 Proposal by the German delegation.
Article 7
Term of Protection

Protection shall be granted for the life of the author and fifty years after his death; where the computer program is an anonymous or pseudonymous work, the term of protection shall be fifty years from the time that the computer program is first lawfully made available to the public. 14

Article 8
Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to other legal provisions such as patent rights, trade marks, unfair competition, trade secrets, the law of contract and protection of semi-conductor products.

2. Protection under the provisions of this Directive shall also be available in respect of works created prior to [date in Article 9], without prejudice to any acts concluded and rights acquired before that date.

14 Reservation by the German delegation which considers that Member States should have the option of granting a longer term of protection.
Article 9
Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to transpose this Directive not later than two years after its notification.

2. Each Member State shall communicate to the Commission the provisions of national law which it adopts in order to transpose this Directive. [It shall forward a copy thereof to the other Member States.] 15

Article 10

This Directive is addressed to the Member States.

15 Reservation by the Greek, Netherlands, Portuguese and United Kingdom delegations on the second sentence, which is to be considered by the Permanent Representatives Committee.
EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 16 May 1990

6381/90
RESTREINT
PI 24

SUMMARY OF PROCEEDINGS

of : Working Party on Intellectual Property (Computer programs)
on : 19 and 20 April and 3 and 4 May 1990

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

of computer programs

1. At its meetings on 19 and 20 April and 3 and 4 May 1990
the Working Party on Intellectual Property (Computer programs)
continued its examination of the issues of reverse engineering,
protection of interfaces and rental right, as well as Articles 6
and 7 of the proposal for a Council Directive on the legal
protection of computer programs.
I. REVERSE ENGINEERING

2. The Working Party was informed at its April meeting that the Presidency had decided to include the proposal for a Directive on the agenda of the meeting of the Council (Internal Market) to be held on 14 May 1990, and that the main subject of discussion would be reverse engineering; this discussion would be prepared in the Permanent Representatives Committee on 2 May 1990. The Chairman emphasized the need for the discussions in the Permanent Representatives Committee and the Council to concentrate at this stage on the principles of how the problem of reverse engineering should be dealt with in the Directive, leaving examination of drafts to the Working Party.

At its meeting on 3 and 4 May, the Working Party heard an oral report on the discussion held in the Permanent Representatives Committee on 2 May.

A. Questions asked by the Commission services

3. At the Working Party's March meeting, the Commission services had asked delegations to consider a number of questions (doc. 5266/90 PI 15, point 5.3). Delegations had consulted industrial circles on these questions, and in many cases the answers had varied according to the interests of those consulted. Nevertheless, several general tendencies emerged:
(a) The main purpose for which reverse engineering should be allowed is interoperability of programs; mention was also made of systems maintenance, and the Italian delegation considered that it should also be allowed for purposes of research;

(b) Only a licensee or other lawful acquiror of a copy of a computer program or persons acting on their behalf should be allowed to perform reverse engineering;

(c) Some were in favour of remuneration being paid to the right holder for reverse engineering, others were against;

(d) The general feeling was that reverse engineering should be limited to the extent necessary to achieve the purpose, but several delegations drew attention to the difficulty of enforcing such a rule;

(e) Several delegations considered that it would be permissible for the information gained from reverse engineering to be used to produce interoperable programs, but not to produce substitute programs;

(f) Views differed on whether or not it should be possible to publish the results of reverse engineering or communicate them to third parties;
(g) the general view was that in the great majority of cases the information being sought could be obtained from published material or standards bodies, by contractual means or in other non-infringing ways, but that in a few cases it could not be obtained without performing reverse engineering.

B. Proposal by the French delegation

4. In the light of the answers to the above questions given by industrial circles in France, the French delegation put forward on 19 April 1990 a proposal which had been approved in France both by those industrial circles which considered that the directive should not permit reverse engineering of computer programs and by those industrial circles which considered that the directive should not prohibit reverse engineering. This proposal is reproduced in Annex I to this document.

The reasoning behind the proposal by the French delegation was that, in order to obtain the information necessary to make interoperable programs, it is necessary to have access to the ideas and principles underlying the interfaces of computer programs; although these ideas and principles cannot be protected by copyright, gaining access to them would sometimes require reverse engineering, involving acts which, under Article 4(a) and (b) of the proposal for a Directive, would constitute infringement if done without the authorization of the right holder; the solution proposed by the French delegation was a provision to the effect that Article 4(a) and (b) could not be invoked to prevent acts being performed that are necessary for the production of interoperable programs, subject to a number of restrictions.
5. The initial reaction of the Belgian, Spanish, Netherlands and Portuguese delegations and the Commission representatives to the general approach adopted by the French delegation was favourable. The German and Irish delegations also indicated that, whereas they would have preferred a simpler solution, they considered that this proposal constituted a good basis for resolving the problem of reverse engineering.

The Danish and United Kingdom delegations expressed doubts as to the general approach proposed by the French delegation.

6. The Danish delegation suggested that the proposal by the French delegation and Article 5(3) (see section H below) be replaced by the following paragraph:

"Notwithstanding the provisions of Article 4(a) and (b), the legitimate user of a copy of a program shall be entitled to undertake research and private study, provided that such acts do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."

The German and Netherlands delegations were not in favour of this suggestion on the grounds that either their national law would have to define the conditions under which acts "do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author", or it would be left to the courts to determine such conditions.

7. The following observations were made with regard to the details of the proposal by the French delegation:
7.1. The Italian delegation considered that this provision should not be restricted to acts carried out for the sole purpose of interoperability, but should be extended to acts carried out for research purposes.

The French delegation considered that acts done for research purposes should be the subject of contractual arrangements between the right holder and the researcher, while the Commission representative pointed out that almost all research done in the computer industry was done for commercial purposes and therefore should not be covered by the provision proposed by the French delegation.

7.2. The Italian and Netherlands delegation pointed out that the words "only by or on behalf of the licensee" were too restrictive, as it was possible to be in lawful possession of a computer program without necessarily being a licensee.

7.3. The Netherlands delegation suggested that conditions (a) and (b) be replaced by the condition that the information enabling interoperability with the original program to be achieved could not be obtained in a reasonable time and under reasonable conditions.

The Italian delegation suggested replacing condition (b) by an obligation to request the information required from the right holder and by a condition that reverse engineering could be performed only if the right holder did not supply this information.
The United Kingdom delegation questioned the usefulness of condition (b) unless it was intended to give the right holder an opportunity to supply the information required.

7.4. With regard to condition (e), the German delegation and the Commission representatives expressed a preference for the terms "substantially similar" rather than "substitute".

7.5. The German and Netherlands delegations considered that the last sentence of the proposal was superfluous.

7.6. Other observations made corresponded to reactions to the questions asked by the Commission services (see point 3 above).

C. Proposal by the Commission services

8. On 20 April 1990 the Commission representative tabled a proposal for a new recital and a new Article 5a (see Annex II to this document), which had been agreed by all the relevant services and private offices of the Commission; although it was not a formal amendment to the Commission's proposal for a directive, it represented the latest position of the Commission services on the question of reverse engineering. The Commission representative explained that in the light of the considerable interest which the computer industry had devoted to the question of reverse engineering over the last six months, the Commission services had realized that it was no longer possible to provide in the Directive that reverse engineering would require the authorization of the right holder under all circumstances; on the other hand, if an exception were to be made for reverse
engineering, there was a risk that this exception could be abused for purposes of piracy. The Commission services had therefore drawn up a proposal which, while providing an exception for reverse engineering, closely defined the limits within which such an exception would be allowed. This new proposal was based on the proposal by the French delegation, but included wording taken from Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in order to make it clear that the solution proposed was in accordance with that provision. The Commission representative stated that, although the question of remuneration was not explicitly mentioned, the Commission services considered that it was implicit that remuneration would be required, as reverse engineering would prejudice the legitimate interests of the right holder if it were free of charge.

D. Proposal by the Irish delegation

9. At the Working Party's May meeting, the Irish delegation tabled a proposal for an article on reverse engineering (see Annex III to this document). It explained that the French delegation and the Commission services had put forward proposals at the April meeting which corresponded to the option of providing for an exemption that would specifically allow reverse engineering for defined purposes under defined circumstances; the Irish delegation felt that consideration should also be given to the option of a "fair use" clause, and it had therefore drawn up such a clause which attempted to codify the circumstances under which use might be considered fair.
E. Proposal by the Netherlands delegation

10. At the Working Party's meeting on 3 and 4 May, the Netherlands delegation tabled a proposal for Articles 5, 5a and 5b (see Annex IV to this document). With regard to reverse engineering (Article 5b) this proposal was based on the proposals made by the French delegation and the Commission services at the Working Party's April meeting and attempted to improve on them; it also took account of discussions with interested circles in the Netherlands.

F. Proposal by the German delegation

11. During the Working Party's May meeting, the German delegation proposed orally that no specific provision on reverse engineering be included in the Directive; in its view, Articles 4(a) and 5(3) of the consolidated text in document 6040/90 PI 21 should remain, possibly with adaptations to the wording, and the second sentence of Article 1(2) of the consolidated text should be transferred to the preamble.

G. Examination of the various proposals

12. The Working Party did not discuss in detail the proposals made by the Commission services and the Irish, Netherlands and German delegations. It limited its examination of them to clarifying a number of points.

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See doc. 6040/90, page 3, footnote 4.

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It was agreed that these proposals and the proposal by the French delegation would be examined at the Working Party's June meeting in the order in which they had been tabled.

H. Article 5(3) and its relationship to Article 5(1)

13. At the Working Party's March meeting, the Commission services had proposed a text for Article 5(3) (see doc. 5266/90, point 5.1). At the April meeting, the Commission representatives maintained this proposal, rather than the slightly modified version appearing in the consolidated text in document 5223/90, with the proviso that the term "lawful acquiror" should read "lawful possessor" (in French: "détenteur légitime").

14. The Commission representatives explained that Article 4(a) and (b) make a number of acts, including reproduction of a computer program, subject to authorization by the copyright holder. In order to avoid any doubt as to whether the term "reproduction" covers only the creation of permanent copies of a computer program or extends to transient reproduction of the program, the second sentence of Article 4(a) makes it clear that the transient acts of loading, displaying, running, transmission or storage of a computer program are to be considered restricted acts insofar as they necessitate a reproduction of the program; at the present state of computer technology, a revised consolidated text has been circulated under reference 6040/90 PI 21.

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2 In the meantime, a revised consolidated text has been circulated under reference 6040/90 PI 21.

3 The Commission representative pointed out that the term "displaying" (in French, "affichage") was more appropriate than "viewing" (in French, "visualisation").
technology, these acts do necessitate a reproduction of the program and therefore are to be considered as restricted acts, but it cannot be excluded that future developments make it possible to perform these acts without having to reproduce the program, in which case they would no longer be restricted acts. Article 5(1) provides an exception to the general rule of Article 4(a) and (b) by stating that the acts referred to in those provisions shall not require the authorization of the right holder where they are necessary for the use of the program in accordance with its intended purpose, and since a certain amount of doubt had arisen, the Commission services had proposed Article 5(3) to make it clear that where a lawful possessor of a program is performing the acts referred to in the second sentence of Article 4(a) under the circumstances of Article 5(1), he will not require the authorization of the right holder to observe, study or test the functioning of the program.

15. The Belgian, Greek, French, Irish, Netherlands and United Kingdom delegations expressed doubts whether Article 5(3) was indispensable, but considered that it was useful for the avoidance of doubt.

The Spanish delegation considered that it was unnecessary.

16. The Danish delegation suggested that Article 5(3) be incorporated into Article 5(1). The French, Portuguese and United Kingdom delegations supported this suggestion.
The German and Irish delegations had doubts as to this suggestion, since Article 5(1) provides an exception from Article 4(a) and (b), while Article 5(3) provides an exception from Article 4(a) only.

The Commission representatives were asked to examine the possibility of incorporating Article 5(3) into Article 5(1) and if possible to propose a draft for a combined provision.

17. During the discussion of Article 5(3) and its relationship to Article 5(1), the Netherlands and French delegations suggested that the words "In the absence of any contractual stipulations to the contrary," be deleted from Article 5(1).

The Danish delegation opposed this suggestion.

The Commission representatives suggested replacing these words by the words "Where a copy of a computer program has been sold, ".

18. The Netherlands delegation suggested that a reference to archival and audit purposes be added to Article 5(1) (see in this context the proposal by the Netherlands delegation in Annex IV).

The Commission representative considered that such an addition was not necessary in the light of the terms "use of the program in accordance with its intended purpose".
19. At the Working Party's May meeting, the Commission representative drew attention to the fact that the Commission still had a reservation on the words "or necessary as a back-up in connection with such use" in Article 5(1).

II. PROTECTION OF INTERFACES

20. At the April meeting, the Commission services tabled a proposal for a new paragraph 3 of Article 8 and a corresponding new recital (see Annex V to this document).

The Commission representatives explained that Community Directives already enacted in the telecommunications sector placed an obligation on telecommunications network operators to publish telecommunications interfaces; since the proposal for a Directive under discussion contained no obligation on authors of computer programs to publish the interfaces of their programs, the Commission services wished to avoid a situation where telecommunications network operators might invoke the Directive on computer programs to avoid their obligation to publish their telecommunications interfaces where these interfaces were in the form of a computer program; the new Article 8(3) therefore made it clear that the computer programs Directive could not be invoked to remove the obligation to publish telecommunications interfaces.

The delegations entered scrutiny reservations on this proposal pending consultation of telecommunications experts.
21. The Commission representatives stated at the May meeting that they could lift their reservation on Article 1(2) as set out in the consolidated text (see doc. 6040/90, page 3, footnote 2), subject to it being made clear that programming languages would not be protected under the Directive.

III. RENTAL RIGHT

22. At its meeting on 19 and 20 April, the Working Party was informed that the Permanent Representatives Committee, after discussing the question of rental right on 28 March 1990, had instructed the Working Party to continue its examination of the question, taking account of the individual legal arrangements in the Member States. The Working Party was also informed of the contents of the provisions on rental rights in the Community's submission to the GATT negotiations in respect of trade related aspects of intellectual property rights (doc. 5605/90 GATT 52, Annex, Part 2.A., Article 3(1) and (2)).

23. The Commission representatives stated that they maintained their position that the Directive should provide for an exclusive rental right. They asked the delegations to consider the text contained in Annex VI to this document.

The German and Netherlands delegations maintained their position that the question of rental should be discussed in a broader framework encompassing other areas of copyright. The Netherlands delegation also maintained its position in favour of a remuneration right rather than an exclusive right with regard to computer programs. The German delegation stated that if this question were to be regulated in this Directive, it
would prefer a provision corresponding to Article 3(1) and (2) of the Community submission to the GATT negotiations to the text put forward by the Commission representatives.

The French delegation withdrew its reservation against dealing with rental right in this Directive.

The Spanish and Italian delegations preferred the text of Article 4(c) in the consolidated text (doc. 6040/90 PI 21) to the text put forward by the Commission representatives.

24. In the light of these reactions, delegations were asked whether they would have fundamental objections if the question of rental right in respect of computer programs were not to be dealt with at all in this Directive, but were to be left to a more general instrument on rental right in the copyright field. The Spanish, Irish and Italian delegations stated that they would have such objections.

25. The Commission representatives noted that the Working Party remained divided on this issue. They pointed out that the European Parliament was unlikely to propose removing the rental right from the Directive, as no amendments to that effect had been put forward in any of the Parliament's committees. The Commission representatives therefore maintained their position that the Directive should provide for an exclusive rental right, and proposed the text contained in Annex VII to this document, which delegations were asked to consider for the Working Party's June meeting.
IV. ARTICLE 6

26. On the basis of suggestions by the Netherlands, Italian and United Kingdom delegations, the Working Party made a number of amendments to the first variant of Article 6; the text of this variant as amended is set out in Annex VIII to this document.

The Greek, Spanish and Netherlands delegations entered scrutiny reservations on the addition of "the possession for commercial purposes" in paragraph 1(c), and the Danish and Netherlands delegations entered scrutiny reservations on the addition of "articles referred to in paragraph 1(c)" in paragraph 2.

27. The German delegation entered a reservation on the whole of the first variant. Its main difficulties were with paragraphs 1(b) and (c) and with paragraph 2 as amended. It explained that the structure of German law was such that the only way of transposing these provisions into German law was by amending the criminal law, but the Community had no competence in respect of criminal law.

The German delegation therefore continued to support the second variant of Article 6, and was prepared to align paragraph 2 of that variant on paragraph 2 of the first variant as set out in 6040/90.

28. The Danish delegation asked the Commission services to reconsider the title of Article 6.
V. ARTICLE 7

29. At its May meeting, the Working Party examined a proposal by the Spanish delegation to include in Article 7 a reference to the situation where a legal person is designated as the author by national legislation (Annex IX to this document).

30. A proposal by the French delegation to replace the Spanish amendment by a reference to collective works was opposed by several delegations and consequently withdrawn.

31. A proposal by the Danish delegation that a reference to Article 2(1) be added to the proposal by the Spanish delegation was accepted by the Working Party. Article 7 would therefore read:

"Protection shall be granted for the life of the author and fifty years after his death; 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".

32. The reservation by the German delegation on Article 7 (see doc. 6040/90, footnote 14) remains.
ANNEX I

Proposal by the French delegation

ARTICLE 5
Qualification of the author's prerogatives

2. Notwithstanding any contractual provisions to the contrary, the prohibitions laid down in Article 4(a) and (b) cannot be invoked by the author to stop actions being carried out which are necessary for the interoperability of computer programs.

The possibility in question may be exercised only by or on behalf of the licensee and solely if the following conditions are fulfilled:

(a) the information enabling interoperability with the original program to be achieved has not already been published or made available;

(b) the right holder for the original program has been notified of the other author's intention of searching for that information;

(c) the information search relates only to that part of the original program concerned by interoperability;

(d) the information obtained cannot be passed on to third parties;

(e) the information obtained cannot be used for the purpose of creating a [substantially similar] or [substitute] computer program.

The possibility provided by this paragraph cannot be invoked to thwart legal action based on Article 4(a) and (b) if the person invoking it distributes the program without reference to the searching carried out.
Proposal by the Commission services

New recital and new Article 5a

Whereas, although the reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes a violation of the exclusive rights of the author, under certain circumstances a modification of the form of the code performed by a legitimate possessor of a copy of the program must be considered legitimate and must therefore be authorized; whereas such circumstances exist when a modification of the form of the code of a computer program is essential to obtain the information necessary to ensure that interoperable programs can be created or can function, i.e. to ensure the full functioning of the program with the other elements of a system enabling these products to function together in all the ways such products are intended to function.

Article 5a
(New Article)

Modification of the form of the code in which the copy of a program has been made available

1. When a modification of the form of the code in which a copy of a program has been made available is essential for ensuring that interoperable programs can be created, can be maintained or can function, and insofar as such a modification performed by the legitimate possessor of a copy of that program has been strictly limited to the parts of the program necessary to attain this goal, such a modification shall be authorized notwithstanding contractual provisions to the contrary, unless the right holder proves that such a modification unreasonably prejudices his legitimate interests or that it conflicts with a normal exploitation of the computer program.

2. Paragraph 1 shall not sanction the use of the information obtained through its application for the marketing of a substantially similar program.
Subject: Proposal by the Irish delegation

(a) Member States shall provide that the performance of the restricted acts under Article 4 of this directive shall be considered fair use of a copyrighted computer program,

- if such performance is essential and exclusively to obtain information necessary to allow another computer program to interoperate, i.e. to exchange data and/or instructions with the copyrighted computer program, and

- if such performance does not impair the actual or potential market for or the value of the copyrighted computer program and complies with Article 9(2) of the Berne Convention.

(b) An otherwise restricted act shall not be considered fair unless it is performed:

(i) on a non-infringing copy of the copyrighted computer program by the [lawful acquiror] [lawful owner and user] of that copy, and

(ii) only on those interfaces or parts of the copyrighted computer program intended by their design for the exchange of data and/or instructions with other computer programs and only to the extent necessary to make such exchanges possible, and

(iii) only when it is necessary because there are no non-infringing means of obtaining the information needed to make such exchange of data and/or instructions possible. Such non-infringing means include:

- the use of information that has been made publicly available or that has been published, and

- requesting the information from the rightholder, and

- observing, studying and testing the functioning of a copyrighted program as provided for in Article 5(3) of this directive.
Proposal by the Netherlands delegation

Subject: Draft for Articles 5, 5a and 5b

- Article 5

1. The lawful user shall not require the authorization of the owner of the rights for the acts referred to in Article 4(a) and (b), where these acts are necessary for the use of a copy of the program in accordance with the purpose envisaged by the owner of the rights.

2. The lawful user of a copy of the program shall not require the authorization of the owner of the rights for the acts referred to in Article 4(a) where these acts are necessary for security, archival or audit purposes.

3. The lawful user of a copy of the program shall not require the authorization of the owner of the rights for the acts referred to in Article 4(a) and (b) where these acts serve the purpose of improving the program for his own use in accordance with the purpose envisaged by the owner of the rights. Without the authorization of the owner of the rights a copy of a program adapted accordingly may not be given to others, except for the purpose of legal proceedings.

- Article 5a

The lawful user shall not require the authorization of the owner of rights for the acts referred to in Article 4(a), where these acts fall within the scope of private exercise or study for non-commercial purposes.

- Article 5b

1. The authorization of the owner of the rights for the acts referred to in Article 4(a) and (b) shall not be required where these acts are necessary (or: indispensable) to realize the interoperability of a program, provided:
   a. these acts are performed by the lawful acquirer of a copy of the program;
   b. the information necessary (or: indispensable) cannot be obtained otherwise within a reasonable time or on reasonable conditions;
   c. these acts are strictly limited to those parts of the program necessary to attain this goal;
d. the information thus obtained is not given to others, except for the purpose of legal proceedings.

2. The burden of proof of the exception laid down in the first paragraph rests upon said acquiror.
Proposal by the Commission services

New recital and new Article 8(3)

New recital n° 8 bis

Whereas in order to ensure open and efficient access to public telecommunications networks and services, including the provision of transmission and switching equipment for those networks, it is necessary that the provisions of this Directive shall be without prejudice to specific requirements of Community law enacted in respect of the publication of interfaces in the telecommunications sector.

New Article 8(3)

The provisions of this Directive shall be without prejudice to specific requirements of Community law enacted in respect of the publication of interfaces in the telecommunication sector.
Proposal by the Commission services

Subject: Rental right

Amend the text in document 5223/90 PI 13 as follows:

1. Article 4(c)
   "(c) the rental of a copy of a computer program."

2. Article 5(2)
   Delete this paragraph.
Proposal by the Commission services

Article 4

c) the distribution to the public of the original computer program or of copies thereof. The first sale of a copy of a program by the author or with his consent shall exhaust the right of the author to control further sale of that copy;

d) the rental of a copy of a program which has previously been sold.
Article 6 - First variant as amended on 4 May 1990

Article 6
[Enforcement of Protection]

1. Without prejudice to the provisions of Article 4(a), Member States shall provide, in accordance with their national legislations, appropriate remedies against a person committing the acts listed in sub-paragraphs (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) the possession for commercial purposes of or any act of putting into circulation of articles the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical means which may have been applied to protect a program.

2. An infringing copy of a computer program or articles referred to in paragraph 1(c) shall be liable to seizure in accordance with the national legislation of each Member State.
Article 7 (Term of protection)

Proposal by the Spanish delegation

Protection shall be granted for the life of the author and fifty years after his death; where the computer program is an anonymous or pseudonymous work, or where a legal person is designated as the author by national legislation, the term of protection shall be fifty years from the time that the computer program is first lawfully made available to the public.

Grounds

This is the text given in 5223/90, with the addition of the specific case of the term where the author is a legal person according to national law.

This addition is justified by the fact that Article 2 of the draft Directive (consolidated text) states that the author is the natural person or group of natural persons or the legal person designated as the author by national legislation.
NOTE

from: Presidency

to: Permanent Representatives Committee and Council

No. prev. doc.: 5223/90 PI 13
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 - consolidated text

The Permanent Representatives Committee and the Council will find attached a consolidated text of the proposal for a Directive on the legal protection of computer programs, drawn up by the Presidency in the light of the proceedings of the Working Party.
Statements

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 Literary 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."

Article 1
Object of Protection

1. 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 design material.

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1 Reservation by the Spanish delegation on the term "literary".
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.]^2 3 4

3. (a) A computer program shall be protected if it is original in the sense that it is its author's own intellectual creation. No qualitative or aesthetic criteria shall be applied to determine its eligibility for protection.

(b) Deleted.^5

**Article 2**

**Ownership of rights**

1. The author of a computer program shall be the natural person or group of natural persons who created the program, or the legal person designated as the author by national legislation. Where collective works are recognized by the legislation of a Member

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2. The Commission services reserved their position on this paragraph.

3. The Chairman proposed, subject to further consideration, that the following recital be added:

"Whereas to the extent that logic, algorithms or programming languages constitute ideas and principles which underlie a computer program, they are also not protected by copyright under this Directive."

4. In order to avoid over-interpretation of this paragraph, the German delegation suggested ending it after the first sentence and stating in the preamble that the normal principles of copyright apply.

5. Reservation by the Irish and United Kingdom delegation and the Commission representative on the deletion of this sub-paragraph.
State, the natural or legal person who is considered by that legislation to have created the program shall be deemed to be the author.

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 the duties entrusted to him, the employer exclusively is entitled to exercise the economic rights in respect of the program in the absence of contractual provisions to the contrary.

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.  

6 Reservation by the Italian delegation and the Commission representative on the deletion of this paragraph.

7 Reservation by the Irish and United Kingdom delegations and the Commission representative on the deletion of this paragraph.

8 Reservation by the Commission representative on the deletion of this paragraph.
Article 4
Restricted Acts

The exclusive rights of the author or his successor in title 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, viewing, running, transmission or storage of the computer program shall be considered restricted acts;

(b) the translation, adaptation, arrangement and any other alteration of a program and the reproduction of the results thereof, without prejudice to the rights of the person who translates the program; 9

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9 Reservation by the German, Netherlands and United Kingdom delegations on this provision in connection with Articles 4(a) and 5.
(c) [the distribution to the public of the original computer program or of copies thereof. The first sale of a copy of a program by the author or with his consent shall exhaust the right of the author to control further sale of that copy but shall not exhaust the right to control its rental or its loan to the public.] 10

(d) Deleted. 11

Article 5

Exceptions to the restricted acts

1. In the absence of any contractual stipulations to the contrary, the acts referred to in Article 4(a) and (b) shall not require the authorization by the right holder where they are necessary for the use of the program in accordance with its intended purpose, or necessary as a back-up in connection with such use.

[2. Where a copy of a computer program has been sold, the exclusive right of the right holder to authorize rental of that copy shall not be exercised to prevent that copy being made available for use as reference material only, without removal from the premises, of non-profit making libraries and research institutions.] 10

10 The Working Party is still considering the issue of rental right.
11 Reservation by the Netherlands delegation on the deletion of this paragraph.
3. Notwithstanding the provisions of Article 4(a), the lawful possessor of a copy of a program shall be entitled, without the authorization of the right holder, to observe, study or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright if he does so while loading, displaying, running, transmitting or storing the program in execution of his contract.]

**Article 6**

**Enforcement of Protection**

First Variant

1. Without prejudice to the provisions of Article 4(a), Member States shall provide, in accordance with their national legislations, appropriate remedies against a person committing the acts listed in sub-paragraphs (a), (b), (c) and (d) below:

(a) participation in 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 of a copy of a computer program knowing or having reason to believe that it is an infringing copy;

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12 Proposal by the Commission services as altered in discussion in the Working Party.
(c) participation in any act of putting into circulation of articles the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical means which may have been applied to protect a program;

(d) participation in any act of selling or buying of infringing copies.

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

Second Variant

1. Member States should provide appropriate remedies against a person, reproducing a computer program without the consent of the right owner or who brings into circulation or distributes such copies.

2. An infringing copy of a computer program shall be liable to seizure.

13 Proposal by the German delegation.
Article 7

Term of Protection

Protection shall be granted for the life of the author and fifty years after his death; where the computer program is an anonymous or pseudonymous work, the term of protection shall be fifty years from the time that the computer program is first lawfully made available to the public. 14

Article 8

Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to other legal provisions such as patent rights, trade marks, unfair competition, trade secrets, the law of contract and protection of semi-conductor products.

2. Protection under the provisions of this Directive shall also be available in respect of works created prior to [date in Article 9], without prejudice to any acts concluded and rights acquired before that date.

14 Reservation by the German delegation which considers that Member States should have the option of granting a longer term of protection.
Article 9
Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to transpose this Directive not later than two years after its notification.

2. Each Member State shall communicate to the Commission the provisions of national law which it adopts in order to transpose this Directive.

Article 10

This Directive is addressed to the Member States.
The Permanent Representatives Committee forwards to the Council the following report from the Presidency and supports the Presidency's recommendation that the Council:

(a) take note of the progress made and approve the results achieved so far;

(b) note and encourage the continuing efforts of experts to resolve those issues which have not yet been settled, taking account of the opinion of the European Parliament when received; and

(c) examine the three options suggested for solving the problem of reverse engineering and obtain Ministers' views on these options or on any other options that might be considered.
Origins

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.

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 PL 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

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\(^1\) Published in Official Journal No C 91 of 12.4.89, pages 4 to 16.  
\(^2\) Published in Official Journal No C 329 of 30.12.89, pages 4 to 9.
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 interoperation 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, without prejudice to the thrust of existing copyright legislation, 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 Community 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 Community 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 Community. 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 accordingly asks 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.
PRESS RELEASE

1401st Council meeting
- INTERNAL MARKET -
Brussels, 14 May 1990

President: Mr Desmond J. O'MALLEY
Minister for Industry and Commerce, Ireland
The Governments of the Member States and the Commission of the European Communities were represented as follows:

Belgium:
Mr Paul DE KEERSMAEKER
State Secretary for European Affairs and Agriculture

Denmark:
Mrs Anne-Brigitte LUNDHOLT
Minister for Industry

Germany:
Mr Otto SCHLECHT
State Secretary, Federal Ministry of Economic Affairs

Greece:
Mr Sotirios HATZIGAKIS
Deputy Minister for Trade

Spain:
Mr Pedro SOLBES
State Secretary for Relations with the European Countries

France:
Mrs Edith CRESSON
Minister for European Affairs

Ireland:
Mr Desmond J. O'MALLEY
Minister for Industry and Commerce

Mr Terry LEYDEN
Minister of State at the Department of Industry and Commerce with special responsibility for Trade and Marketing
Italy:
Mr Pierluigi ROMITA
Minister for Community Policies
Mr Paolo BABBINI
State Secretary for Industry, Trade and Craft Trades
Luxembourg:
Mr Thierry STOLL
Deputy Permanent Representative
Netherlands:
Mr Piet DANKERT
State Secretary for Foreign Affairs
Portugal:
Mr Vitor MARTINS
State Secretary for European Integration
United Kingdom:
Mr John REDWOOD
Parliamentary Under-Secretary of State, Department of Trade and Industry

Commission:
Mr Martin BANGEMANN
Vice-President
Sir Leon BRITTAN
Vice-President
The Council held a discussion on the amendment proposed by the Commission, with more specific reference to motor vehicle civil liability insurance, of the first and second Directives on insurance other than life assurance.

The purpose of the proposed amendment is to extend the scope of the second Directive, which concerns freedom to provide services in the area of direct insurance other than life assurance, to include insurance against civil liability in respect of the use of motor vehicles.

The Directive should facilitate to a maximum freedom to provide motor vehicle civil liability insurance services between Member States, while ensuring a high degree of protection for the insured and victims of accidents.

It should be noted that the second Directive provides for two separate arrangements for the supervision of insurers: the "large risks" arrangement, essentially governed by the State in which the insurer is established ("supervision by the country of origin"), whereas for "small risks" (i.e. small policy-holders), the State in which the risk is located may, under certain conditions, require approval and supervise the policy conditions, tariffs and technical reserves.

The discussion enabled substantial progress to be made in resolving the problems still outstanding. However, the question of the duration and dates of the transitional arrangements for the introduction of the "large risks" system has still to be examined in depth on the basis of the Presidency's compromise.

At the close of the discussion, the Permanent Representatives Committee was instructed to finalize the above matter with a view to the resumption of the Council's discussion on 20 June 1990.
Following the completion of the co-operation procedure with the European Parliament, the Council formally adopted the 3rd Directive on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.

The purpose of this Directive, which forms part of the completion of the Internal Market, is to resolve certain problems which were not settled by the first two Directives on the subject. Thus, the first Directive (72/166/EEC) was aimed principally at abolishing controls on the green insurance card and the second (84/5/EEC) was aimed at reducing disparities in the treatment of accident victims.

The aim of the third is, in particular, to provide further protection of the interests of accident victims and those of the insured.

It is with this in mind that the enacting terms:

- impose compulsory cover for all passengers of the vehicle, including where the passenger is the owner, the holder of the vehicle or the insured person himself;

- stimulate that each civil liability insurance policy, in addition to covering the entire territory of the Community, must guarantee, in each Member State, the cover imposed in the Member State where the vehicle is normally based or that imposed by the Member State in which the vehicle is moving, whichever is the greater;

- harmonize national provisions concerning the guarantee funds, set up by the 2nd Directive, which compensate victims where the vehicle which caused the accident was not insured or was not identified; the victim will no longer be responsible for establishing that the person liable is unable or refuses to compensate him.
The Council took note of the progress of proceedings on the proposal for a Directive on the legal protection of computer programs, on which it is still awaiting the Opinion of the European Parliament. The proposal stipulates that the Member States should grant the protection of copyright to computer programs as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works.

The discussion focussed on the reverse engineering of computer programs. Several options were put forward in order to resolve this question.

At the close of the discussion, the Council concluded that:

- it was desirable not to depart significantly from the current framework for legal protection;

- examination of all the options suggested should be continued, as should the study of the possibility of combining some of those options;

- the Permanent Representatives Committee and the Working Party were instructed to continue their examination of all these options, taking into account the European Parliament's Opinion, once it was delivered;

- the Permanent Representatives Committee was instructed to report back to the Council on its examination of all the options with a view to a more definitive discussion of the matter within the Council.

These proposals replace the previous proposals of 1970 and 1975 and are further to the memorandum forwarded in July 1988.

According to the proposals, adoption of the Statute, while continuing to be optional, would afford undertakings the possibility of resorting to a form of limited liability company directly linked to Community law. Access to this new form would be facilitated both by the flexibility possible in the choice of founder members and by the fixing of a relatively low minimum capital. Provision is made for references to the Directives concerning companies already adopted or on which negotiations appear to be well advanced, as well as to the law of the States in which they have their registered offices.

The questions which were raised concern, in particular:

- the attractiveness of the Statute for undertakings;
- the link between the Statute and national law;
- employee participation.

The Council instructed the Permanent Representatives Committee to examine the proposals in greater detail in order to be able to resume the discussion at a forthcoming Council meeting.
OBSTACLES TO PUBLIC PURCHASE OFFERS

The Council heard a statement by Vice-President BRITTAN presenting a study on eliminating obstacles to the acquisition of companies through a public purchase offer.

After a brief exchange of views on this subject, the Council took note of the Commission's intention to submit a formal proposal to it on the matter.

PHARMACEUTICAL PRODUCTS

The Council held an initial exchange of views on a proposal for a Regulation recently submitted by the Commission concerning the creation of a supplementary protection certificate for medicinal products.

The purpose of the proposal is to improve the legal protection of medicinal products covered by patents, the protection of which is shortened by the present marketing authorization system. By means of the introduction of a supplementary protection certificate, which will take effect after the expiry of the duration of the patent, the pharmaceutical industries of the Member States will be placed in conditions similar to those existing in certain third countries.

The Council instructed the Permanent Representatives Committee to begin studying the proposal in order to enable the Council to discuss it once the European Parliament and the Economic and Social Committee deliver their Opinions.

Vice-President BANGEMANN also informed the Council of the Commission's other plans concerning pharmaceutical products.
MISCELLANEOUS DECISIONS

1. Miscellaneous decisions concerning agricultural policy

After the formal adoption of an initial series of Regulations (see Press Release 6025/90 Presse 55 of 7.5.1990) further to the discussions on the prices package on 25, 26 and 27 April 1990, the Council formally adopted the other Regulations and Decisions on the fixing of the prices for agricultural products and certain related measures (1990/1991). These were the following Regulations and Decisions:

Cereals and rice

- amending Regulation (EEC) No 2727/75 on the common organization of the market in cereals

- fixing the prices applicable to cereals for the 1990/1991 marketing year

- fixing the amount of the co-responsibility levy for cereals for the 1990/1991 marketing year

- fixing for the 1990/1991 marketing year the amount of the aid for durum wheat

- fixing the monthly price increases for cereals, wheat and rye flour and wheat groats and meal for the 1990/1991 marketing year

- fixing the production aid for certain cereals sown in the 1990/1991 marketing year

- instituting aid for small producers of certain arable crops
- amending Regulation (EEC) No 729/89 laying down general rules for the special arrangements applicable to small producers as part of the co-responsibility arrangements in the cereals sector

- fixing the aid for small producers of certain arable crops sown in the 1990/1991 marketing year

- fixing the production aid for certain varieties of high-quality flint maize sown in the 1990/1991 marketing year

- amending Regulation (EEC) No 1008/86 laying down detailed rules for production refunds applicable to potato starch

- fixing the minimum price for potatoes to be paid by the starch manufacturer to the potato producer for the 1990/1991 cereals marketing year

- fixing rice prices for the 1990/1991 marketing year

- fixing the monthly price increases for paddy rice and husked rice for the 1990/1991 marketing year

- fixing the amount of the production aid for certain varieties of rice sown in the 1990/1991 marketing year

Sugar

- fixing, for the 1990/1991 marketing year, certain sugar prices and the standard quality of beet
- fixing, for the 1990/1991 marketing year, the derived intervention prices for white sugar, the intervention price for raw sugar, the minimum prices for A and B beet, the threshold prices, the amount of compensation for storage costs and the prices to be applied in Spain and Portugal

Olive oil - oilseeds

- fixing the production target price, the production aid and the intervention price for olive oil for the 1990/1991 marketing year

- fixing the guide price for flax seed for the 1990/1991 marketing year

- fixing the aid for hemp seed for the 1990/1991 marketing year

- fixing the target prices and intervention prices for colza, rape and sunflower seed for the 1990/1991 marketing year

- fixing the monthly increases in the target price, the intervention price and the intervention buying-in price for colza, rape and sunflower seed for the 1990/1991 marketing year

- fixing the guide price for soya beans for the 1990/1991 marketing year

- fixing the minimum price for soya beans for the 1990/1991 marketing year

- amending Regulation (EEC) No 1594/83 on the subsidy for oilseeds
Textile fibres

- fixing the guide price for unginned cotton for the 1990/1991 marketing year

- fixing the maximum guaranteed quantity of cotton and the minimum price for unginned cotton for the 1990/1991 marketing year

- amending Regulation (EEC) No 1964/87 adjusting the system of aid for cotton introduced by Protocol No 4 annexed to the Act of Accession of Greece

- fixing the amount of aid for fibre flax and hemp and the amount withheld to finance measures to promote the use of flax fibre for the 1990/1991 marketing year

- fixing the amount of aid in respect of silkworms for the 1990/1991 rearing year

Sheepmeat/goatmeat and pigmeat

- fixing the basic price for sheepmeat for the 1991 marketing year

- instituting specific aid for sheep and goat farming in certain less-favoured areas of the Community

- fixing the basic price and the standard quality for pig carcases for the period 1 July 1990 to 30 June 1991

WINE

- amending Regulation (EEC) No 822/87 on the common organization of the market in wine

- fixing the guide prices for wine for the 1990/1991 wine year
- amending Regulation (EEC) No 1442/88 on the granting, for the 1988/1989 to 1995/1996 wine years, of permanent abandonment premiums in respect of wine-growing areas


**Tobacco**

- amending Regulation (EEC) No 727/70 on the common organization of the market in raw tobacco

- laying down special measures applicable to raw tobacco of a certain variety from the 1989 harvest

- fixing, for the 1990 harvest, the norm and intervention prices and the premiums granted to purchasers of leaf tobacco, the derived intervention prices for baled tobacco, the reference qualities, the production areas and the guaranteed maximum quantities for the 1991 harvest and amending Regulation (EEC) No 1252/89

- amending Regulation (EEC) No 1469/70 fixing the percentages and quantities of tobacco taken over by the intervention agencies and the percentage of Community tobacco production above which the procedure laid down in Article 13 of Regulation (EEC) No 727/70 applies
II. Other miscellaneous decisions

Customs Union


It should be noted that Title II of Directive 79/695/EEC contained a series of provisions laying down simplified procedures for release for free circulation. The Directive stipulated that as from 1 January 1984:

- Member States could not apply any simplified procedures other than those contained in the Directive;
- Member States were bound to implement all those procedures insofar as their administrative organization permitted it.

With a view to the 1993 single market, this Directive updates some of those procedures in order to take into better account developments in customs legislation and the implementation of the procedures in practice, and makes them compulsory in all the Member States.

The Council also adopted the Decision on the Community's participation in the negotiation, within the United Nations Economic Commission for Europe, of a Convention on the customs arrangements applicable to containers used within an international pool.
USSR

The Council adopted the Regulation implementing certain provisions of the Agreement between the EEC and the EAEC and the USSR on trade and commercial and economic co-operation, i.e. the progressive introduction of certain liberalization measures intended to facilitate access to the Community market for Soviet goods.
SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)
on: 7 and 8 June 1990

No. prev. doc.: 7010/90 PI 32
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. At its meeting on 7 and 8 June 1990 the Working Party on Intellectual Property (Computer programs) continued its examination of the issues of reverse engineering, protection of interfaces and rental right, as well as Articles 5 and 6 of the proposal for a Council Directive on the legal protection of computer programs.
I. REVERSE ENGINEERING AND THE PROTECTION OF INTERFACES

A. Proposal by the Italian delegation

2. Following the presentation of a number of proposals on reverse engineering at the Working Party’s two previous meetings (see doc. 6381/90 PI 24, points 4 to 12 and Annexes I to IV), the Italian delegation presented a proposal for an Article 5bis on reverse engineering (see Annex 1 to this document), which attempted to synthesize the contents of those proposals.

B. Principles to be contained in a solution to the problem of reverse engineering

3. The Working Party discussed, taking into account the various proposals which had been submitted, the principles to be contained in a solution to the problem of reverse engineering of computer programs.

4. The Chairman considered that the discussion of the question of reverse engineering in the Council on 14 May 1990 had indicated that the majority of delegations were in favour of seeking a solution along the lines of the third option suggested in the Presidency’s report to Council (an exemption from copyright which would specifically allow reverse engineering for defined purposes under defined circumstances), or a combination of that option with the

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1 Document 6179/90 PI 22.
second option (a "fair use" provision). He therefore suggested that a provision on reverse engineering should take the form of a derogation from copyright, if possible incorporating "fair use" aspects.

The majority of delegations and the Commission representatives agreed with this principle. The Danish delegation considered that further consideration should be given to the "fair use" option before a decision was taken in favour of this principle. The German and Netherlands delegations reserved their positions as to which option should be adopted.

5. With regard to the question in respect of which acts a derogation should be provided, there was general agreement that the derogation should be limited to the passage from machine code to source code, and that this would involve the acts referred to in Article 4(a) and (b) of the proposal for a directive.

6. With regard to the question how the persons who would be able to benefit from the derogation should be defined, the Working Party agreed on the terms "by or on behalf of a person having a right to use a copy of the program"; these terms would cover both a purchaser of a copy of a program and a licensee, as well as a person acting on their behalf, such as a service engineer, while making the entitlement to perform reverse engineering subject to the right to use the program.
7. It was agreed that the main condition for performing reverse engineering was that the acts concerned should be indispensable (and not merely necessary) for interoperability. In order to fulfil this condition, the following requirements inter alia would have to be met:

- all non-infringement means of attaining interoperability had been reasonably exhausted;

- reverse engineering must be confined to the relevant part of the program;

- there must be an actual need for interoperability.

8. With regard to the selection of the points on a copyright protected program at which an independently created program may interoperate with the first program, the Working Party noted that

- allowing the rightholder to select these points could lead to rightholders being excessively restrictive in the points which they select;

- allowing the creator of the second program to choose freely the points of interoperation would have the disadvantage that the first program might be changed at these points (with the consequence that the programs were no longer interoperable), as the only points of attachment which the
rightholder in the first program is obliged to maintain unchanged are those which he discloses in manuals and other published material;

- an intermediate solution would have to be sought.

9. With regard to the question whether the copyrightholder should be entitled to remuneration from a person performing reverse engineering, the Commission representatives considered that any right of the copyright holder to remuneration should be preserved, and therefore could accept the wording suggested by the Italian delegation in paragraph 3 of its proposal, while the Belgian, Danish, German, Netherlands and United Kingdom delegations considered that there could be no basis for remuneration in respect of acts which were the subject of a derogation from copyright.

10. The Working Party agreed that the information obtained as a result of reverse engineering should not be given to others, except when necessary for interoperability of the program created as a result of reverse engineering with the program which had been engineered in reverse.

11. The German, French, Netherlands and United Kingdom delegations considered that it was not necessary to include the terms of Article 9(2) of the Berne Convention on the Protection of Literary and Artistic Works in a provision on reverse engineering. The Italian delegation suggested that
If these terms were not included in the provision on reverse engineering, they should be mentioned in the preamble to the Directive.

12. The Spanish, Netherlands and Portuguese delegations considered that it was not necessary to state that the information obtained from reverse engineering could not be used for purposes other than interoperability. These delegations and the German delegation also considered that it was not necessary to state that the information obtained from reverse engineering could not be used for the marketing of a program substantially similar in expression (paragraph 2 of the proposal by the Italian delegation).

The Italian delegation and the Commission representatives considered that it was necessary to make both these statements.

C. Compromise proposal by the Presidency

13. In the light of the discussion on the principles to be contained in a solution to the problem of reverse engineering of computer programs, the Presidency presented a compromise proposal covering both reverse engineering and protection of interfaces (see Annex II to this document), incorporating provisions on reverse engineering in a redraft of Article 5 of the proposal for a Directive. The Chairman asked delegations whether they could accept this

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2 With regard to the parts of Article 5 which are not directly concerned with reverse engineering, see section II below.
compromise proposal as a package, on the understanding that a definition of the term "interoperability" would have to be further elaborated (see point 8 above) and that questions of drafting could be considered at a later stage.

14. The initial reaction of the Belgian, German, Greek, Spanish, French, Irish, Italian, Portuguese and United Kingdom delegations and the Commission representatives was favourable to the compromise proposal as a package, subject to detailed examination.

The Danish delegation stated that it could not adopt a position on this compromise proposal until further consideration had been given to the other options mentioned in document 6179/90 PI 22, particularly the "fair use" option. It also feared that Article 5(3) and (4) of this compromise proposal would lead to a reduction in the level of protection for computer programs.

The Netherlands delegation, while indicating its willingness to examine this compromise proposal constructively, stated that it could not accept it without substantial amendments.

15. The Netherlands and United Kingdom delegations considered that the second sentence of Article 1(2) was superfluous. The Chairman pointed out that the corresponding recital was intended to make it clear that this sentence was necessary for the avoidance of doubt. The Commission representatives offered to prepare a statement
for the Council minutes with a view to removing the misgivings of the Netherlands and United Kingdom delegations on this point.

16. The Commission representatives reserved their position on the question whether the issue of remuneration (see point 9 above) was covered adequately by the terms "on reasonable conditions" in Article 5(3)(b).

17. The wording of Article 8(3) in the Presidency's compromise proposal was taken from a proposal by the United Kingdom delegation to add to the text proposed by the Commission services (document 6381/90 PI 24, Annex V) a reference covering Council Decision No. 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications.

The Danish and German delegations entered scrutiny reservations on this provision.

The Danish delegation doubted whether there was any legal basis in the Berne Convention for such a provision. The Commission representative replied that as this provision did not constitute a derogation from copyright law, there was no need for a legal basis in the Berne Convention.

3 Official Journal No. L 36 of 7.2.87, pages 31 to 37.
The German delegation considered that this provision was superfluous and might lead to a contrario interpretations.

18. The Chairman informed the Working Party that the Presidency intended to forward the compromise proposal to the Permanent Representatives Committee\(^4\) for approval at its next meeting and for a decision whether or not it should be submitted to the Council (Internal Market) at its meeting on 20 June 1990.

II. ARTICLE 5

19. With regard to the consolidated text of Article 5(1) in document 6040/90 PI 21, the Netherlands and French delegations had suggested at a previous meeting that the words "In the absence of any contractual provisions to the contrary" be deleted, and the Commission representatives had suggested replacing these words by the words "Where a copy of a computer program has been sold," (see document 6381/90 PI 24, point 17).

The Working Party noted that this provision contained two derogations from the requirement of authorization by the right holder to perform the acts referred to in Article 4(a) and (b):

\(^4\) The Presidency report to the Permanent Representatives Committee, with the compromise proposal annexed, was circulated under reference 6970/90 PI 31.
(i) where those acts are necessary for the use of the program in accordance with its intended purpose, and

(ii) where those acts are necessary for producing a back-up copy.

It also noted that there was general agreement that where the right holder had sold the program or where he had licensed it and the licensing agreement was silent in respect of these derogations, these derogations would apply; there was not agreement, however, whether or not these derogations could be overruled by contractual provisions.

The Danish, French and United Kingdom delegations considered that the derogation under (i) above could be overruled by contractual provisions, while the German, Greek, Spanish, Italian and Netherlands delegations considered that it could not.

The Danish, German and United Kingdom delegations considered that the derogation under (ii) above could be overruled by contractual provisions, while the Greek, Spanish, Italian and Netherlands delegations considered that it could not.

20. The Presidency compromise proposal on reverse engineering and the protection of interfaces (see section I C. above and Annex II) included a proposal for Article 5(1) which attempted to take account of the
discussion of this provision. The Greek, Spanish, Italian and Netherlands delegations opposed this element of the Presidency proposal as it would allow contractual provisions to overrule the derogations contained in Article 5(1).

There was general agreement that it could be misleading to refer to the case where a copy of a computer program has been sold, as there are areas where the licensing of a copy of a computer program involves the sale of that copy. The words "When a copy of a program has been sold or" were therefore deleted from the Presidency proposal.

21. In an attempt to find a compromise solution to the question whether or not the derogations contained in Article 5(1) could be overruled by contractual provisions, the Italian delegation submitted a proposal (see Annex III to this document) whereby the derogation in respect of use of the program in accordance with its intended purpose would apply in the absence of specific contractual provisions, while the derogation in respect of back-up copies could not be overruled by contractual provisions to the contrary.

After adaptation of the wording of the proposal by the Italian delegation to ensure that this solution would not allow the making of an unlimited number of copies on the pretext that they were back-up copies, the majority of
The Netherlands delegation entered a reservation on this provision since it would allow contractual provisions to override the derogation in respect of use of the program in accordance with its intended purpose and since that delegation's proposal that a reference to archival and audit purposes be added (see doc. 6381/90 PI 24, point 18) had not been included in Article 5(1).

The Presidency compromise proposal (Annex II) included Article 5(3) from the previous consolidated text (document 6040/90 PI 21) as Article 5(2), replacing the term "the lawful possessor of a copy of a program" by the term "the person having the right to use a copy of a program" (see point 6 above).

The Working Party accepted this provision.

The Danish delegation submitted a proposal concerning reproduction and alteration in writing of computer programs which have been made available to the public in a written form (see Annex IV to this document) for discussion at a subsequent meeting.

5 The original Article 5(2) had been withdrawn in the meantime - see doc. 6381/90 PI 24, Annex VI.
III. RENTAL RIGHT

24. At the Working Party's previous meeting, the Commission representatives had maintained their position that the Directive should provide for an exclusive rental right (document 6381/90 PI 24, point 25) and had proposed the text set out in Annex VII to document 6381/90 PI 24.

25. The French, Irish and Italian delegations supported the Commission's position.

The German and Netherlands delegations maintained their position that the question of rental should be discussed in a broader framework encompassing other areas of copyright, and that this Directive should not set a precedent which might prejudice the broader discussion.

The Danish delegation was inclined to support the position of the German and Netherlands delegations. However, if a provision on rental right were to be included in this Directive, it would have difficulty in accepting the text as proposed in Annex VII to document 6381/90.

The United Kingdom delegation was also inclined to support the view that the issue of rental right should not be dealt with in this Directive, but it had doubts whether an instrument encompassing other areas of copyright would be appropriate.
The Spanish and Portuguese delegations, while supporting the Commission services' proposal, would not oppose a postponement of this issue to a broader framework if the majority of delegations were to favour that approach.

26. The Chairman considered that this issue should be referred to the Permanent Representatives Committee.

IV. ARTICLE 6

27. At the Working Party's previous meeting the majority of delegations had accepted the first variant of Article 6 as set out in Annex VIII to document 6381/90 PI 24, while the German delegation had supported the second variant.

28. The Netherlands delegation withdrew its scrutiny reservations on the first variant.

The Greek delegation maintained a scrutiny reservation on the inclusion of "the possession for commercial purposes" in paragraph 1(c) of the first variant.

The Danish delegation maintained a reservation on the devices referred to in paragraph 1(c) being liable to seizure (paragraph 2 of the first variant), as it considered this sanction to be too severe.
The German delegation maintained its reservation on the whole of the first variant and continued to support the second variant. The Spanish delegation also supported the second variant.

29. It was agreed that the title of Article 6 should read "Special measures of protection" and that the term "articles" in paragraphs 1(c) and 2 of the first variant should be replaced by "devices".

V. OTHER BUSINESS

30. It was noted that point 30 in document 6381/90 PI 24 should be amended to read as follows:

"A proposal by the French delegation to supplement the Spanish amendment by a reference to collective works was opposed by several delegations and consequently withdrawn."

6 Article 6 as amended appears in the latest consolidated text in document 7010/90 PI 32.
Proposal by the Italian delegation

Article 5bis

1. The authorization of the owner of the rights for the acts referred to in Article 4(a) and (b) shall not be required - (notwithstanding contractual provisions to be contrary) - where these acts are indispensable to realize the interoperability of a program, provided:

(a) these acts are performed by the lawful possessor of a copy of the program;

(b) the information necessary for interoperability is not given directly by the owner of the rights within a reasonable time and on equitable conditions, nor are otherwise freely available;

(c) these acts are strictly limited to those parts of the program necessary to attain this goal;

(d) the information thus obtained is not given to others, except when it is necessary for interoperability;

(e) these acts do not conflict with a normal exploitation of the program and do not unreasonably prejudice the legitimate interests of the owner of the rights.

2. The provisions of paragraph 1 of this Article shall not permit the information obtained through its application to be used for goals other than interoperability and for the marketing of a program substantially similar in expression.

3. The provisions of paragraphs 1 and 2 are without prejudice to the right of the owner to an equitable remuneration.

4. Notwithstanding the provisions of Article 4(a) and (b), the lawful possessor of a copy of a program shall be entitled, without the authorization of the right holder, to observe, study
or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright, if he does so while loading, displaying, running, transmitting or storing the program.
Compromise presented by the Presidency

1. Interfaces
   a) a new recital shall be added as follows:

   "Whereas for the avoidance of doubt it has to be made clear
   that only the expression of a computer program is protected
   and that 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; whereas to the extent that logic, algorithms and
   programming languages constitute ideas and principles which
   underlie a computer program, they are not protected by
   copyright under this directive."

   b) Article 1(2) shall read:

   "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."

2. Restricted Acts
   Article 4 a) and b) shall read:

   "The exclusive rights of the author or his successor in title
   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 translation, adaptation, arrangement and any other
       alteration of a program and the reproduction of the
       results thereof, without prejudice to the rights of the
       person who translates the program."
3. Exceptions

a) A new recital shall be added as follows:

"Whereas, although the unauthorised reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available, constitutes an infringement of the exclusive rights of the author, it has to be considered that under the following circumstances performance of any of these acts in order to modify the form of the code, by or on behalf of a person having a right to use a copy of the program, is legitimate and consistent with fair practice and must therefore be deemed to be authorised; whereas such circumstances exist when a modification of the form of the code of a computer program is indispensable to obtain the necessary information to ensure that interoperable programs can be created or can function, that is to ensure the functioning of an independently created program with an existing program enabling these programs to function together in the ways such programs are intended to function(1); whereas Member States must ensure that such a modification does not conflict with a normal exploitation of the program and does not unreasonably prejudice the legitimate interest of the rightholder.

b) Article 5 shall read:

1. When a copy of a program has been sold or in the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) shall not require the authorization by the right holder where they are necessary for the use of the program by the lawful acquirer in accordance with its intended purpose or necessary as a back-up in connection with such use.

2. Notwithstanding the provisions of article 4(a) the person having a right to use a copy of a program shall be entitled, without the authorization of the right holder, to observe, study or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright, if he does so while loading, displaying, running, transmitting or storing the program in execution of an contract.

3. The authorization of the owner of the rights for the acts referred to in article 4(a) and (b) shall not be required - notwithstanding contractual provisions to the

(1) A definition of the term "interoperability" has to be further elaborated.
contrary – where performance of these acts to modify
the form of the code is indispensable to achieve the
interoperability of an independently created program,
provided:

a) these acts are performed by or on behalf of a
person having a right to use a copy of the program;

b) the information necessary cannot be obtained
otherwise within a reasonable time or on
reasonable conditions;

c) these acts are strictly limited to those parts of
the program necessary to attain interoperability;

d) the information thus obtained is not given to
others, except when necessary for the
interoperability of the independently created
program.

4. The provisions of paragraph 3 of this article shall
not permit the information obtained through its
application to be used:

a) for goals other than to achieve interoperability
of the independently created program,

b) for the development, production or marketing of a
program substantially similar in its expression, or

c) for any other act which infringes copyright.

4. Article 5(2) of the consolidated text is deleted.

5. Article 6(3) shall read:

The provisions of this Directive shall be without prejudice
to specific requirements of Community law already enacted in
respect of the publication of interfaces in the
telecommunication sector or Decisions of the Council relating
to standardization in the field of information technology and
telecommunications.
Subject: Article 5(1)

1. (a) 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.

(b) Notwithstanding contractual provisions to the contrary, the acts referred to in Article 4(a) and (b) shall not require the authorization by the rightholder where they are necessary as a back-up in connection with the use of the program by the lawful acquirer in accordance with its intended purpose.
Proposal by the Danish delegation concerning Article 5

The Danish delegation proposes the following new provision in Article 5 of the directive:

"Notwithstanding the provisions of Article 4(a) and (b), Member States may permit reproduction and alteration in writing of computer programs which have been made available to the public in a written form."
A. INTRODUCTION

1. This proposal for a Directive was considered by the Council (Internal Market) on 14 May 1990, with particular reference to the questions of reverse engineering and protection of interfaces. The Council concluded that:

- it was desirable not to move too far from the existing legal order of protection;

1 On the basis of a report from the Presidency in doc. 6179/90 PI 22.
- all the options identified in the report from the Presidency merited further consideration, as did the possibility of combining some of those options;

- the Permanent Representatives Committee and the Working Party were instructed to continue their exploration of all of those options, taking account of the opinion of the European Parliament when received;

- the Permanent Representatives Committee was invited to report back to Council on its examination of all the options with a view to a more definitive consideration of this matter in Council.

The Presidency submits a report to the Permanent Representatives Committee on its further examination of reverse engineering and protection of interfaces (Section B below) and on the state of work on other aspects of the proposal for a Directive (Section C below).

B. REVERSE ENGINEERING AND PROTECTION OF INTERFACES

2. The Presidency considers that the discussion in Council on 14 May 1990 indicated that the majority of delegations were in favour of seeking a solution along the lines of the third option suggested in the Presidency report (an exemption from copyright which would specifically allow reverse engineering for defined purposes under defined circumstances), or a combination of that...

2 The European Parliament has not yet given its opinion.
option with the second option (a "fair use" provision). The Working Party has therefore concentrated its efforts in this direction. Following examination by the Working Party of contributions from several delegations, the Presidency submits a compromise proposal in the Annex hereto, which attempts to incorporate "fair use" aspects (option 2) into an exemption for reverse engineering (option 3), as well as offering a solution to the question of protection of interfaces.

3. Since this proposal was tabled as recently as 8 June, delegations have been able to give no more than initial reactions to it. The initial reaction of the majority of delegations was favourable to the approach of this proposal as an overall compromise, subject to more detailed examination and subject to drafting.

4. The following points should be noted in connection with this proposal:

(a) With regard to protection of interfaces, the new recital making it clear that the second sentence of Article 1(2) is necessary for the avoidance of doubt is intended to overcome the reservations of those delegations which consider this sentence superfluous. The Commission services have offered to prepare a statement for the Council minutes which could help to remove any remaining misgivings on this point.

(b) The Danish and German delegations have scrutiny reservations, pending consultation with telecommunications experts, on Article 8(3), which is intended to make it clear
that the Directive under consideration may not be invoked to avoid obligations to publish interfaces resulting from other Community acts in the fields of information technology and telecommunications.

(c) With regard to reverse engineering, the Danish delegation considers that further consideration should be given to the second option mentioned in the Presidency's previous report (a "fair use" provision) before a decision is taken in favour of the approach taken by the Presidency's compromise proposal.

(d) The exemption from copyright allowing reverse engineering is strictly limited to passage from machine code to source code. The terms "modify the form of the code" in Article 5(3) are intended to make this clear.

(e) A definition of the term "interoperability" needs to be further elaborated in the Working Party, particularly with regard to the selection of points on a copyright protected program at which an independently created program may interoperate with the first program.

(f) The Commission services consider that reverse engineering under the conditions laid down should preserve the right of the copyright holder to remuneration, while the majority of delegations consider that no remuneration may be required in respect of acts exempted from copyright protection. The terms "on reasonable conditions" in Article 5(3)(b) attempt to provide a compromise solution on this point.
5. The Presidency submits its compromise proposal on protection of interfaces and reverse engineering to the Permanent Representatives Committee for approval of the approach adopted, on the understanding that:

(a) it constitutes an overall package,

(b) approval should be subject to further consideration in the light of the European Parliament's opinion when received, and

(c) a more detailed definition of interoperability should be elaborated.

C. PROGRESS ON OTHER ASPECTS OF THE PROPOSAL FOR A DIRECTIVE

6. The Working Party has made considerable progress during the last six months on the proposal for a Directive. The consolidated text contained in document 7010/90 PL 32 sets out the draft as it now stands, together with an indication of the points on which delegations still have reservations. Many of these reservations relate to points on which the Presidency considers that no further progress can be made until the European Parliament has given its opinion.

The major points of disagreement (other than protection of interfaces and reverse engineering) are summarized in points 7, 8 and 9 below. The Presidency submits these three points to the Permanent Representatives Committee for consideration at the appropriate time.
7. **Rental right**

7.1. The Permanent Representatives Committee discussed this question on 28 March 1990 and instructed the Working Party to continue its examination, taking account of the individual legal arrangements in the Member States.

7.2. The Commission services maintain their position that the Directive should provide for an exclusive rental right, as set out in Article 4(d) (which is to be read in conjunction with Article 4(c)) of the consolidated text, but no longer insist on the maintenance of Article 5(2) of their proposal. The French, Irish and Italian delegations support the Commission’s position.

The Danish, German, Netherlands and United Kingdom delegations on the other hand consider that the question of rental should be discussed in a broader framework encompassing other areas of copyright, and that this Directive should not set a precedent which might prejudice the broader discussion.

The Spanish and Portuguese delegations, while supporting the Commission’s proposal, would not oppose a postponement of this issue to a broader framework.
8. Special measures of protection

The majority of delegations and the Commission services support the first variant of Article 6 as set out in the consolidated text, considering that this provision is essential as a clear signal of the Community’s determination to combat piracy.

However, the Greek delegation has a scrutiny reservation on the inclusion of "the possession for commercial purposes" in paragraph 1(c), and the Danish delegation has a reservation on the devices referred to in paragraph 1(c) being liable to seizure (paragraph 2), as it considers this sanction to be too severe.

The German delegation has a reservation on the whole of the first variant of Article 6, as the only way of transposing its provisions into German law would be to amend criminal law, and it points out that the Community has no competence in respect of criminal law. It also has reservations on including possession among the acts referred to in this article. The German delegation has therefore proposed the second variant of Article 6, which is supported by the Spanish delegation.
9. **Term of protection**

The majority of delegations and the Commission services are in favour of Article 7 as set out in the consolidated text, which is in conformity with Article 7 of the 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.

D. **ACTION REQUESTED**

10. The Presidency requests the Permanent Representatives Committee to:

(a) approve the approach adopted in the Presidency's compromise proposal on protection of interfaces and reverse engineering set out in the Annex, on the understanding that it constitutes an overall package, that approval should be subject to further consideration in the light of the European Parliament's opinion when received, and that a more detailed definition of interoperability should be elaborated;

(b) consider whether this proposal should be submitted to the Council (Internal Market) at its meeting on 20 June 1990 for approval on the same understanding;
(c) consider at the appropriate time the major points of disagreement set out under points 7, 8 and 9 above;

(d) note with approval the progress made on the other aspects of the proposal for a Directive.
ANNEX

COMPROMISE PROPOSAL BY THE PRESIDENCY
ON PROTECTION OF INTERFACES AND REVERSE ENGINEERING

1. Interfaces

a) a new recital shall be added as follows:

"Whereas for the avoidance of doubt it has to be made clear that only the expression of a computer program is protected and that 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; whereas to the extent that logic, algorithms and programming languages constitute ideas and principles which underlie a computer program, they are not protected by copyright under this directive."

b) Article 1(2) shall read:

"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."

c) Article 8(3) shall read:

"The provisions of this Directive shall be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunication sector or Decisions of the Council relating to standardization in the field of information technology and telecommunications."
2. Restricted Acts

Article 4 a) and b) shall read:

"The exclusive rights of the author or his successor in title 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 translation, adaptation, arrangement and any other alteration of a program and the reproduction thereof, without prejudice to the rights of the person who translates the program."

3. Exceptions

a) A new recital shall be added as follows:

"Whereas, although the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available, constitutes an infringement of the exclusive rights of the author, it has to be considered that under the following circumstances performance of any of these acts in order to modify the form of the code, by or on behalf of a person having a right to use a copy of the program, is legitimate and consistent with fair practice and must therefore be deemed to be authorized; whereas such circumstances exist when a modification of the form of the code of a computer program is indispensable to obtain the necessary information to ensure that interoperable programs can be created or can function, that is to ensure the functioning of an independently created program with an existing program enabling these programs to function together in the ways such programs are intended to function; whereas Member States must ensure that such a

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3 A definition of the term "interoperability" has to be further elaborated.
modification does not conflict with a normal exploitation of
the program and does not unreasonably prejudice the
legitimate interest of the rightholder."

b) Article 5 shall read:

"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
acquiror 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. Notwithstanding the provisions of Article 4(a) 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, principles and other
elements which underlie the program and which are not
protected by copyright, if he does so while loading,
displaying, running, transmitting or storing the program
in execution of his contract.

3. The authorization of the owner of the rights for the acts
referred to in Article 4(a) and (b) shall not be
required - notwithstanding contractual provisions to the
contrary - where performance of these acts to modify the
form of the code is indispensable to achieve the
interoperability of an independently created program,
provided:

a) these acts are performed by or on behalf of a person
having a right to use a copy of the program;

b) the information necessary cannot be obtained otherwise
within a reasonable time or on reasonable conditions;

c) these acts are strictly limited to those parts of the
program necessary to attain interoperability;

d) the information thus obtained is not given to others,
except when necessary for the interoperability of the
independently created program.
4. The provisions of paragraph 3 of this article shall not permit the information obtained through its application to be used:

a) for goals other than to achieve interoperability of the independently created program,

b) for the development, production or marketing of a program substantially similar in its expression, or

c) for any other act which infringes copyright."
NOTE

from: Presidency

to: Permanent Representatives Committee

No. prev. doc.: 6381/90 PI 24
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 - consolidated text

The Permanent Representatives Committee will find attached a consolidated text of the proposal for a Directive on the legal protection of computer programs, drawn up by the Presidency in the light of the proceedings of the Working Party.
Statements

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."

Article 1

Object of Protection

1. 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 design material.

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1 Reservation by the Spanish delegation on the term "literary".

7010/90 cs EN - 2 -
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) A computer program shall be protected if it is original in the sense that it is its author's own intellectual creation. No qualitative or aesthetic criteria shall be applied to determine its eligibility for protection.  

(b) Deleted.  

**Article 2**  
**Ownership of rights**  

1. The author of a computer program shall be the natural person or group of natural persons who created the program, or the legal person designated as the author by national legislation. Where collective works are recognized by the legislation of a Member State, the natural or legal person who is considered by that legislation to have created the program shall be deemed to be the author.  

2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.  

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2 This paragraph forms part of the Presidency's overall compromise proposal on protection of interfaces and reverse engineering.  
3 Reservation by the Irish and United Kingdom delegations and the Commission representative on the deletion of this sub-paragraph.
3. Deleted.

4. Where a computer program is created by an employee in the execution of the duties entrusted to him, the employer exclusively is entitled to exercise the economic rights in respect of the program in the absence of contractual provisions to the contrary.

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.

Article 4
Restricted Acts

The exclusive rights of the author or his successor in title include the right to do or to authorize:

4 Reservation by the Italian delegation and the Commission representative on the deletion of this paragraph.
5 Reservation by the Irish and United Kingdom delegations and the Commission representative on the deletion of this paragraph.
6 Reservation by the Commission representative on the deletion of this paragraph.
(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 translation, adaptation, arrangement and any other alteration of a program and the reproduction of the results thereof, without prejudice to the rights of the person who translates the program; 

(c) [the distribution to the public of the original computer program or of copies thereof. The first sale of a copy of a program by the author or with his consent shall exhaust the right of the author to control further sale of that copy;

(d) the rental of a copy of a program which has previously been sold.] 8 9

7 Subparagraphs (a) and (b) form part of the Presidency's overall compromise proposal on protection of interfaces and reverse engineering.
8 Reservation by the Danish, German, Netherlands and United Kingdom delegations, which consider that the question of rental should be discussed in a broader framework encompassing other areas of copyright.
9 Reservation by the Netherlands delegation on the absence of a further subparagraph with the wording: "the communication to the public of a computer program in whole or in part."
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 right holder where they are necessary for the use of the program by the lawful acquiror in accordance with its intended purpose. The making of a back-up copy by a person having a rights to use the program may not be prevented by contract insofar as it is necessary for that use.

2. Notwithstanding the provisions of article 4(a) the person having a right to use a copy of a program shall be entitled, without the authorization of the right holder, to observe, study or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright, if he does so while loading, displaying, running, transmitting or storing the program in execution of his contract.

3. The authorization of the owner of the rights for the acts referred to in article 4(a) and (b) shall not be required — notwithstanding contractual provisions to the contrary — where performance of these acts to modify the form of the code is indispensable to achieve the interoperability of an independently created program, provided:

10 This Article forms part of the Presidency's overall compromise proposal on protection of interfaces and reverse engineering.
(a) these acts are performed by or on behalf of a person having a right to use a copy of the program,

(b) the information necessary cannot be obtained otherwise within a reasonable time or on reasonable conditions;

(c) these acts are strictly limited to those parts of the program necessary to attain interoperability;

(d) the information thus obtained is not given to others, except when necessary for the interoperability of the independently created program.

4. The provisions of paragraph 3 of this article shall not permit the information obtained through its application to be used:

(a) for goals other than to achieve interoperability of the independently created program;

(b) for the development, production or marketing of a program substantially similar in its expression, or

(c) for any other act which infringes copyright.
Article 6
Special measures of protection

[First Variant]¹¹

1. Without prejudice to the provisions of Article 4(a), Member States shall provide, in accordance with their national legislations, appropriate remedies against a person committing the acts listed in sub-paragraphs (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) the possession for commercial purposes of or any act of putting into circulation of devices the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical means which may have been applied to protect a program.

¹¹ Variant supported by the Commission services and the majority of delegations.
¹² Scrutiny reservation by the Greek delegation on the words "the possession for commercial purposes of or".
2. An infringing copy of a computer program shall be liable to seizure in accordance with the national legislation of each Member State.]

[Second Variant 14

1. Member States should provide appropriate remedies against a person, reproducing a computer program without the consent of the right owner or who brings into circulation or distributes such copies.

2. An infringing copy of a computer program shall be liable to seizure in accordance with the national legislation of each Member State.]

Article 7

Term of Protection

Protection shall be granted for the life of the author and fifty years after his death; 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. 15

13 Reservation by the Danish delegation on the words "or devices referred to in paragraph 1(c)."
14 Variant proposed by the German delegation and supported by the Spanish delegation.
15 Reservation by the German delegation which considers that Member States should have the option of granting a longer term of protection.

7010/90
Article 8
Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to other legal provisions such as patent rights, trade marks, unfair competition, trade secrets, the law of contract and protection of semi-conductor products.

2. Protection under the provisions of this Directive shall also be available in respect of works created prior to [date in Article 9], without prejudice to any acts concluded and rights acquired before that date.

3. The provisions of this Directive shall be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunication sector or Decisions of the Council relating to standardization in the field of information technology and telecommunications. 16

Article 9
Final provisions

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to transpose this Directive not later than two years after its notification.

16 Scrutiny reservation by the Danish and German delegations on this paragraph, which forms part of the Presidency’s overall compromise proposal on protection of interfaces and reverse engineering.
2. Each Member State shall communicate to the Commission the provisions of national law which it adopts in order to transpose this Directive.

Article 10

This Directive is addressed to the Member States.
The following new recitals should be added to the Directive:

(a) Whereas for the avoidance of doubt it has to be made clear that only the expression of a computer program is protected and that 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; whereas to the extent that logic, algorithms and programming languages constitute ideas and principles which underlie a computer program, they are not protected by copyright under this directive.

(b) Whereas, although the unauthorised reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available, constitutes an infringement of the exclusive rights of the author, it has to be considered that under the following circumstances performance of any of these acts in order to modify the form of the code, by or on behalf of a person having a right to use a copy of the program, is legitimate and consistent with fair practice and must therefore be deemed to be authorised; whereas such circumstances exist when a modification of the form of the

17 The recitals form part of the Presidency's overall proposal on protection of interfaces and reverse engineering.

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code of a computer program is indispensable to obtain the necessary information to ensure that interoperable programs can be created or can function, that is to ensure the functioning of an independently created program with an existing program enabling these programs to function together in the ways such programs are intended to function; whereas Member States must ensure that such a modification does not conflict with a normal exploitation of the program and does not unreasonably prejudice the legitimate interest of the rightholder.

18 A definition of the term "interoperability" has to be further elaborated.
EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 18 June 1990

7085/90
EXT 2
RESTREINT
CRS/CRP 22
PI 35

EXTRACT
from the
DRAFT SUMMARY RECORD
of the 1435th meeting
of the Permanent Representatives Committee
(Part I)
held on Thursday 14 June 1990

Item 28: Preparation of the Council meeting (Internal Market) to be held on 20 June 1990
(docs. 6970/90 PI 31 and 7010/90 PI 32)
The Committee took note of the report from the Presidency in document 6970/90 PI 31 and the consolidated text of the proposal for a Directive in document 7010/90 PI 32.

With regard to the Presidency’s compromise proposal on protection of interfaces and reverse engineering, annexed to document 6970/90 PI 31, which incorporates elements of "fair use" into an exemption from copyright which would specifically allow reverse engineering of computer programs for defined purposes under defined circumstances, the Committee:

- gave its preliminary approval to the general approach adopted by the proposal as a package on the related questions of protection of interfaces and reverse engineering;

- noted, however, that the preliminary approval of the Spanish delegation was limited to the reverse engineering aspects of the proposal;

- emphasized that its preliminary approval was subject to further consideration in the light of the European Parliament’s opinion when received;

- instructed the Working Party on "Intellectual Property" to clarify certain concepts used in the proposal, and in particular to elaborate a more detailed definition of interoperability;
agreed, in the absence of the European Parliament's opinion and bearing in mind that this subject was discussed by the Internal Market Council on 14 May 1990, that it was not necessary to proceed to discussion of this proposal at the Internal Market Council meeting of 20 June 1990.

The Committee noted with approval the progress made on the proposal for a Directive and agreed to consider at one of its subsequent meetings the points of disagreement set out under points 7, 8 and 9 of the report in document 6970/90 PI 31.
**I

REPORT

drawn up on behalf of the Committee on Legal Affairs and Citizens Rights

on the proposal from the Commission to the Council for a directive on the legal protection of computer programs (COM(88) 816 final - Doc. C 3-56/89)

Rapporteur: Mrs M. SALEMA

- PART A: Draft legislative resolution

Opinions
By letter of 3 April 1989, the President of the Council of the European Communities consulted the European Parliament, pursuant to Article 100a of the Treaty, on the proposal from the Commission to the Council for a directive on the legal protection of computer programs (Doc. C 3-56/89 - COM(88) 816-SYN 183).

At the sitting of 27 July 1989, the President of the European Parliament referred this proposal to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Energy, Research and Technology for their opinions.

At its meeting of 20 September 1989, the Committee on Legal Affairs and Citizens' Rights appointed Mrs SALEMA rapporteur.


At the last meeting, the committee adopted the draft report together with the draft legislative resolution by 18 votes to 8, with 2 abstentions.

The following took part in the vote: Stauffenberg, Chairman; Vayssade and Rothley, Vice-Chairmen; Salema, rapporteur; Anastassopoulos, Bandres Molet, Blak, Bontempi, Bru Puron, Coimbra Martins (for Marinho), Cooney, Garcia Amigo, Inglewood, Janssen van Raay, Medina Ortega, Merz, Marques Mendes, Oddy, Patterson, Pinxten (for Malangre), Price, Rogalla, Schmid, A. Simpson, Valent, van Outrive and Zavvos.

The opinions of the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Energy, Research and Technology are attached.

The draft report was tabled on 29 June 1990. The explanatory statement will be published separately.

The deadline for tabling amendments to this report will appear on the draft agenda for the part-session at which it is to be considered.
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Annex I: Opinion of the Committee on Economic and Monetary Affairs and Industrial Policy
Annex II: Opinion of the Committee on Energy, Research and Technology
The Committee on Legal Affairs and Citizens' Rights hereby submits to the European Parliament the following amendments to the Commission proposal, together with a draft legislative resolution:

Proposal for a Council directive on the legal protection of computer programs.

Text proposed by the Commission

Amendments presented by the Committee on Legal Affairs and Citizens' Rights

Article 1

Amendment No. 1

Replace the first two paragraphs with the following:

1. Member States shall protect computer programs, including their preparatory design material, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works.

2. Exclusive rights shall be conferred by the provisions of copyright laws. Protection shall be accorded to computer programs as literary works.

Amendment No. 2

New paragraph 2a

2a. For the purposes of this Directive a computer program shall be defined as any sequence of instructions intended to be used, directly or indirectly, in a data-processing system in order to carry out a function or obtain a specific result, independently of its form of expression.

The preparatory design material, technical documentation and users' manuals associated with a computer program shall enjoy the same protection as the program itself.
3. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

4. (a) A computer program shall not be protected unless it satisfies the same conditions as regards its originality as applied to other literary works.

(b) Programs generated by means of a computer shall be protected in so far as they satisfy the conditions laid down in point (a).

Article 2

1. Subject to the following paragraphs, the author of a computer program is the natural person or group of natural persons who has created the program.

2. In respect of computer programs created by a group of natural persons, the exclusive rights shall be exercised in common unless otherwise provided by contract.

This definition of a computer program shall also extend to programs generated by the use of another program.

Amendment No. 3

3. Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any aspect of a program, including its interfaces, shall not be protected by copyright under this Directive.

Amendment No. 4

4. A computer program shall be protected if it is original in the sense that it is the result of the author's own creative intellectual effort. No other criteria shall be applied to determine its eligibility for protection.

Amendment No. 5

2. In respect of computer programs created by a group of natural persons, the rights conferred by the protection accorded by Article 1 shall be exercised in common unless otherwise provided by contract.
3. Where a computer program is created under a contract the natural or legal person who commissioned the program shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract. Unchanged.

Amendment No. 6
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 shall be entitled to exercise all economic rights in the program so created, unless there are contractual arrangements to the contrary.

Amendment No. 7
5. In respect of programs which are generated by the use of a computer program, the natural or legal person who causes the generation of subsequent programs shall be entitled to exercise all rights in respect of the programs, unless otherwise provided by contract. Article 3 unchanged

Delete paragraph 5.
Article 4

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 in whole or in part, by any means, in any form, and for whatever purpose. Where such operations as loading, viewing, running, transmission or storage of the computer program necessitate a permanent or temporary reproduction of the program, such acts of reproduction shall be subject to authorization by the right-holder;

(b) the translation, adaptation, arrangement and any other modification of a program and the reproduction of the results thereof;

(c) Unchanged
Article 5

Exceptions to the restricted acts

1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right-holder, in so far as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purposes of its use shall require the authorization of the right-holder.

2. Where a computer program has been sold or made available to the public by means other than a written licence agreement signed by both parties, the exclusive right of the right-holder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.

Amendment No. 9

1. In the absence of any contractual provisions to the contrary, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right-holder in so far as they are necessary for the use of the program for the purposes for which it was intended or for its preservation in relation to such use.

2. Where a copy of a computer program has been made available to the public in a legal manner, and in the absence of contractual provisions to the contrary, the right to authorize rental shall not be exercised to prevent normal use of the program in non-profit making public libraries.

Amendment No. 10

(New paragraph 3)

Notwithstanding the provisions of Article 4(a), the legitimate owner of a copy of a program may, without having to request the authorization from the right-holder, observe, study or test the working program in order to determine its underlying ideas, principles and other characteristics where these are not protected by copyright, in the course of loading, viewing, running, transmission or storage in the execution of his contractual duties.
Amendment No. 11

Article 5a (new)

Notwithstanding any contractual arrangements to the contrary, the rights enumerated in Article 4(a) and (b) shall not be exercised by the author to prevent any act necessary to ensure the maintenance of the program and the creation or operation of interoperable programs. This option may only be exercised by the licensee on his own behalf and only where the following conditions are fulfilled:

(a) the information necessary to achieve interoperability shall not have been published or made available previously;

(b) the retrieval of information shall be confined to the parts of the original program which are necessary for the achievement of this aim;

(c) the information retrieved may not be communicated to third parties except in so far as this is necessary for the operation of the second program;

(d) the information retrieved may not be used to create or market a substantially similar program.

Article 6 unchanged

Article 7

Term of protection

Amendment No. 12

Protection shall be granted for 50 years from the date of creation.

Protection shall be granted for 50 years from 1 January of the year following publication of the program, or, where a program has not been published, its creation.
Article 8

1. The provisions of this Directive shall be without prejudice to any legal provisions concerning patent rights, trade marks, unfair competition, trade secrets or the law of contract in so far as such provisions do not conflict with the principles laid down in the present Directive.

2. The provisions of this Directive are applicable also in respect of works created prior to [date in Article 9].

Amendment No. 13

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 or the law of contract.

2. The provisions of this Directive are applicable also to programs created prior to 1 January 1993.

Article 9

Final provisions

Amendment No. 14

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to comply with this Directive by [date].

2. Member States shall ensure that they communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to comply with this Directive by 1 January 1993.

2. Member States shall ensure that they communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.
3. A Consultative Committee shall be set up by the Commission, to consist of representatives of the Member States and of representative associations of authors and producers of computer programs with the objectives of:

(a) providing the Commission with information on research and on problems arising from the implementation of this Directive;

(b) drawing up proposals with a view to possible changes in the rules which may be required for more effective realization of the Community's objectives.

4. The Commission shall take on all the necessary initiatives in order to ensure the realization, at national and Community level, of the objectives set out in this Directive.

5. The Commission shall forward to Parliament and to the Council, on a biennial basis, a report on the implementation of this Directive at national and Community level.
A

LEGISLATIVE RESOLUTION

embodying the opinion of the European Parliament on the proposal from the
Commission to the Council for a directive on the legal protection of computer
programs

The European Parliament,

- having regard to the proposal from the Commission to the Council
  (COM(89) 816 final - SYN 183)\(^1\),
- having been consulted by the Council pursuant to Article 100a of the EEC
  Treaty (Doc. C 3-56/89),
- having regard to the report of the Committee on Legal Affairs and Citizens’
  Rights on the legal protection of computer programs and the opinions of the
  Committee on Economic and Monetary Affairs and Industrial Policy and the
  Committee on Energy, Research and Technology (Doc. A 3-173/90),
- having regard to the Commission position on the amendments adopted by
  Parliament,

1. Approves the Commission proposal subject to Parliament’s amendments and in
   accordance with the vote thereon;

2. Calls on the Commission to amend its proposal accordingly, pursuant to
   Article 149(3) of the EEC Treaty;

3. Asks to be consulted again should the Council intend to make substantial
   modifications to the Commission proposal;

4. Calls on the Council to incorporate Parliament’s amendments in the common
   position that it adopts in accordance with Article 149(2)(a) of the EEC
   Treaty;

5. Instructs its President to forward this opinion to the Council and
   Commission.

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\(^1\) OJ No. C

DOC_EN\RR\91422 - 13 - PE 136.025/fin.
OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Economic and Monetary Affairs and Industrial Policy

Draftsman: Mr K. Pinxtten

The Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr Pinxtten draftsman on 20 September 1989.

It considered the draft opinion at its meetings of 28 September 1989, 29 November to 1 December 1989, 18-20 December 1989, 22-23 January 1990, 30 January to 1 February 1990, 20-22 February 1990 and 19-21 March 1990 and at the latter meeting adopted unanimously the opinion’s conclusions, together with the amendments contained therein.

The following took part in the vote: Beumer, Chairman; Desmond and de Montréal, Vice-Chairmen; Pinxtten, draftsman; Barton, Bernard-Reymond, Cassidy, Caudron, Cox, Falconer (for Crawley), Fitzgerald (for Ruiz Mateos), Herman, McCarti (for Hoppenstedt), Mattina, Megret, Merz, Metten, Patterson, Porto (for Visentini), Read, Roth (for Ernst de la Graete), Siso Cruellas, Smith, A. (for Seal), van der Waal (for Lataillade) and von Wogau.
1. There can be no doubt as to the importance of computer software for the EC economy. The Commission's Green Paper on copyright estimated the Western European market for system software at US $ 9.5 billion in 1985. Our main suppliers of software, however, are American in origin; in 1985 American companies accounted for between 65% and 85% of the Western European market for system software, and about 55% of the market for application software. US imports of software, by contrast, are minimal. As a result of the 'computerization' of our society this sector is still expanding, and the demand for software within the EC is greater than that in the US at the moment. The development of the Community software industry is therefore of great importance for the economy of the European Community, and particularly for its industrial and technological future. To this end it is essential to create an appropriate legal framework within which the sector can develop. In this respect European producers of software have hitherto been at a disadvantage as regards competition with countries with a long-standing computer industry (particularly the US), which have had appropriate legal measures for the protection of their software industry for some considerable time now. After all, the authors of computer programs are very vulnerable without legal protection for their creations, given the lack of technical anti-copying devices. In view of the considerable investments and the creativity and research to which computer programs owe their existence, the lack of proper legal protection against unlawful copying severely hinders and discourages the marketing of such programs. Accordingly a number of Member States have taken statutory measures for the legal protection of computer programs, while others are in the process of developing similar initiatives.

2. The purpose of the directive in question is to establish the necessary legal protection for computer programs throughout the Community. Naturally the Committee on Economic and Monetary Affairs and Industrial Policy gives its fullest support to this aim. The present opinion will examine the extent to which the proposal for a directive provides for the necessary legal protection for the software industry in the Community, while maintaining enough flexibility to promote innovation through competition.

3. In theory there are a number of different ways of protecting computer programs: patent protection, contracts, legal protection tailored specifically to computer programs, and protection by copyright. If the software industry in the Community is to be given the legal security which it needs, then protection measures must be made as uniform as possible throughout the Community. Discrepancies in the legislation of the various Member States could lead to distortion of competition and thus have an adverse effect on the operation of the internal market. However, the choice of an appropriate form of legal protection should also take into account the need for protection outside the Community. After all, a form of legal protection confined to the EC, with no legal force beyond the borders of the Community, would be limited in its field of application and ineffective, given that it could be circumvented outside the EC. It is therefore important to bear in mind the need to guarantee a certain degree of reciprocity. In view of this, copyright protection would seem to be the best solution. Copyright protection is laid down in the Berne Convention, which has now been ratified by 89 countries, a recent accession being that of the US. This Convention provides for the protection of the works of authors who are nationals of one of the states party to the Convention, who are normally resident there or who first published their work there. Such a choice would guarantee maximum international protection, while avoiding potential trade policy problems.
4. The decision to opt for copyright protection as laid down in the Berne Convention will, however, involve a number of problems. A number of terms relating to copyright are inadequately defined and may give rise to differences of interpretation and hence to discrepancies in the administration of justice and the enforcement of the Convention in the various Member States. Efforts should therefore be made to define the technical terms and measures as precisely as possible in the directive, in order to ensure that the law is administered as uniformly as possible. It is important to limit the scope for variations in interpretation as far as possible, although it is inevitable, given the decision to opt for copyright protection, and the powers of the national courts, that the courts of the various Member States will to some extent put their stamp on the mode of enforcement in each country.

5. Article 1(2) of the proposal for a directive confers copyright protection on computer programs as literary works. This means that - as stated in paragraph 3 of the same Article - protection is accorded to the expression, but not to the ideas and principles. Paragraph 3 lists other exclusions: logic, algorithms, programming languages and interface specifications, inasmuch as these represent ideas and principles. These do not, in fact, add anything to the general exclusion of 'ideas and concepts'. However, reactions already received to the proposal for a directive indicate that these terms are susceptible of different interpretations, so that their inclusion may result in discrepancies in the administration of justice. It is for this reason that one of the amendments proposed deletes these additional exclusions.

6. A big advantage of applying copyright protection to computer programs as literary works is that it enables a balance to be maintained between, on the one hand, necessary protection against unlawful reproduction through protection of the means of expression and, on the other, innovation which is a product of competition, as no protection is conferred upon ideas and principles. However, the precise definition of the terms 'expression' and 'ideas and principles' is also open to different legal interpretations.

7. Refusal to make available the information regarding the interfaces and access protocols needed in order to produce a compatible system and to guarantee interoperability is not generally in the interest of hardware and software producers. This accounts for the prevailing policy of openness and the companies' willingness to introduce certain sections of their programs into the public domain, in order to achieve greater compatibility between the various systems. A genuine internal market will not exist until the best possible provision has been made to ensure the compatibility of hardware and software. With this aim in mind, every effort should be made to advance progress towards standardization under the auspices of the International Organization for Standardization (ISO), to whose activities the producers make a voluntary contribution. In the light of efforts to achieve compatibility and interoperability then, the introduction of more thorough protection specifically for interfaces and access protocols is quite out of the question. However, those interfaces and access protocols which consist of computer programs must enjoy the protection for which provision is made in the present directive. As no specific protection for interfaces is included in the directive, the general rule on the protection of computer programs being applicable to those consisting partly of such a program, there is no reason to refer specifically to interfaces in the directive. It is therefore proposed that the specific reference in question be deleted.
Those producers who enjoy a position of power in the fields of software and hardware alike have a particular interest in keeping information about interfaces secret. However, if they were to abuse the protection accorded to them under the copyright, the regulations on fair competition would come into play and an investigation would need to be held to ascertain whether they were abusing their dominant position.

8. Paragraph 4 of Article 1 stipulates that protection be made conditional upon the criterion of originality as it applies to literary works. The interpretation in law of the concept of 'originality' (as it applies to) ... other literary works' varies considerably at international level and between the various Member States. In this connection the Commission observes in its explanatory memorandum that 'the only criterion which should be applied to determine the eligibility for protection is that of originality, that is, that the work has not been copied. No other aesthetic or qualitative test should be applied'. Although we can agree with this interpretation, the interpretation of the term in law is far more restrictive in certain cases (such as the Inkasso case). It therefore seems advisable to incorporate a more precise definition of the term 'originality' in the directive, in order to avoid differences of interpretation under the law.

9. The inclusion in paragraph 4(b) of Article 1 of specific provisions for programs generated by computers does not add anything of substance. Since the result would be the same without this specific provision, it is proposed that it be deleted.

10. Article 4 contains provisions governing restricted acts. The second sentence of paragraph (a) of Article 4, 'in so far as they necessitate a reproduction of the program in part or in whole, loading, viewing, running, transmission or storage of the computer program shall be considered restricted acts', adds nothing to the general rule and should therefore be deleted. Opinions on restricted acts vary widely. Certain parties are very much in favour of authorizing reverse engineering under certain circumstances. If this is made legal, however, legal protection for computer programs will virtually cease to exist.

11. Article 5 deals with exceptions to the restricted acts described in Article 4. The aim of this article is to enable users to use their computer programs in the normal ways. As the only article in the directive whose purpose is to protect users, it ought to ensure that all users who have acquired a computer program in a legal manner can carry out all the operations associated with the normal use of a computer program without having to obtain authorization. Such operations include making a back-up copy and adapting a program to some degree to the user's particular needs. The draft directive draws a distinction between computer programs issued on licence and those which the user has acquired in some other legal manner, such as purchase of a copy of a program with or without a written contract, lease, hire, etc. It is only for users who have not concluded a written licence agreement in respect of the computer program which they have acquired that the directive guarantees the right to carry out all the operations necessarily associated with the normal use of a computer program, without the need to obtain authorization for such use. The users of computer programs which are subject to a written licence agreement are not protected in any way by the directive, nor are they guaranteed the right to use their computer programs in the normal ways. The Commission itself acknowledges in its explanatory memorandum that: '... in some areas, the balance of power between producers and users of computer
programs may not permit the latter to negotiate equitable contract conditions, due to the market strength of some software suppliers'. To protect users against the dominant position of some suppliers of software, the directive should therefore incorporate provisions guaranteeing the right to normal use of computer programs supplied on the basis of licence agreements and prohibiting the incorporation into licence agreements of clauses under which acts associated with the normal use of a computer program are made subject to authorization from the right-holder.

12. The right to use computer programs in public libraries must not be restricted to programs acquired other than by a written licence agreement; it should be extended to all computer programs acquired in a legal manner.

In the light of these considerations the rapporteur proposes that Article 5 be amended.

13. Article 6, which relates to secondary infringements, states, inter alia, that a person who knows or has reason to believe that he is in possession of an infringing copy of a program is guilty of infringement. However, if such a person was genuinely unaware of this at the time he acquired the program and did not learn that the program was an infringing copy until it was in his possession, he cannot be said to be guilty of infringement and cannot be punished for that offence. An amendment to rectify this situation is accordingly proposed.

14. Article 7 proposes that protection be accorded for a period of fifty years: this is the period of copyright protection laid down for literary works in the Berne Convention. It may be argued that a shorter period of protection might be more appropriate for computer programs. However, the period of protection laid down in the Berne Convention must, of necessity, be respected. A change in the length of the period of protection laid down in this Convention may be considered in the near future, and it would therefore be preferable to refer to the period of protection laid down in the Convention rather than to stipulate an absolute period of time. The Commission's proposal that the period of protection should start on the date of creation of the computer program should likewise be taken up. In the case of computer programs it would be inappropriate for the period of protection to start on the date of the author's death, and this would unnecessarily prolong the period of protection.

CONCLUSIONS

15. In view of the above considerations the Committee on Economic and Monetary Affairs and Industrial Policy requests the Committee on Legal Affairs and Citizens' Rights, as the committee responsible, to make the following amendments to its report:
ARTICLE 1(3)

3. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

Amendment No. 1

3. 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 and principles. (Delete rest of paragraph).

ARTICLE 1(4)

4(b) Programs generated by means of a computer shall be protected in so far as they satisfy the conditions laid down in 4(a) above.

Amendment No. 2

Delete 4(b)

ARTICLE 4(a)

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

Amendment No. 3

(a) the reproduction of a computer program by any means and in any form, in part or in whole. (Delete rest of paragraph).
ARTICLE 5(1)

1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right-holder, in so far as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purpose of its use shall require the authorization of the right-holder.

Amendment No. 4

1. Where a computer program has been made available to the public in a legal manner, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right-holder, in so far as they are necessary for the use or scientific analysis or testing of the program. (Delete second sentence).

ARTICLE 5(2)

2. Where a computer program has been sold or made available to the public by means other than a written licence agreement signed by both parties, the exclusive right of the right-holder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.

Amendment No. 5

2. Where a computer program has been made available to the public in a legal manner, the right-holder may not prevent the normal use of the program by the public in public libraries.

Amendment No. 6

Article 5(3): add the following new paragraph:

3. A licence agreement or other written agreement must not contain any clauses which conflict with the provisions laid down in paragraphs 1 and 2.
ARTICLE 6(1)

1. It shall be an infringement of the author's exclusive rights in the computer program to import, possess or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

Amendment No. 7

1. It shall be an infringement of the author's exclusive rights in the computer program to import, acquire or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

ARTICLE 7

Protection shall be granted for fifty years from the date of creation.

Amendment No. 8

The period of protection shall be that for which provision is made in the Berne Convention, from the date of creation.
ANNEX II

OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Energy, Research and Technology

Draftsman: Mr A. TURNER

At its meeting of 30 August 1989, the Committee on Energy, Research and Technology appointed Mr TURNER draftsman of the opinion.

The committee considered the draft opinion at its meetings of 26 October and 8 November 1989.

It adopted the conclusions contained therein on 8 November 1989 by 6 votes to 3, with 7 abstentions.

The following took part in the vote: Sälzer, Vice-Chairman and acting Chairman; Lannoye and Adam, Vice-Chairmen; Turner, rapporteur (for Seligman); Anger, Bettini, Breyer, Gasoliba I Böhm, Görlich (for Lagorio), Linkohr, Pierros, Pompidou, Porrazzini, Quisthoudt-Rowohl, Regge, Rovsing, Schlee, Verwaerde and West.
INTRODUCTION

1. The proposal for a Directive submitted to the European Parliament aims to strengthen and make uniform throughout the Member States of the European Community legal protection for computer programmes.

The proposal in its present form will not help to create a legal environment capable of eliminating any disparities with regard to the free movement of computer programmes within the Community and will certainly not create conditions favourable to the establishment of a strong European industry in this field.

2. A remarkable feature of the present proposed Draft Directive is that copyright protection would be given to a computer programme as a 'literary work' (which is in fact exactly what it is when first created) but that this 'work' is something which the public can neither read, appreciate or understand. This is a remarkable departure from principle. The basic rule of copyright is that copyright protection is only given to the actual literary 'form of expression' which an author of a work, for instance a novel, has created but that the ideas (for instance, the plot underlying the 'work') are not. Thus for instance a literary work describing a new solution to some problem (which might for instance be a political, social, economic or technical problem) is only protected in so far as the actual 'literary form of expression' is concerned, while the ideas and solutions or principles which the author is putting forward are not protected.

3. For this reason the Draft Directive under Article 1.3 quite correctly excludes protection from the ideas, principles, logic algorithms or programming languages underlying a software programme. However, in the case of computer software programmes the public cannot find out what these ideas, principles, logic, algorithms or programming languages underlying the programme are except 'by decompiling' the 'object code' (that is the machine code comprising an apparently meaningless, immensely long series of zeros and ones) by means of a decompiler which is capable of analyzing the 'object code' and investigating and interrogating it in order to discover the 'source code' which lies behind the 'object code'. The originator of the programme will have written his novel programme in source code and it will have been translated into object code. A member of the public who is attempting to study the programme will decompile or translate the object code into a source code which he will be able to study to see what the ideas, principles and logic of the original source code are. The source code into which the member of the public translates the object code will not be identical to the original source code which the originator wrote, but it will be very similar. The process is rather like translating an original novel from French into English and then re-translating the English back into French. The English version and the second French version will infringe the copyright of the first version but the last will not be identical to the first.

4. The critical fact to recognize is that because of the terms of Article 4, all the above steps undertaken by a person who has bought a copy of the original programme (in object code) from the originator will be infringement, and each of the above acts will be forbidden acts. This would be a novel development in copyright law, because it would be
analogous to saying that copyright protection of a book prevented the purchaser of a book from reading it. It would have, of course, a serious restrictive effect on innovation and competition within the EC because protection given to programmes would be such that others entering or developing in the same field would be in the dark as to the state of the art. In the case of patent protection a protective monopoly is given preventing use of an invention but the invention itself is published so that competitors and the public in general gain knowledge of it. It would seem proper, if possible, to obtain a similar balance between the rights of industrial property on the one hand and the public on the other in the field of copyright relating to computers as exists in other industrial fields.

5. If this balance were achieved so that the public knew the subject of the copyrighted programme, the fact that the public had this knowledge would not mean that they were entitled to obtain economic benefit by copying the programme, because the whole purpose of the protection is to give commercial protection to copyrighted programmes against copying. Protection of the form of expression of a programme should not require that the public should be kept from seeing what the subject matter protected is and be prevented from appreciating the principles, ideas, logic and algorithms underlying it (which are not protected) so long as they do not copy the subject matter when designing their own programmes. As the draft now stands, under Article 4 the operation of a computer programme so as to show it on the screen or to print out the programme would be an infringement, as would be the operation of the computer in such a way as to use the programme to direct the actions of the computer such as by loading the programme, viewing, running, transmitting or storing it. As will be seen, the present proposal would not only keep knowledge of the protected form of expression of the programme from the public, but would prevent them knowing its unprotected features, ie the underlying principles, ideas, logic and algorithms.

6. If the Directive provided that the public could 'read' the programme by decompiling it without committing infringement it could be difficult for a member of the public who had read and studied it to claim if he subsequently wrote a similar programme, that he had not in fact copied it. In order to prove that he had not copied he would have to show that his programme was substantially different in its 'form of expression' from the original, although, of course, he would be entitled to use the ideas, principles, logic, algorithms or programming languages underlying the original programme as these are not protected by copyright. There have been methods developed in industry making it quite clear that copying of the 'form of expression' has not taken place, such as the so-called 'clean room' procedure whereby a company divides its operations which are directed towards studying a competitor's programmes, from its creative operations in making its own programmes. The ideas, principles, logic, algorithms or programming languages discovered by studying a competitor's programme can be freely used in the creative operations of the company, but the latter employees will have these passed on to them by the employees who have decompiled the original programme without any information as to the form of expression used by the originators. In this way the chain of information is broken proving that copying of the form of expression has not taken place. From a technical and economic point of view it is essential that computer programmes should not be kept secret for the public in Europe, more especially as in American law decompiling has not been prevented by
Statute or by the Courts, and in a number of cases the fact that
decompilation has taken place has not given rise to any legal objection.
Decompilation for the purposes of research and study is also permitted, and
in Japan a right of private study is recognised. In both cases, of course,
it is a condition of the law that no copies of a programme are reproduced
for commercial use or sale and no commercial use may be made of the
programme to help in the design of the form of expression of another
programme. Nor, of course, can a copy made for the purposes of
decompilation be reproduced for any purpose other than research or study.
Thus, for instance, it could not be published free as this would be highly
damaging to the copyright owner. As a consequence the Directive should
provide for fair use of the subject matter of the copyright for the
purposes only of study and research.

If in Europe decompilation were not permitted, US and Japanese industrial
competitors could decompile European companies' programmes in their own
country, but European companies could not decompile US or Japanese (or
other European) programmes in Europe. This would quite obviously have a
very serious effect on European competitiveness, and a European law which set
up such a situation could only be regarded with very considerable concern
and surprise.

Explanatory Note on the Nature of Interfaces

I. Programme interfaces are programmes or parts of programmes which enable one
computer to operate with another or with some other facility or with a
piece of exterior software, or to enable two pieces of independent software
to operate together. Thus interfaces may be the connection between a
piece of hardware and a piece of software, or between two pieces of
hardware connected by a piece of software, or between two pieces of
software. Programmes whether they are 'interface' programmes or not should
be and are protected by copyright. When a user of a computer or software
wishes to connect a piece of his own hardware or software to another piece
of hardware or software he will need to know sufficient details of the
interface programmes involved to be able to make the connection. It is
normal for suppliers of software to provide a written 'specification' of
the interfaces so that the customer can do this. Indeed IBM gave an
undertaking to the Commission (1984) to provide such information to
companies in the EC in the celebrated action. Such specifications are
written literary works and as such are protected by copyright just like any
written literary work. Needless to say, any ideas, principles, logic or
algorithms underlying such specifications are not protected by copyright
any more than they would be for any other literary work.

II written specifications of interfaces are not provided by the seller of a
piece of hardware or software, or if the written specification provided is
insufficient, it will be necessary for the purchaser or a person wishing to
design an independent piece of soft- or hard-ware to interact with the
programme to study the software of the interface. To do this he will need
to decompile the original programme, and to be entitled to do so as
explained, in relation to software programmes in general, in paragraph 6
and following, above. There should be no distinction in this respect
between interface programmes and other software programmes.
The proposals suggested above, therefore, and the amendments proposed below for dealing with the problems of paragraph 6 will equally deal with the problems of interface programmes.

Furthermore, the provision of an interface programme to mesh in with the interface of an existing piece of hard- or soft-ware will not normally infringe the copyright in the first interface programme, because it will be the "mate" of the first - in the same way that the male plug of a domestic electric appliance is not the "same design" as the female plug in the wall, the one meshing in with the other but being of different shape. Thus copyright in interface programmes will not prevent those wishing to design interfaces to them from doing so, so long as there is no bar on decompiling to enable the first programme to be understood.

Relationship to Community law on competition

It has been said that elements of Community competition law should not be included in this Directive and that the Directive should be confined to copyright law per se. This is correct. However, it is a misleading and elementary error of Community law to suggest (as has indeed been done) that the setting out of the exclusive rights in Article 4 to reproduce by "loading, viewing (or more correctly 'displaying'), running, transmission and storage of the complete programme" or "adaptation" of it do not in any way limit the power of the competition Directorate of the Commission in carrying out its responsibilities in the field of competition law. If such exclusive rights are to be given by Article 4, it is within the monopoly of the copyright owner to grant or withhold simpliciter any one or more of these rights. Against such a limited licence, granting some but withholding other of these rights by the copyright owner to the purchaser, the competition Directorate would have no jurisdiction to act because it is not possible for the Directorate to allege that the simple withholding of a portion of a monopoly right is contrary to the EEC competition law. Thus if the copyright owner gave the right to the purchaser only of the "loading, viewing (more properly 'displaying'), running, transmission or storage" for the purpose of operating his computer (thus excluding the right to do so for the purpose of reading, studying or researching a programme or the ideas, principles, algorithms, logic or programming languages underlying them) the Commission would be powerless to object. Competition law cannot therefore protect the public right to see and study a programme and the ideas, principles, algorithms, logic or programming languages lying behind it unless specific conditions are inserted in this Directive along the lines proposed below.

Specific reference to ideas, principles, logic, algorithms, and programming languages underlying a programme

It has been suggested that a specific reference to the ideas, principles, logic, algorithms, and programming languages underlying a programme is unnecessary because it is inherent in part of copyright law. It would be unwise not to make this specific reference because such a specific reference is made by a Statute in Japan specifically with regard to computer programmes and this was done to accord with the effect of US case law. If in Europe we did not include specific reference in the context of computer programmes to these exclusions, it would be possible to argue that
European law gave greater protection against the study and research into the uncopyrighted characteristics of a computer programme than is accorded in the US or in Japan which would of course have the same deleterious effect on European competitors vis-a-vis the US and Japan on exactly the same lines as set out above with regard to the question of decompilation and interfaces.

Necessary amendments to meet the above issues include

Article 1, paragraph 1, add at the end.
"The exclusive rights shall not include the right to prevent any act done exclusively and necessarily for the study and research of the expression in any form of a computer programme, or any act necessary to study or research the ideas, principles, logic, algorithms, or programming language underlying a programme.

Article 4(a), delete.
"Viewing".

Add, after "reproduction", the words "other than temporary copying, moving and storage operations which leave no trace once the operation has terminated."

Article 5, add new paragraph 3.
"The reproduction of a computer programme by any means and in any form, and the adaptation of a computer programme, shall be permitted for the purposes of study and research of the form of expression of the programme and of the ideas, principles, logic, algorithms, and programming languages underlying the programme, provided that no use is made of such reproduction which conflicts with a normal exploitation of the work by the author or unreasonably prejudices the interests of the author."

Article 6(2), add at end.
"... except for the sole purpose of studying or researching the expression of the programme or the ideas, principles, logic, algorithms or programming language underlying it."

Alternatively, in accordance with the Berne Convention we could replace all amendments to Articles 1, 5 and 6 by

5 (new)
Subject to contractual arrangements to the contrary, the rights enumerated in Articles 4a and 2 above shall not be exercised to prevent any act done exclusively and for no other purpose than for the study and research of the expression in any form of a computer programme or any act necessary solely for the study and research of the ideas and principles underlying a program. If the results of such studies and research are used in a way which prejudices the rightholders' legitimate economic interests, such analyses will still be deemed to be an infringement.

1 Note the Berne Convention refers to "private study and research". The word "private" could be retained so long as it is made clear expressly that this does not preclude study and research by companies so long as this does not conflict with the normal exploitation of the work by the author or unnecessarily prejudice the interests of the author.
**I
REPORT
drawn up on behalf of the Committee of Legal Affairs and
Citizens' Rights
on the proposal from the Commission to the Council for a
directive on the legal protection of computer programs
(COM(88) 816 final - Doc. C3-56/89)
Rapporteur: Mrs M. Salema

Part B: Explanatory statement
EXPLANATORY STATEMENT

The completion of the large area without internal frontiers provided for in Article 8A of the EEC Treaty, as modified by the Single European Act, entails the free movement of goods and freedom to provide services in the twelve EEC Member States and hence the harmonization of national laws which may in some way affect intra-Community trade.

More particularly, the Green Paper on copyright (COM(84) 300 final of 14 June 1984) also spoke of the need to harmonize those national laws relating to intellectual or industrial property which may lead to different treatment for a given product or activity in the various Member States. Of particular importance in this context are services related to information and the media (for example, 'television without frontiers') or to the electronics industry (the directive on semiconductors). The Community has a clear interest in ensuring that these activities and products are covered by an adequate legal framework so as to avoid artificial distortions within Community territory as regards both the exercise of activities and safeguarding the rules of competition.

Through the proposal for a directive in question, which is based on Article 100A of the EEC Treaty, the Commission intends to tackle the new, delicate and complex problem posed by the protection of computer programs. This is a relatively new market area for which (and this problem applies throughout the world) it has been difficult to define a clear legal framework. Unfortunately, the lack of regulations is leading to considerable instability in this market since, without adequate protection, there is no incentive to invest in research and to market products which may be immediately copied with no profits going to their creator.

There are various technical solutions available, for example, through mechanisms for safeguarding industrial property (registration, trade marks and patents) or through 'contractual' safeguards (licensing contracts under which the parties undertake to use the program correctly). However, since many countries are not parties to the international conventions on industrial property, the first solution would not be suitable as a means of protecting products for which there is now a worldwide market, while, as regards the second solution, the contractual mechanism based on licensing seems to be too complicated in view of the number involved.

For these reasons, legislation and jurisprudence in those countries which first developed computers have tended to apply by analogy the laws relating to copyright. These laws date back to the 1896 Berne Convention which, over the years, has been revised to take account of modern market requirements and the development of national legal systems.

In their present form, therefore, the laws relating to copyright seem to constitute the most widespread, effective and flexible system - albeit not the only one - for safeguarding computer programs, which are a somewhat indefinable concept.
Although there is no recognized definition of this type of product, and the Commission's decision not to give a precise definition in this, as in other points of the directive, understandable for fear that any autonomous definition on the part of the Community might result in restrictions for European producers and also distortions in the Community's external trade policy, most of the members of the Committee on Legal Affairs and Citizens' Rights nevertheless wanted to insert a definition of a computer program into Article 1, so as to make the subject of the directive clearer. It is understood, therefore, for the purposes of this directive, that a computer program is a whole sequence of instructions designed to be used, directly or indirectly, in a data-processing system to carry out a function or obtain a specific result, whatever its form of expression may be.

For greater clarity, as suggested in the opinion delivered by the Economic and Social committee, the directive should contain a reference to the Convention and the revised versions thereof. There is no need to quote the Berne Convention in full, however, since it does not refer explicitly to computer programs and it is therefore necessary to define further specific provisions for this product. Moreover, such provisions have already been adopted by many countries (USA, Japan, Germany, France, etc.) and it would therefore be useful if they could be harmonized at Community level. This is also in line with the wishes of the national authorities and most of the economic interest groupings involved.

The proposal for a directive could therefore be made even more clear if it is specified that the protection guaranteed extends to preparatory material for computer programs on a par with literary works under the Bern Convention.

The decision to use protection of copyright as the main means of safeguarding computer programs naturally involves certain difficulties as regards the distinction between ideas and principles (which in themselves may not be protected by copyright) and their concrete expression (which, on the other hand, may be protected by copyright). Indeed, whereas in literary works a distinction may be made between the plot and the novel, in the case of computer programs this distinction is not as easy, in particular as regards interfaces. The definition of copyright usually covers the following:

1. Communication protocols;
2. Operating systems and compiler languages and some of their codes;
3. Menus, display messages and graphics;
4. The allocation of computer control functions to specific keyboard operations;
5. Instructions written as machine code (not humanly perceivable) on which control of transmission, reception, processing and the flow of data between computers and the various parts of computers depends.

The choice of attributing these functions to the notion of 'ideas' or 'expressions of ideas' results in extremely important practical and economic consequences. Indeed, if these functions are not protected, anyone may have access to the program and obtain from it all the elements needed either to reproduce it or to use it in order to generate a new program. On the other hand, total inaccessibility of these functions would make it impossible not only to have access to the 'expression' of the idea but to the idea itself, which runs counter to the spirit of the Berne Convention. It is well known that the greatest pressure for liberalization comes from those countries, such

DOC_EN\RR\91791 - 4 - PE 136.025/fin./Part B
as Japan, which, although major producers of hardware, lag behind the United States and Europe in the production of software, which they are naturally keen to control.

The attempt to separate what is being protected from what is not, by using the usual distinction between 'ideas' and 'expressions of ideas', with specific reference to interfaces, is clarified by a proposed amendment to the text of the directive which reflects the need not to catalogue what is not protected, in view of the risks inherent in this kind of enumeration, and which also aims to extend the directive and make it more flexible, so as not to create unnecessary obstacles to access to programs. On the other hand, it would be useful to provide a clearer definition of the notion of 'originality' in this field which, in UK, German and French law (to give just three examples) is governed by different criteria. Thus a programme is original in the sense that it is the author's intellectual creation and other criteria need not be considered.

A particular problem arises as regards programs generated by another program. Although it is interesting in theory, the solution put forward in the Commission proposal seems somewhat premature. It seems preferable in this case, also, to wait and see whether the experience of the next few years shows that specific regulations are required at Community level. (It goes without saying that if Article 1(4)(b) is cancelled, Article 2(5) would also lapse).

On the question of the paternity of programs, Article 2(1) and Article 3(1) should be coordinated and provision should be made in Article 2 for legal persons and collective works to be protected by the directive. To this end, it would be advisable to specify that not only natural persons or groups of natural persons but, where this is permitted by national law, legal persons shall also be considered as authors of a computer program. A similar provision should be introduced in respect of collective works where these are deemed to be of significance in the eyes of the law in the various Member States. However, amendments to this effect were not adopted by the Committee on Legal Affairs and Citizens' Rights.

As regards Article 2(4) relating to computer programs created in the course of employment, it seems advisable to make it clear that the employer shall be entitled to exercise financial rights only when the program was created by the worker whilst carrying out his duties or on his employer's instructions, unless otherwise specified in the contract.

Article 4 lists the rights that are recognized by the directive. It accordingly sets out, in respect of the computer program sector, the principles of the Berne Convention. It should also be made clear and explained fully in subparagraph (a) and be indicated clearly in subparagraph (b) that 'adaptation' of a computer program also includes the possibility of translation, adjustment and any other modification of the program, as well as the reproduction of the results thereof, in accordance with the provisions of the Berne Convention.

Article 5 which deals with exceptions to the restricted acts under the terms of Article 4, has been substantially amended, in particular in order to ensure that under certain circumstances information may be retrieved from the program for the creation or operation of interoperable programs.
A new idea is also introduced whereby the legitimate owner of a copy of a program may observe, study or test it, without having to request the right-holder’s authorization, for the purpose of ascertaining its underlying ideas, principles and other characteristics, where these are not protected by copyright, in the course of loading, viewing, running, transmission or storage operations.

However, these amendments do not mean that it is permissible to sell programs which are ‘copies’ of the original program, i.e. illegal reproductions which constitute an infringement of copyright. The amendments are moreover unequivocal, since they do not allow any kind of ‘entrepreneurial piracy’.

The provisions of Article 6 form a corollary to the two previous articles and seem to be sufficiently clear. Article 7 introduces a new feature in respect of the provisions of the Berne Convention which fixes the term of protection on the basis of two factors: the life of the author plus an average period of 50 years. If this new feature proposed by the directive is incorporated into national law, it is to be hoped that it will not lead to conflicts between the Member States and the other parties to the Berne Convention. In any event the beginning of the period of protection is fixed taking into account the publication of the programme.

As regards Article 8, the rapporteur is of the opinion that paragraph 1 should be reworded so as to make it clear that the safeguarding of copyright may be combined with other forms of protection deriving from patent rights, trade marks, etc., while at the same time specifying that this list is not exhaustive.

Paragraph 2 should specify that the protection accorded by the directive also extends to works created before the entry into force of the directive.

The rapporteur proposes that the following be included in the final provisions:

- a fixed date for the entry into force of the directive (Article 9(1)). 1 January 1993 seems to be a reasonable deadline to allow the incorporation of the provisions into national law (other deadlines relating to the adoption of the directive or its notification as provided for in the Treaty might lead to ambiguities);

- the setting-up of a consultative committee in which, in addition to the national authorities, the most representative associations of producers/authors of computer programs in the Community would be represented (there is a clear need for this in a constantly-developing sector so that the Community authority can be given direct information on legal or market developments, thereby enabling it to propose the necessary changes to the directive);

- a further provision specifying that periodic reports on the application of the directive in the Member States shall be sent to the Council and the Parliament;
Lastly, a provision empowering the Commission to take all the necessary measures at Community and international level to ensure that the objectives of the directive are achieved. It is clear that, as is already the case for the directive on the protection of semiconductors, the new regulations will require the Community to be represented in conjunction with its Member States in negotiations on the revision of the existing international Conventions.

CONCLUSIONS

This proposal for a directive is just one of the first steps being taken by the Community in the complex sector of the exercise of rights relating to intellectual property. The provisions of the Treaty recognize the sovereignty of Member States in this field, in particular as regards the existence and the nature of rights in addition to their protection (Article 222 of the EEC Treaty), but the decisions of the Court of Justice have made it clear that the Community can take action in respect of laws relating to the exercise of these rights. In this, as indeed in other cases, different forms of protection in the various Member States can lead to distortions as regards installation or the exercise of activities in Community territory.

A study of the above-mentioned provisions shows on the one hand that there is a clear need for judicious use of Community law, given that the sector is subject to many different types of legislation; (international agreements, Community and national regulations) and also that it is a relatively new field for which even leading countries such as the USA, Japan, Germany, the United Kingdom and France have not yet come up with entirely clear and unequivocal solutions, particularly as regards the most complex points of reverse engineering and the moral rights of the author. On the other hand, as explained above with regard to the amendments to Article 5, it was decided to open up this area, with the clear purpose of allowing the interoperability of systems and thus helping to create more computer programs and increase the creativity of programs produced by either individuals or groups of persons, or businesses, especially small or medium-sized ones, without forgetting the growing needs and difficulties of users and whilst preventing the software market from becoming totally dominated by powerful hardware companies (an aim clearly stated in paragraph 15 of the European Parliament’s resolution on the 18th report of the Commission on competition policy, adopted on 18 January 1990 - OJ No. C 38, 19.2.1990, p. 2). A statement by the Community of its position and jurisdiction in this field is needed so that it may be able to defend this statement within the framework of international agreements to which it is already party in its own right (in particular GATT and the negotiations on intellectual property) and international agreements to which it should become party once the directive has been adopted.

Finally, we should point out, pursuant to the provisions of Rule 119 of the Rules of Procedure, that there was a minority opinion in favour of rejecting Amendments 55 and 49 (now 10 and 11) which insert a new Article 5(3) and a new Article 5a. This made the same minority vote against the report as a whole, although it voted in favour of many of the other amendments. In fact, this minority felt that the two amendments, as adopted, abolish the concept of copyright, and all that it entails, including the jeopardizing of entrepreneurial initiative, removing protection of ownership and is encouraging creativity by individuals or companies in the data-processing field. It encourages the copying of models created by other parties, and
makes it practically impossible to bring legal proceedings against someone who uses the creation of an author, particularly if the author is an individual or a small or medium-sized undertaking. The minority concluded that nobody would devote intellectual or economic resources to creating new computer programs, since it would make decompiling easier.
AMENDMENT No. 15
tabled by Mr BRU PURON

REPORT by Mr SALEMA (Doc. A 3-173/90)
LEGAL PROTECTION OF COMPUTER PROGRAMS

Proposal for a directive
COM(88) 816 final - Doc. C 3-56/89

Commission text
Parliament's amendments

Notwithstanding any contractual provisions to the contrary, the author may not invoke the prohibitory provisions of Article 4(a) and (b) to prevent any act that is essential for maintaining the program and for creating or operating interoperable programs.

This option may be exercised by the licensee or, on his behalf, by a person authorized to do so where the following conditions are fulfilled:

(a) the information necessary to achieve interoperability shall not have been published or made available previously;

(b) the retrieval of information shall be confined to the parts of the original program which are necessary for the achievement of this aim;

(c) the information retrieved may not be communicated to third parties except in so far as this is necessary for the operation of the second program;

(d) the information retrieved may not be used to create or market a substantially similar program which infringes copyright in respect of the original program;
Article 2(3)

Where a computer program is created under a contract the natural or legal person who commissioned the program shall be entitled to exercise all rights in respect of the program, unless otherwise provided by the contract.

Where a computer program is created under a contract the natural or legal person who implemented one program shall be entitled to exercise all rights in respect of the program, unless otherwise provided by the contract.
AMENDMENT No. 17
tabled by Mr JANSSEN VAN RAAY and Mr GARCIA AMIGO, on behalf of the EPP Group

REPORT by Mrs SALEMA (Doc. A 3-173/90)

Proposal for a directive
COM(88) 816 final – Doc. C 3-056/90
LEGAL PROTECTION OF COMPUTER PROGRAMS

Text proposed by the Commission
Text amended by Parliament

Amendment No. 17

Article 5

1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right-holder, insofar as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purposes of its use shall require the authorization of the right-holder.

2. Where a computer program has been sold or made available to the public by means other than a written licence agreement signed by both parties, the exclusive right of the right-holder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.

1. The provisions of Article 4(a) and (b) shall not prevent any modification to the form of part of the code under which a copy of the program was supplied where such a modification is essential to allow interoperable programs to be interfaced with the program at the appropriate interface point, because the information required could not be obtained otherwise, after all lawful means have been exhausted and provided that such a modification, made by the legal holder of a copy of the program who has the right to use the program, is strictly confined to the parts of the program corresponding exactly to the interface points.

2. The provisions of paragraph 1 above shall not constitute grounds for information thus obtained being used in a manner which might be detrimental to the existing or potential market for the program or to its value or prejudicial to the legitimate interests of the right-holder or which might present an obstacle to the normal use of the computer program.

3. The provisions of paragraph 1 above shall not permit the information thus acquired to be communicated to third parties.
Amendment No. 18
Article 5a (new)

5a. The rights laid down in Article 4(a) and (b) shall not prevent acts carried out on a program to obtain the information required for other computer programs to interoperate with this program. This right may be exercised only by the lawful holder of a copy of the program, who is entitled to use it, or on his behalf, and only where the following conditions are fulfilled:

(a) the information allowing interoperability with the original program has not been published or made available,

(b) the acts are confined to that part of the original program required to secure interoperability,

(c) the information retrieved may not be communicated to third parties and

(d) the information obtained cannot be used in such a way as to prejudice unjustifiably to the legitimate interests of the right-holder or adversely affect the normal use of the original program.
1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right-holder, insofar as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purposes of its use shall require the authorization of the right-holder.

1. In the absence of contractual provisions to the contrary or where a copy of a computer program has been sold, the acts referred to in Article 4(a) and (b) shall not require the authorization of the right-holder insofar as they are necessary for the use of the copy of the program by its lawful acquirer for the purposes for which it was made available by the right-holder, or for its preservation in relation to such use.
5 JULY 1990

AMENDMENT No. 20

tabled by Mr JANSSEN VAN RAAY and Mr GARCIA AMIGO
on behalf of the EPP Group

Report by Mrs SALEMA (Doc. A3-173/90)

Proposal for a directive
COM(88) 816 final – Doc. C3-056/90
LEGAL PROTECTION OF COMPUTER PROGRAMMES

Commission text

Text amended by Parliament

(Amendment 20)

Article 5, paragraph 2a (new)

Notwithstanding the provisions of Article 4(a), the legitimate owner of a copy of a program may, without having to request the authorization from the right-holder, observe, study or test the working program in order to determine its underlying ideas, principles and other characteristics where these are not protected by copyright, in the course of loading, viewing, running, transmission or storage in accordance with his contractual objections.
A modification (by reverse engineering or any other method) of the farm in which a program has been supplied shall not require the authorization of the right-holder provided that:

1. the change is made to a copy of a program which has been lawfully acquired,
2. it is essential to obtain the information required to create programs which are interoperable with it; however the retrieval of information shall be strictly confined to the parts of the original program which are necessary for the achievement of this aim;
3. no information is communicated to third parties;
4. it relates exclusively to that part of the program designed for interfacing with it;
5. the information retrieved may not be used to create or market a substantially similar program.

'Interoperable program' means another computer program which may be connected with the first at a specific point (interface) and in a specified manner.
Authorship of program

1. Subject to the following paragraphs, the author of a computer program is the natural person or group of natural persons who has created the program.

Authorship of program

1. The author of a computer program is the natural person or group of natural persons or, where the law of the Member States permits, the legal person who has created the program. Where collective works are recognized by the law of a Member State, the natural or legal person considered by the law of the Member State to have created the work shall be considered to be its author.
Notwithstanding any contractual arrangements to the contrary, the rights enumerated in Article 4(a) and (b) shall 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. This option may only be exercised by the licensee on his own behalf and only where the following conditions are fulfilled:

(a) the information necessary to achieve interoperability shall not have been published or made available previously;
(b) the retrieval of information shall be confined to the parts of the original program which are necessary for the achievement of this aim;
(c) the information retrieved may not be communicated to third parties except in so far as this is necessary for the operation of the second program;
(d) the information retrieved may not be used to create or market a substantially similar program.

'Interoperable program' means another computer program which may be connected with the first at a specific point (interface) and in a specified manner.
AMENDMENT No. 24
tabled by Mr PINXTEN, on behalf of the Committee on Economic and Monetary Affairs and Industrial Policy

REPORT by Mrs SALEMA (Doc. A 3-173/90)
LEGAL PROTECTION OF COMPUTER PROGRAMS

Proposal for a Directive
COM(88) 816 final - Doc. C 3-56/89 - SYN 183

Text proposed by the Commission
Text amended by Parliament

Amendment No. 24

ARTICLE 1(3)

Amendment No. 1

3. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

3. 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 and principles. (Delete rest of paragraph).
AMENDMENT No. 25
tabled by Mr PINXten, on behalf of the Committee on Economic and Monetary Affairs and Industrial Policy

REPORT by Mrs SALEMA (Doc. A 3-173/90)
LEGAL PROTECTION OF COMPUTER PROGRAMS

Proposal for a Directive
COM(88) 816 final - Doc. C 3-56/89 - SYN 183

Text proposed by the Commission
Text amended by Parliament

Amendment No. 25

ARTICLE 4(a)

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

Amendment No. 3

(a) the reproduction of a computer program by any means and in any form, in part or in whole. (Delete rest of paragraph).
AMENDMENT No. 26
atabled by Mr PINXTEN, on behalf of the Committee on Economic and Monetary Affairs and Industrial Policy

REPORT by Mrs SALEMA  (Doc. A 3-173/90)
LEGAL PROTECTION OF COMPUTER PROGRAMS

Proposal for a Directive
COM(88) 816 final - Doc. C 3-56/89 - SYN 183

Text proposed by the Commission                      Text amended by Parliament

Amendment No. 26

ARTICLE 5(1)

1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right-holder, in so far as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purpose of its use shall require the authorization of the right-holder.

Amendment No. 4

1. Where a computer program has been made available to the public in a legal manner, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right-holder, in so far as they are necessary for the use or scientific analysis or testing of the program. (Delete second sentence).
AMENDMENT No. 27
tabled by Mr PINXten, on behalf of the Committee on Economic and Monetary
Affairs and Industrial Policy

REPORT by Mrs SALEMA (Doc. A 3-173/90)
LEGAL PROTECTION OF COMPUTER PROGRAMS

Proposal for a Directive
COM(88) 816 final - Doc. C 3-56/89 - SYN 183

Text proposed by the Commission

Text amended by Parliament

Amendment No. 27

ARTICLE 5(2)

2. Where a computer program has been
sold or made available to the public
by means other than a written licence
agreement signed by both parties, the
exclusive right of the right-holder to
authorize rental shall not be
exercised to prevent use of the
program by the public in non-profit
making public libraries.

Amendment No. 5

2. Where a computer program has been
made available to the public in a
legal manner, the right-holder may
not prevent the normal use of the
program by the public in public
libraries.
AMENDMENT No. 28

tabled by Mr PINXTE, on behalf of the Committee on Economic and Monetary Affairs and Industrial Policy

REPORT by Mrs SALEMA (Doc. A 3-173/90)
LEGAL PROTECTION OF COMPUTER PROGRAMS

Proposal for a Directive
COM(88) 816 final - Doc. C 3-56/89 - SYN 183

Text proposed by the Commission

Text amended by Parliament

Amendment No. 28

Amendment No. 6

Article 5(3): add the following new paragraph:

3. A licence agreement or other written agreement must not contain any clauses which conflict with the provisions laid down in paragraphs 1 and 2.
AMENDMENT No. 29
tabled by Mr PINXTEN, on behalf of the Committee on Economic and Monetary Affairs and Industrial Policy

REPORT by Mrs SALEMA (Doc. A 3-173/90)
LEGAL PROTECTION OF COMPUTER PROGRAMS

Proposal for a Directive
COM(88) 816 final - Doc. C 3-56/89 - SYN 183

Text proposed by the Commission

Text amended by Parliament

Amendment No. 29

ARTICLE 6(1)

Amendment No. 7

1. It shall be an infringement of the author's exclusive rights in the computer program to import, possess or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

1. It shall be an infringement of the author's exclusive rights in the computer program to import, acquire or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.
AMENDMENT No. 30
tabled by Mr PINXTEN, on behalf of the Committee on Economic and Monetary Affairs and Industrial Policy

REPORT by Mrs SALEMA  (Doc. A 3-173/90)
LEGAL PROTECTION OF COMPUTER PROGRAMS

Proposal for a Directive
COM(88) 816 final - Doc. C 3-56/89 - SYN 188

Text proposed by the Commission

Text amended by Parliament

Amendment No. 30

ARTICLE 7

Protection shall be granted for fifty years from the date of creation.

Amendment No. 8

The period of protection shall be that for which provision is made in the Berne Convention, from the date of creation.
5 July 1990

AMENDMENT No. 31
tabled by Mr COX

REPORT by Mrs SALEMA
PROTECTION OF COMPUTER PROGRAMS
Proposal for a directive
COM(88) 816 final - Doc. C3-56/89 - SYN 183

Text proposed by the Commission

Text amended by Parliament

(Amendment No. 31)
Article 5(2b) (new)

2b. The provisions of paragraph 2a of this article shall not permit the information obtained through its application to be used:

a) for goals other than to achieve interoperability of the independently created program,

b) for the development, production or marketing of a program substantially similar in its expression, or

c) for any other act which infringes copyright.
Article 5(2a) (new)

2a. The authorization of the owner of the rights for the acts referred to in Article 4(a) and (b) shall not be required notwithstanding contractual provisions to the contrary where performance of these acts to modify the form of the code is indispensable to achieve the interoperability of an independently created program, provided:

a) these acts are performed by or on behalf of a person having a right to use a copy of the program,

b) the information necessary cannot be obtained otherwise within a reasonable time or on reasonable conditions,

c) these acts are strictly limited to those parts of the program necessary to attain interoperability,

d) the information thus obtained is not given to others, except when necessary for the interoperability of the independently created program.

PE 142.529/32
Or. En.
REPORT by Mrs SALEHA
PROTECTION OF COMPUTER PROGRAMS
Proposal for a directive
COM(88) 816 final - Doc. C3-56/89 - SYN 183

Text proposed by the Commission
Text amended by Parliament

(Amendment No. 33)
Article 5

1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right-holder, in so far as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purpose of its use shall require the authorization of the right-holder.

2. Where a computer program has been sold or made available to the public by means other than a written licence agreement signed by both parties, the exclusive right of the right-holder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.

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 right-holder 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. Notwithstanding the provisions of Article 4(a) the person having a right to use a copy of a program shall be entitled, without the authorization of the right-holder, to observe, study or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright, if he does so while loading, displaying, running, transmitting or storing the program in execution of his contract.
Notwithstanding any contractual arrangements to the contrary, the rights enumerated in Article 4(a) and (b) shall not be exercised by the author to prevent any act indispensable to ensure the creation, maintenance or operation of an interoperable program. This option may only be exercised by the licensee on his own behalf and only where the following conditions are fulfilled:

(a) the information necessary to achieve interoperability shall not have been published or made available previously;

(b) the retrieval of information shall be confined to the parts of the original program which are necessary for the achievement of this aim;

(c) the information retrieved may not be communicated to third parties except in so far as this is necessary for the operation of the second program;

(d) the information retrieved may not be used to create or market a substantially similar program.
Nothing in this Article should be taken to permit the information obtained through its application to be used in a manner which unreasonably prejudices the right-holder’s legitimate interests or conflicts with a normal exploitation of the computer program.
Notwithstanding any contractual arrangements to the contrary, the rights enumerated in Article 4(a) and (b) shall 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. This option may only be exercised by the licensee or by another person entitled to use a copy of the program on his behalf by the person authorized to do so and only where the following conditions are fulfilled:

(a) the information necessary to achieve interoperability shall not have been published or made available previously;

(b) the retrieval of information shall be confined to the parts of the original program which are necessary for the achievement of this aim;

(c) the information retrieved may not be communicated to third parties except in so far as this is necessary for the operation of the second program;

(d) the information retrieved may not be used to create or market a program, which violates a copyright or the program of origin.

The provisions of this article may not be interpreted in such a way as to allow information obtained in the application thereof to be used in a manner which unjustifiably damages the legitimate interests of the right-holder or which is contrary to the normal operation of the program.
Minutes of proceedings of the sitting of

WEDNESDAY, 11 JULY 1990
KEY TO SYMBOLS USED

*: ordinary consultation (single reading)
** I: cooperation procedure (first reading)
** II: cooperation procedure (second reading)
***: parliamentary assent

(The type of procedure is determined by the legal basis proposed by the Commission)

■ Provisionally translated title

INFORMATION RELATING TO VOTING TIME

- unless stated otherwise, the rapporteurs informed the Chair in writing, before the vote, of their position on the amendments;
- the results of roll-call votes are given in Annex I.

ABBREVIATIONS USED FOR PARLIAMENTARY COMMITTEES

POLI Political Affairs Committee
AGRI Committee on Agriculture, Fisheries and Rural Development
BUDG Committee on Budgets
ECON Committee on Economic and Monetary Affairs and Industrial Policy
ENER Committee on Energy, Research and Technology
RELASE Committee on External Economic Relations
LEGA Committee on Legal Affairs and Citizens' Rights
SOCI Committee on Social Affairs, Employment and the Working Environment
REGI Committee on Regional Policy and Regional Planning
TRAN Committee on Transport and Tourism
ENVI Committee on the Environment, Public Health and Consumer Protection
CULT Committee on Youth, Culture, Education, the Media and Sport
DEVE Committee on Development and Cooperation
CONT Committee on Budgetary Control
INST Committee on Institutional Affairs
RULE Committee on the Rules of Procedure, the Verification of Credentials and Immunities
WOME Committee on Women’s Rights
PETI Committee on Petitions

ABBREVIATIONS USED FOR POLITICAL GROUPS

SOC Socialist Group
EPP Group of the European People's Party (Christian-Democratic Group)
LDR Liberal, Democratic and Reformist Group
ED European Democratic Group
Greens Green Group in the European Parliament
EUL Group for the European Unitarian Left
EDA Group of the European Democratic Alliance
ER Technical Group of the European Right
LU Left Unity Group
RB Rainbow Group
NA Non-attached Members
1. Approval of minutes ........................................ 1
2. Documents received ......................................... 2
3. Deadline for tabling amendments .......................... 3
4. Topical and urgent debate (objections) .................. 3
5. Decision on urgent procedure ............................... 5
6. European Union (debate) .................................... 5
7. Council and Commission statements on the European Council meeting on 25 and 26 June 1990 (followed by debate) .......................... 6
8. European Union (continuation of debate) .................. 8

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9. Foodstuff labelling and presentation ** I (vote) .............. 9
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PART I
Proceedings of the sitting

In the Chair: Mr BARON CRESPO
Vice-President

(The sitting was opened at 9 a.m.)

1. Approval of minutes

The minutes of the previous sitting were approved.

The following spoke:

- Mr TOMLINSON, who protested against the holding of committee meetings while votes were taking place in the Chamber; he called in particular for a meeting of the Committee on Budgets, set for Friday, to be postponed until the end of voting on that day (the President replied that this issue would be considered as a whole at one of the forthcoming meetings of the Bureau);

- Mr COIMBRA MARTINS, who pointed out that the air traffic control strike planned for Friday in France had been cancelled;

- Mr DE CLERCQ, Chairman of the REX Committee, who, while supporting Mr TOMLINSON's remarks, stated that if the request for urgent procedure on Doc. C3-211/90 were adopted, his committee would be obliged to meet in the morning;

- Mr GOLLNISCH, on a personal matter related to Mr CAUDRON's intervention during the previous day's sitting (Part I, end of Item 7 of previous day's Minutes);

- Mr SPERONI, who drew attention to an error in the Italian version of the Minutes of the previous day;

- Mr CAUDRON, who referred to his statement of the previous day and asked for measures to be taken to ensure that incidents such as the one of which he had complained would not be repeated (the President replied that it was forbidden to put tracts in the Members' pigeon-holes).
2. **Documents received**

The President announced that he had received:

(a) from the Council, the following request for an opinion on:

- a proposal from the Commission to the Council for a regulation amending Regulation (EEC) No. 3906/89 in order to extend economic aid to other countries of Central and Eastern Europe (Doc. C3-211/90 - COM(90) 318 final)

  referred to: RELA (responsible)
  POLI (opinion)
  BUDG (opinion)

(b) from the parliamentary committees, the following reports:

- * report drawn up by the Committee on Agriculture, Fisheries and Rural Development, on the proposal from the Commission to the Council concerning a regulation on the conclusion of the Agreement between the European Economic Community and the Republic of Cape Verde on fishing off Cape Verde (COM(90) 109 final - Doc. C3-119/90)
  Rapporteur: Mr DA CUNHA OLIVEIRA
  (Doc. A3-185/90);

- * report drawn up by the Committee on Agriculture, Fisheries and Rural Development, on the proposal from the Commission to the Council for a regulation laying down additional general rules on the common organization of the market in milk and milk products as regards cheese (COM(90) 209 final - Doc. C3-146/90)
  Rapporteur: Mr GUILLAUME
  (Doc. A3-186/90)

- * report drawn up by the Committee on Agriculture, Fisheries and Rural Development, on the proposal from the Commission to the Council for a regulation on transitional measures concerning trade with the German Democratic Republic in the agriculture and fisheries sector (COM(90) 282 final - Doc. C3-179/90)
  Rapporteur: Mr GUILLAUME
  (Doc. A3-187/90);

(c) from the Commission:

- communication on the Community’s relations with the countries of Central and Eastern Europe: the role of telecommunications (Doc. C3-212/90- COM(90) 258 final)

  referred to: ENER (responsible)
  RELA (opinion)
  ECON (opinion)
- communication on scientific and technological cooperation with the countries of Central and Eastern Europe (Doc. C3-213/90 - COM(90) 257 final)

referred to: ENER (responsible)  
RELA (opinion)  
BUDG (opinion).

3. **Deadline for tabling amendments**

The deadline for tabling amendments to the motion for a resolution on the parliamentary procedures applicable to consideration of the German unification proposals (Doc B3-1423/90) was extended to 11 a.m. that morning.

4. **Topical and urgent debate (objections)**

The President announced that he had received, pursuant to Rule 64(2), second subparagraph, the following objections, tabled and justified in writing, to the list of subjects for the next debate on topical and urgent subjects of major importance:

**II. CAMBODIA**

- a motion by the SOC Group seeking to replace this item by its motion for a resolution on the European Social Fund (Doc. B3-1445/90).

The motion was adopted by RCV (SOC):

Members voting : 274  
For : 167  
Against : 107  
Abstentions : 0

**IV. HUMAN RIGHTS**

- a motion by the SOC and LU Groups seeking to replace the item 'Niger' by four motions for resolutions on Cyprus (Docs. B3-1408, 1415, 1441 and 1470/90).

The motion was adopted.

(The motion by the EDA Group seeking to replace the item 'Sri Lanka' by these four motions for resolutions thus fell.)

- a motion by the RB Group seeking to include in this item the motions for resolutions on human rights in Kosovo (Docs B3-1418 and 1447/90).
The motion was adopted by RCV (RB):

Members voting: 268
For: 154
Against: 109
Abstentions: 5

- a motion by the Green Group seeking to include in this item its motion for a resolution on the rehousing of families of the Place de la Réunion in Paris (Doc. B3-1461/90).

The motion was adopted.

- a motion by the Green Group seeking to include in this item its motion for a resolution on the serious restriction of freedom of the press and freedom of opinion in Turkey (Doc. B3-1462/90).

The motion was rejected.

- a motion by the RB Group seeking to include in this item its motion for a resolution on the imprisonment of Antonio Maria Chana in Cuba (Doc. B3-1458/90).

The motion was adopted by EV.

V. DISASTERS

- a motion by the EUL Group seeking to include in this item its motion for a resolution on the incident at Vandello 2 nuclear power station (Tarragona, Spain) (Doc. B3-1456/90).

The motion was rejected by RCV (EUL):

Members voting: 286
For: 63
Against: 217
Abstentions: 6

- a motion by the EPP Group seeking to include in this point its motion for a resolution on pollution in the Bay of Algeciras (Doc. B3-1402/90).

Mr NAVARRO VELASCO asked the President to read out the justification for this objection. The President complied.

The motion was adopted.

- a motion by the LU Group seeking to include in this item its motion for a resolution on emergency food aid to Mozambique (Doc. B3-1427/90).

The motion was adopted.
- a motion by the SOC Group seeking to include in this item its motion for a resolution on the eradication of the Lucilia fly in North Africa (Doc. B3-1409/90).

The motion was adopted.

- a motion by the RB Group seeking to include in this item its motion for a resolution on the removal of chemical weapons from the FRG (Doc. B3-1416/90).

The motion was rejected by EV:

Mr GOLLNISCH spoke on a point of procedure.

5. Decision on urgent procedure

The next item was the decision on the request for urgent procedure in respect of the proposal from the Commission to the Council (COM(90) 318 final - Doc. C3-211/90) for a regulation amending Regulation (EEC) No. 3906/89 in order to extend economic aid to other countries of Central and Eastern Europe.

The following spoke: Mr DE CLERCQ, Chairman of the REX Committee, and Mr TOMLINSON, the latter on procedure.

Parliament approved the request for urgent procedure.

This item was entered on the agenda for Friday, 13 July. The deadline for tabling amendments was set at 12 noon on Thursday, 12 July.

6. European Union (debate)

The next item was the joint debate on four interim reports drawn up on behalf of the Committee on Institutional Affairs.

On the basis of Rule 102, Mr BLOT, on behalf of the ER Group, moved the inadmissibility of Mr COLOMBO's report (Doc. A3-165/90).

The following spoke: Mrs VEIL, Mr GOLLNISCH, Mr HÄNSCH, the latter on procedure, and Mrs VEIL.

The motion by the ER Group was rejected by RCV (LDR):

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Mr COLOMBO introduced his interim report on the European Parliament's guidelines for a draft Constitution for the European Union (Doc. A3-165/90).
Mr MARTIN introduced his second interim report on the Intergovernmental Conference in the context of Parliament's strategy for European Union (Doc. A3-166/90).

Mr GISCARD D'Estaing introduced his interim report on the principle of subsidiarity (Doc. A3-163/90).

Mr DUVERGER introduced his second interim report on the preparation of the meeting with the national parliaments to discuss the future of the Community (the 'Assizes') (Doc. A3-162/90).

The following spoke: Mr MARCK, draftsman of the opinion of the Committee on Budgetary Control, Mr HANSCH, on behalf of the SOC Group, Mr OREJA AGUIRRE, on behalf of the EPP Group, Mr DE GUCHT, on behalf of the LDR Group, Mr PRAG, on behalf of the ED Group, Mrs AGLIETTA, on behalf of the Green Group, Mr DE GIOVANNI, on behalf of the EUL Group, Mr MUSSO, on behalf of the EDA Group, and Mr BLOT, on behalf of the ER Group.

In the Chair: Mrs FONTAINE
Vice-President

The following spoke: Mr EPHREMINIS, on behalf of the LU Group, Sir James SCOTT-HOPKINS, who asked that the deadline for tabling joint motions for resolutions be extended to 5 p.m. that evening for the item on Cyprus, which had been added to the topical and urgent debate by means of an objection (the President replied that she would submit this request to the President of Parliament), Mr VANDERMEULEBROUCKE, on behalf of the RB Group, and Mr PANNELLA, non-attached Member.

Further to the request by Sir James SCOTT-HOPKINS, the President announced that the President of Parliament had given his assent.

Mr BANGEMANN, Vice-President of the Commission, spoke.

In the Chair: Mr BARON CRESPO
President

The debate was suspended at that point. It would be resumed at 3 p.m.

7. Council and Commission statements on the European Council meeting on 25 and 26 June 1990 (followed by debate)

Mr HAUGHEY, Member of the Council and President-in-Office of the European Council for the first half of 1990, and Mr BANGEMANN, Vice-President of the Commission, made statements regarding the European Council meeting held in Dublin on 25 and 26 June 1990.
The President announced that he had received the following motions for resolutions with request for an early vote, to wind up the debate, pursuant to Rule 56(3):

- by Mr GISCARD D'ESTAING, on behalf of the LDR Group, on the Dublin European Council (Doc. B3-1351/90);

- by Mr MUSSO, on behalf of the EDA Group, on the Council and Commission statements following the Dublin meeting of the European Council (Doc. B3-1355/90);

- by Mr COLAJANNI, on behalf of the EUL Group, on the Dublin European Council (Doc. B3-1360/90);

- by Mr BLOT, on behalf of the ER Group, on the Dublin European Council (Doc. B3-1363/90);

- by Mr COT, on behalf of the SOC Group, on the Dublin summit of 25 and 26 June 1990 (Doc. B3-1367/90);

- by Mrs AGLIETTA, Mrs JOANNA, Mr BANDRÉS MOLET, Mr MONNIER-BESOMBES and Mr AMENDOLA, on behalf of the Green Group, on the statement by the Irish Presidency on the meeting of the European Council in Dublin on 25 and 26 June 1990 (Doc. B3-1369/90/rev.);

- by Mr LUCAS PIRES, Mrs COMEN-RUIJTEN and Mr CHAMERIE, on behalf of the EPP Group, on the Dublin summit (Doc. B3-1371/90);

- by Mr DE LA MALENA, on behalf of the EDA Group, on the Council and Commission statements on the outcome of the second European Council in Dublin (Doc. B3-1428/90).

He announced that the decision on the request for an early vote would be taken at the end of the debate.

The following spoke in the debate: Mr DESMOND, on behalf of the SOC Group, Mr ANASTASSOPOULOS, on behalf of the EPP Group, Mr MAHER, on behalf of the LDR Group, and Sir Fred CATHERWOOD, on behalf of the ED Group,

In the Chair: Mrs FONTAINE
Vice-President

The following spoke: Mr ANGER, on behalf of the Green Group, Mr NAPOLITANO, on behalf of the EUL Group, Mr LALOR, on behalf of the EDA Group, Mr NEGRET, on behalf of the ER Group, Mr DE ROSSA, on behalf of the LU Group, Mr BLANEY, on behalf of the RB Group, Mr MONTERO IBALA, non-attached Member, Mr GALLE, Mr McCARTIN, Mr CALVO ORTEGA, Mr FABRELLA, Mr MARINHO, Mrs SCHLEICHER and Mr VAN DER WAAL.

The President declared the debate closed.
Decision on the request for an early vote:

Parliament agreed to an early vote.

The vote on the motions themselves would be taken at 6 p.m. the following day.

(The sitting was suspended at 1 p.m. and resumed at 3 p.m.)

In the Chair: Sir Fred CATHERWOOD
Vice-President

Sir James SCOTT-HOPKINS complained of the noise of work being done around the IPE Building (the President replied that the services concerned were endeavouring to find a solution to the problem).

8. European Union (continuation of debate)

The following spoke: Mr METTEN, Mrs CASSANNAGNO CERRETTI, Mr CAPUCHO, Mrs JEPSEN, Mrs JOANNY, Mr PUERTA GUTIERREZ, Mr HERZOG, Mr BONDE, Mr VAN DER WAAL, Mr PLANAS PUCHADES, Mr LUCAS PIRES, Mrs VEIL, Mrs JACKSON, Mr BANDRÉS MOLET, Mr MARINHO, Mr HERMAN, Mr CHEYSSON, Mr TINDEMANs and Mr MATTINA.

The President proposed, pursuant to Rule 104(1), that the debate be closed for voting time.

The following spoke on this proposal: Mr CHRISTIANSEN, who asked for a copy of the text of the speech which he would have made to be published in the report of the proceedings (the President replied that this was not possible under the Rules), and Mr FAYOT, on the comments made by the previous speaker and on the President’s answer.

The President pointed out that speakers who had not been able to take the floor could make an explanation of vote if they so wished.

Parliament agreed to the proposal to close the debate.

The President declared the debate closed.

In the Chair: Mrs PERRY
Vice-President
9. Foodstuff labelling and presentation ** I (vote)  
(procedure without report)

- proposal from the Commission to the Council (SEC(89) 2151 - Doc. C3-136/90 - SYN 235) for a directive on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs:

Parliament approved the Commission proposal (Part II, Item 1).

The President announced that the Council had informed her that it wished to speak on the vote on the TOMLINSON report concerning the draft supplementary budget No. 2 (Doc. A3-184/90) provided that the vote was taken immediately.

The following spoke on this proposal: Mr VON DER VRING and Mr COT, and also Mr KLEPSCH, who asked for an electronic check to ascertain whether sufficient Members were present.

The President called for an electronic vote: 237 Members took part.

As the number of Members required for a qualified majority vote were not present, the President decided to proceed with the votes in the usual order.

Mr CHANTERIE spoke.

10. Possession of weapons ** I (vote)  
(VON WOGAU report - Doc. A3-160/90)

- amended proposal for a directive COM(89) 446 final - Doc. C3-28/90 - SYN 98:

AMENDMENTS ADOPTED: 1 by EV, 3, 19 by EV, 4, 17, 5 (1st part), 6 by EV, 48, 7 (3rd part by EV and 5th parts), 75 by RCV (EPP), 76 by EV, 8, 9, 20 by EV, 52, 10, 11, 27 by EV, 78 by EV, 68 by EV, 12, 13 by RCV (EPP), 24 by EV, 22, 40, 73 by EV, 60 by EV, 71 by EV, 61, 70, 30, 45 by EV, 15 and 16;

AMENDMENTS REJECTED: 55, 49, 2, 77, 57, 51, 5 (2nd part), 36, 7 (1st, 2nd and 4th parts, the 2nd part by EV and the 4th part by RCV (EPP), 65 by EV, 66 by EV, 67, 58, 50, 23, 69, 25, 26, 46, 28, 29, 62, 31 by EV, 44, 63, 72, 34 by EV, 35 by EV, 18 and 54;

AMENDMENTS FALLEN: 38, 37, 39, 79, 21, 41, 14, 32, 33 and 53;

AMENDMENTS WITHDRAWN: 64, 47, 42 and 43.
The rapporteur spoke on:
- a corrigendum to am. 1 concerning certain language versions;
- am. 13, which should read: ‘shall lead automatically to the revocation of the relevant weapons card held by the sportsman and marksman in question’.

The following spoke in the light of these remarks: Mr METTEN, who put a question to the Commission, Mr BANGEMANN, Vice-President of the Commission, who answered the question, and the rapporteur.

Mr BONETTI spoke on am. 36 (the President cut him off).

Split vote were taken on the following:

am. 5:
1st part to ‘five years’
2nd part: remainder.

am. 7:
1st part: introductory phrase
2nd part: point (a)
3rd part: points (b) and (c)
4th part: point (ca)
5th part: final subparagraph.

Results of RCVs:

am. 7 (4th part):

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am. 75:

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am. 13:

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Parliament approved the Commission proposal as amended (Part II, Item 2).
EXPLANATIONS OF VOTE:

The following spoke: the rapporteur, Mr PATTERSON, who questioned the Commission on the compatibility of the text adopted by Parliament with the Schengen Agreement, Mr BANGEMANN, Vice-President of the Commission, who answered the question, Mr METTEN, on the Commission's answer, Mr WIJSENBEEK, on Mr METTEN's comments, Sir James SCOTT-HOPKINS, Mr STAUFFENBERG and Mr BONETTI, the last three speakers for explanations of vote.

- draft legislative resolution:

Parliament adopted the legislative resolution (Part II, Item 2).

Mr TOMLINSON referred back to the proposal made by the President at the beginning of voting time and asked for the vote on his report to be taken at that point, out of courtesy towards the President-in-Office of the Council.

Mr COT spoke on this request on behalf of the SOC Group.

The President called for an electronic vote to ascertain whether enough Members were present in the Chamber: 277 Members voted.

The President therefore announced the vote on the TOMLINSON report.

Mr GAIRESISO spoke on the vote on the previous item.

11. Supplementary and amending budget No. 2
(TOMLINSON report on draft supplementary and amending budget No 2, as amended by the Council - Doc. A3-184/90)

- draft budget:

AMENDMENTS ADOPTED: 2 and 1.

Mr VITTAIONE, President-in-Office of the Council, made a statement on supplementary and amending budget No. 2, and the vote which had just been taken, stating that the Council had certain reservations.

Mr VON DER VRING, Chairman of the Committee on Budgets, spoke on this statement.

- motion for a resolution:

Parliament adopted the resolution (Part II, Item 3).
12. **Transit of natural gas** **I (vote)**
   (GASOLIBA I BÖHM report - Doc. A3-161/90)

   - proposal for a directive COM(89) 334 - Doc. C3-151/90:

   **AMENDMENTS ADOPTED:** 1 to 5 (en bloc), 6, 7, 8, 9, 10, 11 by split vote, 12, 13 by EV, 14, 15, 16, 17, 18, 19 and 20;

   **AMENDMENTS REJECTED:** 22, 23, 25 and 24;

   **AMENDMENTS WITHDRAWN:** 21 and 26.

   A split vote was taken on am. 11:
   1st part to 'will be strengthened'
   2nd part to 'with caution'
   3rd part: remainder

   Parliament approved the Commission proposal as amended (Part II, Item 4).

   - **draft legislative resolution:**

   **EXPLANATIONS OF VOTE:**

   The following spoke: Mr DESAMA, on behalf of the Belgian members of the SOC Group, and Mr SELIGMAN.

   Parliament adopted the legislative resolution (Part II, Item 4).

13. **Legal protection of computer programs** **I (vote)**
   (SALEMA report - Doc. A3-173/90)

   - proposal for a directive COM(88) 816 - Doc. C3-56/89 - SYN 183:

   **AMENDMENTS ADOPTED:** 1, 2, 3, 4, 22, 5, 6, 7, 8 (introductory phrase, point (a) and point (b) by successive votes, 33 (1st part), 9 (2nd part), 10, 35 (1st part), 35 (2nd part by EV), 12, 13 and 14;

   **AMENDMENTS REJECTED:** 24, 16, 25, 26, 9 (1st part), 33 (2nd part by EV), 20, 28, 31, 29 and 30;

   **AMENDMENTS WITHDRAWN:** 27 and 11;

   **AMENDMENTS WITHDRAWN:** 17, 19 and 32.

   Mr SCHMID spoke on the conduct of the vote after the vote on the 2nd part of am. 9.

   As am. 35 was a compromise amendment replacing ams. 32, 23, 21, 34, 18 and 15, the President asked whether Parliament agreed to a vote on that amendment.

PV 22 I - 12 - PE 143.503
Mr HOON spoke on the English version of the am., and Mr JANSSEN VAN RAAY requested a split vote on behalf of the EPP Group:

1st part: whole text without the words ‘maintenance of the program’
2nd part: that phrase.

Parliament approved the Commission proposal as amended (Part II, Item 5).

- draft legislative resolution:

Parliament adopted the legislative resolution (Part II, Item 5).

14. Standard emergency call number ** I (vote)
(SCOTT-HOPKINS report - Doc. A3-119/90)

- proposal for a decision COM(89) 452 - Doc. C3-177/89 - SYN 223:

AMENDMENTS ADOPTED: 1 to 5 (en bloc), 6 and 7 (en bloc), and 8;

AMENDMENT REJECTED: 9.

Parliament approved the Commission proposal as amended (Part II, Item 6).

- draft legislative resolution:

Parliament adopted the legislative resolution (Part II, Item 6).

15. Pan-European radio paging ** II (vote)
(recommendation for the second reading - Doc. A3-115/90 - rapporteur: Mr SEAL)

- common position of the Council Doc. C3-120/90 - SYN 193:

AMENDMENT ADOPTED: 2;

AMENDMENTS REJECTED: 1 by EV, and 3/rev.

The common position was thus amended (Part II, Item 7).

16. Amendment of Rules 56, 58 and 64 (vote)
(HARRISON report - Doc. A3-179/90)

- Parliament’s Rules of Procedure:

AMENDMENTS ADOPTED: 1 (1st and 2nd parts), 4 (2nd part), 2 by EV, and 3;

AMENDMENTS REJECTED: 4 (1st part), 1 (3rd and 4th parts, the latter by EV (290 for, 242 against, 29 abstentions));
AMENDMENTS FALLEN: 1 (5th part), and 5.

Split votes were taken on the following:

am. 4:
1st part: first 3 subparagraphs
2nd part: 4th subparagraph.

am. 1:
1st part: 1st subparagraph
2nd part: 2nd subparagraph, without the words 'to which no amendments shall be admissible'
3rd part: those words
4th part: 3rd subparagraph
5th part: remainder.

- proposal for a decision:

EXPLANATIONS OF VOTE:

The following spoke: Mr LANGER, on behalf of the Green Group, the rapporteur and Miss McINTOSH, the last two speakers on the voting procedure.

Parliament adopted the decision by EV (Part II, Item 8).

17. German unification (vote)
(motion for a resolution tabled by Mr COT, on behalf of the SOC Group, Mr GISCARD D'ESTAING, on behalf of the LDR Group, Mr LANGER, on behalf of the Green Group, Mr COLAJANNI, on behalf of the EUL Group, Mr DE LA MALNE, on behalf of the EDA Group, Mr PIQUET, on behalf of the EUL Group, on the procedures applicable in the context of the consideration of proposals on German unification (Doc. B3-1423/90).

The following spoke: Mr BEUMER, Chairman of the Committee on Economic Affairs, on ams. 3/rev., 4/rev. and 5/rev., Mr COT, Chairman of the SOC Group, Mr KLEPSCH, on behalf of the EPP Group, and Mr PANNELLA, who protested at the fact that the President had given the speakers the floor, contrary to the provisions of the Rules of Procedure.

The President asked the House whether it agreed to allow a number of Members to speak on the substance of the motion for a resolution.

Parliament agreed to this.
The following spoke: Mr STAUFFENBERG, Chairman of the Committee on Legal Affairs, Mr COLLINS, Chairman of the Committee on the Environment, Mr DE LA MALENE, Chairman of the EDA Group, Mr BANGEMANN, Vice-President of the Commission, on Mr COLLINS' comments, Mr GOLLNISCH, on the application of Rules 109, 112, 132 and 110, Mr KELLETT-BOWMAN, Mr DONNELLY, rapporteur of the Temporary Committee for the study of the impact of the process of German unification on the European Community, and Mr COLLINS, who made a personal statement.

AMENDMENTS ADOPTED: 7, 9, 8, and 2 by EV;


AMENDMENT WITHDRAWN: 1.

After the vote on am. 9, Mr BLOT asked, pursuant to Rule 103(1), for the motion for a resolution to be referred back to committee.

The President replied that this request was inadmissible, as there was no committee responsible.

Mr GOLLNISCH contested the President's interpretation, on the basis of Annex VI of the Rules of Procedure, and requested that the matter be referred back to the Committee on the Rules of Procedure.

The President upheld her decision.

EXPLANATIONS OF VOTE:

The following spoke: Mr GISCARD D'ESTAING, on behalf of the LDR Group, and Mr GOLLNISCH, on behalf of the BR Group.

The following spoke: Mr CHANTERIE, on behalf of the EPP Group, and Mr COT, on the last speaker's comments.

Parliament adopted the resolution (Part II, Item 9).
In the Chair: Mr ALBER
Vice-President

18. European Union (vote)
(motions for resolutions contained in the interim reports by Mr COLOMBO (Doc. A3-165/90), Mr MARTIN (Doc A3-166/90), Mr GISCARD D'ESTAING (Doc. A3-163/90) and Mr DUVERGER (Doc. A3-162/90)

(a) Colombo report - Doc. A3-165/90:

AMENDMENTS ADOPTED: 89 (1st part), 59, 120, 147 (compromise), 121 by EV, 122, 123, 36 by EV, 124, 149 (compromise), 100, 101 by EV, 112, 129/rev. by EV, 113 by EV, 125, 45 by RCV (EDA), 114 by EV, 40, 109, 116 by EV, 148 (compromise), 47 by EV, 66, 104 by EV, 150 (compromise), 37/rev., 118 (1st part by EV), 119, 136, 146 (compromise), and 105 by EV;

AMENDMENTS REJECTED: 35 by RCV (ER), 29, 31, 89 (2nd part), 90, 7 by RCV (ER), 6 by RCV (ER), 77, 5, 26 by RCV (ER), 91, 76, 75, 68, 4, 108, 1, 24, 93, 28 by RCV (ER), 2, 51, 139, 143 by RCV (EDA), 54, 39 by EV, 38, 115, 8, 141, 69, 65, 60, 52, 85, 9, 70, 61, 53, 126 by EV, 10, 142, 71 by EV, 80, 79, 131, 94, 11, 106, 130, 117, 102 by EV, 12, 132, 72, 73, 86, 13, 103 by EV, 84 by EV, 42, 133, 145, 14 by RCV (ER), 95, 134, 87, 15, 16, 88, 17, 18 by RCV (ER), 99 by EV, 98, 19 by RCV (ER), 25 by RCV (ER), 118 (2nd part by EV), 78, 81, 135, 82 by EV, 46, 96, 20, 32, 21, 22, 110, 33 by RCV (ER), and 34 by RCV (ER), and 137;

AMENDMENTS FALLEN: 74, 138, 30, 92, 49, 3, 50, 44, 41, 83 and 97;

AMENDMENTS WITHDRAWN: 48, 111, 64, 62, 63, 43, 67, 127, 107 and 128.

The President pointed out at the start of the vote that he had received five compromise amendments replacing a number of other amendments and asked Parliament, pursuant to Rule 92, whether there were any objections to a vote on these amendments.

Parliament agreed to a vote.

After the vote on am. 61, Mr LANGER protested at what he felt was the excessive speed at which the vote was being taken.

Split votes were taken on the following:

am. 89:
1st part to 'regions'
2nd part: remainder

am. 118:
1st part to 'citizens of the Union'
2nd part: remainder

Both unamended and amended parts of the text were adopted. Para. 2 fell.

PV 22 I - 16 - PE 143.503
Results of RCVs:

am. 35:

Members voting : 297
For : 20
Against : 271
Abstentions : 6

am. 7:

Members voting : 280
For : 14
Against : 264
Abstentions : 2

am. 6

Members voting : 271
For : 15
Against : 254
Abstentions : 2

am. 26:

Members voting : 293
For : 15
Against : 274
Abstentions : 4

am. 45:

Members voting : 311
For : 173
Against : 131
Abstentions : 7

am. 28:

Members voting : 292
For : 13
Against : 276
Abstentions : 3

am. 143:

Members voting : 276
For : 39
Against : 229
Abstentions : 8

PV 22 I
am. 14:

Members voting : 313
For : 15
Against : 296
Abstentions : 2

am. 18:

Members voting : 305
For : 17
Against : 287
Abstentions : 1

am. 19:

Members voting : 310
For : 16
Against : 294
Abstentions : 0

am. 25:

Members voting : 290
For : 12
Against : 278
Abstentions : 0

am. 33:

Members voting : 316
For : 18
Against : 297
Abstentions : 1

am. 34:

Members voting : 300
For : 17
Against : 283
Abstentions : 0

EXPLANATIONS OF VOTE:

The following spoke: Mrs JOANNY, on behalf of the Green Group, Mr BLOT, on behalf of the ER Group, Mrs GRUND, Mr MARTINEZ, Mr MEGAHY, Mr CHEYSSON, Mr ARBELOA MURU, Mr DESSYLAS, Mr EPHREMIDIS and Mr MELIS, on behalf of the RB Group.
Parliament adopted the resolution by RCV (SOC):

Members voting  : 275
For             : 217
Against         : 38
Abstentions    : 20

(Part II, Item 10(a)).

Mr LE PEN asked for the sitting to be suspended for ten minutes.

The President put this proposal to the House.

The proposal was rejected.

(b) second report by Mr MARTIN - Doc. A3-166/90:

AMENDMENTS ADOPTED: 93 by EV, 117, 118, 151 by EV, 50, 124, 44, 128, 1, 67, 13 by EV, 159 by EV, 101, 102 by RCV (EDA), 14, 98 by EV, 97, 103, 77, 10, 112, 168 (compromise), 143 by EV, 120, 132 by EV, 134 by split vote (LDR), 3, 4, 169 (compromise), 56, 121 by split vote (SO), 48, 122, 53, 140, 6, 125, 94, 45 and 123;

AMENDMENTS REJECTED: 85, 62, 86, 127, 152, 153, 15, 65, 16, 17, 18, 145, 19 by RCV (ER), 2, 146, 20, 43, 95, 129, 154, 155, 66, 147, 51, 21, 22 by RCV (ER), 144 by EV, 23 by RCV (ER), 88, 89, 90, 91, 92, 83, 130, 156, 78, 157, 24, 131, 11 by EV, 158, 114 by RCV (EDA), 12 by EV, 52, 99, 100, 25 by RCV (ER), 149, 40, 142 by EV, 26, 106, 113 by RCV (EDA), 63, 27 by RCV (ER), 160, 150, 68, 84, 69, 70, 109, 161, 60, 96, 162, 133 (1st part), 79, 5, 29, 137, 30, 57, 31 by RCV (ER), 55, 164, 64 (2nd part), 81, 82, 54, 116, 138, 32, 139, 148, 33 by RCV (ER), 41 by EV, 42, 9, 46, 34 and 47;

AMENDMENTS FALLEN: 119, 8, 39, 38, 37, 61, 36, 120, 141, 133 (2nd part), 80, 28, 115, 76, 58, 126, 75, 49, 64 (1st part), and 110.

Paragraph fallen: 27.

On a request by the rapporteur:

- am. 10 was inserted after para. 14
- am. 97 was put to the vote after am. 98.

On compromise am. 168 and 169, the President asked the House whether there were any objections to their being put to the vote.

A split vote was taken on am. 134 (LDR):
1st part: point (a)
2nd part: point (b).
Mr COLOM I NAVAL, draftsman of the opinion of the Committee on Legal Affairs, pointed out that am. 4 should be put to the vote before am. 141. Mr VON DER VRING spoke on the German version of am. 4; a split vote was taken on the latter.

Mr HERMAN contested whether am. 141 should have fallen. Mr VON DER VRING replied.

Mr PRAG asked for the first part of am. 133 to be put to the vote, as he considered it should not fall. The rapporteur agreed.

Mr VON DER VRING pointed out that para. 27 should fall.

Mrs AGLIETTA spoke after am. 164 on the conduct of the vote.

Both unamended and amended parts of the text were adopted, with the exception of the 2nd part of para. 33 (para. 9 by RCV (ER)).

Split votes were taken on the following paragraphs:

para. 12 (ED):
1st part to 'established'
2nd part: remainder

para. 14 (Mr PRAG, on behalf of the ED Group):
indent by indent (7th indent by split vote).

para. 29 (ED)

para. 33 (SOC):
1st part to 'Court of Justice'
2nd part: remainder

Results of RCVs:

am. 19:

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para. 9:

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<tbody>
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<td>am. 22:</td>
<td>275</td>
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<td>am. 23:</td>
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<td>am. 114:</td>
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<td>am. 25:</td>
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<td>am. 113:</td>
<td>293</td>
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<tr>
<td>am. 27:</td>
<td>282</td>
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</tbody>
</table>
am. 31:

Members voting : 289  
For : 17   
Against : 270  
Abstentions : 2

am. 33:

Members voting : 284  
For : 16  
Against : 263  
Abstentions : 5

EXPLANATIONS OF VOTE:

The following spoke: Mr DE GUCHT, on behalf of the LDR Group, Mr PRAG, on behalf of the ED Group, Mr MARTINEZ, on behalf of the ER Group, Mr BLOT, Mrs VAN DIJK and Mr SPERONI.

Parliament adopted the resolution.

Mr BLOT and Mr MARTIN pointed out that their respective groups had requested an RCV on the motion for a resolution as a whole.

The President agreed to their requested and decided to take an RCV.

Parliament adopted the resolution:

Members voting : 234  
For : 204  
Against : 26  
Abstentions : 4

(Part II, Item 10(b)).

Mr PANNELLA spoke on procedure.

Despite the late hour, the President then proposed to put to the vote the rapport by Mr GISCARD D'ESTAING (Doc. A3-163/90).

Parliament agreed to this.
AMENDMENTS ADOPTED: 20, 11, 1, 3 by EV, 8, 2 by EV, 33, and 61 (compromise);

AMENDMENTS REJECTED: 41 by RCV (ER), 54, 21, 24, 25, 38, 22, 19, 23, 5, 18, 44, 10, 42, 31, 45 by RCV (ER), 56 by EV, 26, 46, 58, 43 by EV, 4, 50 by EV, 12, 27, 57, 35, 48, 40 by RCV (ER), 32, 37, 15, 29, 34, 52, 60, 39 by RCV (ER), 30, 59 by EV, and 17;

AMENDMENTS FALLEN: 51, 28, 13, 47, 14, 6, 7, 49, 36, 53, 55 and 16.

The rapporteur proposed that am. 35 be taken as an addition.

He also pointed out that as am. 14 was of a purely linguistic nature, it should not be put to the vote.

Mr MARTIN requested a split vote on para. 13; Mr DE GUCHT pointed out that, owing to the adoption of am. 61, it was no longer possible to take a split vote on para. 13. Mr MARTIN agreed.

Pursuant to Rule 92, the President consulted the House on whether to put compromise am. 61 to the vote.

Both unamended and amended parts of the text were adopted.

Results of RCVs:

am. 41:

Members voting : 215
For : 10
Against : 202
Abstentions : 3

am. 45:

Members voting : 220
For : 11
Against : 209
Abstentions : 0

am. 40:

Members voting : 241
For : 14
Against : 224
Abstentions : 3
am. 39:

Members voting : 220
For : 11
Against : 207
Abstentions : 2

EXPLANATIONS OF VOTE:

The following spoke: Mrs AGLIETTA, Mr BLOT, on behalf of the ER Group, Mr MARTINEZ, Mr ANTONY and Mr SPERONI.

As the request for a split vote on para. 13 had not been accepted, Mr COT asked for the report to be referred back to committee. Mr DE GUCHT proposed that, in the circumstances, the split vote on para. 13 should nevertheless be taken. The rapporteur pointed out that am. 61 did not affect the part of para. 13 on which the SOC Group wished to hold a split vote. Mr PANNELLA spoke on procedure. Mr CHANTERIE proposed that the vote on the motion for a resolution as a whole be held over to the following day, so that the issue raised by Mr COT’s request could be reconsidered.

The President took over Mr CHANTERIE’s proposal and put it to the House.

Parliament agreed to this.

The vote on the motion for a resolution as a whole was thus postponed to the following day.

END OF VOTING TIME

19. Agenda for next sitting

The President announced the following agenda for the sitting on Thursday, 12 July 1990:

10 a.m. to 1 p.m., 3 p.m. to 8 p.m. and 9 p.m. to midnight:

10 a.m. to 1 p.m.:
- DONNELLY interim report on German unification
- TITLEY report on an EEC-Argentina commercial agreement *
- MOORHOUSE report on an EEC-GCC free trade agreement *
- joint debate on six oral questions with debate to the Commission on Economic and Monetary Union

3 p.m. to 6 p.m.:
- Council statement on the work programme of the Italian presidency and communication from the Commission on institutional matters (followed by debate)

1 Oral question Doc. B3-1320/90 was included in the debate
joint debate on two reports by Mrs DOMINGO SEGARRA and Mr MIRANDA DA SILVA and an oral question with debate on fisheries (continuation) *
- LULLING report on MCAs *

6 p.m.:
vote on:
- DONNELLY report
- reports by Mr GISCARD D'ESTAING (continuation) and Mr DUVERGER
- PENDERS report
- motions for resolutions on armaments
- motions for resolutions on Central and Eastern Europe
- motions for resolutions on the Dublin European Council
- motions for resolutions on which the debate has closed

9 p.m. to midnight:
- topical and urgent debate

(The sitting was closed at 8.30 p.m.)
PART II

Texts adopted by Parliament

**II 1.** Labelling, presentation and advertising of foodstuffs
(vote: see Part I, Item 9 of the Minutes)
proposal for a directive SEC(89) 2151 fin. -
Doc. C3-136/90 - SYN 235 : approved

**I 2.** Possession of weapons
(debate: see Part I, Item 16 of the Minutes of 9.7.1990
Vote: see Part I, Item 10 of the Minutes)
von WOGAU report (Doc. A3-160/90)
- amended proposal for a directive COM(89) 446 final -
  SYN 98
- legislative resolution

3. Supplementary and amending budget no. 2
(debate: see Part I, Item 17 of the Minutes of 10.7.1990
Vote: see Part I, Item 11 of the Minutes)
TOMLINSON report (Doc. A3-184/90)
- draft budget
- resolution

**I 4.** Transit of natural gas
(debate: see Part I, Item 17 of the Minutes of 9.7.1990
Vote: see Part I, Item 12 of the Minutes)
GASOLIBA I BÖHM report (Doc. A3-161/90)
- proposal for a directive COM(89) 334 - SYN 206
- legislative resolution

**I 5.** Legal protection of computer programs
(debate: see Part I, Item 18 of the Minutes of 9.7.1990
Vote: see Part I, Item 13 of the Minutes)
SALEMA report (Doc. A3-173/90)
- proposal for a directive COM(88) 816 final - SYN 183
- legislative resolution

**I 6.** Standard emergency call number
(debate: see Part I, Item 18 of the Minutes of 10.7.1990
Vote: see Part I, Item 14 of the Minutes)
SCOTT-HOPKINS report (Doc. A3-119/90)
- proposal for a decision COM(89) 452 final - SYN 223
- legislative resolution

**II 7.** Pan-European radio paging
(debate: see Part I, Item 15 of the Minutes of 9.7.1990
Vote: see Part I, Item 15 of the Minutes)
SEAL report (Doc. A3-115/90)
- decision
8. **Amendments to Rules 56, 58 and 64 of the Rules of Procedure**
   (vote: see Part I, Item 16 of the Minutes)
   HARRISON report (Doc. A3-179/90)
   . decision

9. **German unification**
   (vote: see Part I, Item 17 of the Minutes)
   Motion for a resolution (Doc. B3-1423/90)
   . resolution

10. **European Union**
    (a) COLOMBO report (Doc. A3-165/90)
        . resolution
    (b) MARTIN report (Doc. A3-166/90)
        . resolution
1. Procedure without report

Proposal from the Commission of the European Communities to the Council (SEC(89) 2151 - C3-136/90 - SYN 235) for a directive on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs: approved
2. Possession of weapons

Amended proposal for a directive COM(89)446 final - SYN 98

Amended proposal from the Commission to the Council for a directive on control of the acquisition and possession of weapons

Approved with the following amendments:

Text proposed by the Commission

Text amended by Parliament

(Amendment No. 1)
Entire Text

Replace the words 'firearms certificate' with 'weapons card'.

(Amendment No. 3)
Recital 6a (new)

Whereas more effective rules should be adopted to make it possible to monitor the traffic and possession of firearms within the Community once the internal market has been established and systematic border controls within the Community have therefore been abolished;

(Amendment No. 19)
Recital 8a (new)

Whereas the public authorities must implement measures leading to the gradual reduction of firearms owned by private individuals in the Community;

1 OJ C 299, 28.11.1989, p.6
2. For the purposes of this Directive 'dealer' shall mean any natural or legal person whose trade or business consists wholly or partly in the manufacture, sale, purchase, exchange, hiring out, repair or conversion of firearms.

4. The 'European firearms certificate' is a document which is issued on request to a person lawfully in possession of a firearm or to a person contemplating the acquisition of a firearm by the authorities of a Member State. It shall contain the sections set out in Annex II. Where more than one person may possess the same firearm, more than one certificate shall be issued.

1. This Directive is without prejudice to the application of national provisions concerning either the carrying of weapons or game-shooting or target-shooting competitions.
(Amendment No. 48)
Article 2(2)

2. This Directive shall not apply to the acquisition or possession of weapons by the armed forces, the police or the public authorities.

(Amendment No. 7)
Article 5, first and second paragraphs

Without prejudice to Article 3, Member States shall allow the acquisition and possession of firearms classified in category B only by persons who have good cause and who:

(a) are 18 years old or more;
(b) have the necessary mental and physical capacity;
(c) are not likely to be a danger to public order or public safety.

Without prejudice to Article 3, Member States shall allow the possession of firearms classified in categories C and D only by persons satisfying the tests in points (a), (b) and (c) of the first paragraph.

Without prejudice to Article 3, Member States shall allow the acquisition and possession of firearms classified in category B only by persons who have good cause and who:

(a) deleted;
(b) have the necessary mental and physical capacity;
(c) are not likely to be a danger to public order or public safety;

Without prejudice to Article 3, Member States shall allow the possession of firearms classified in categories C and D only by persons satisfying the tests in points (a), (b) and (c) of the first paragraph.
(Amendment No. 75)

Article 7a (new)

Member States shall take all appropriate measures to ban all advertising or exhibition for sale of prohibited firearms as defined in Annex I(2), category A of this directive. As regards the firearms in other categories defined in Annex I of this directive, Member States shall take all appropriate measures to ban all advertising or exhibition for sale which does not explicitly indicate, where applicable, that their acquisition and possession are subject to authorization or declaration.

(Amendment No. 76)

Article 8(2)

2. Dealers shall inform the Member State in which it takes place of every acquisition of a firearm classified in category C except where that firearm is subject to authorization. If the person acquiring such a firearm is a resident of another Member State, that other Member State shall be informed of the acquisition by the Member State in which it took place.

(Amendment No. 8)

Article 9

1. Every Member State shall prohibit the handing over of firearms classified in categories A, B or C within its territory, by a dealer or by any other person, to any person who is not a resident of that Member State.

1. The handing over in the territory of a Member State by a dealer or by any other person of firearms classified in categories B or C to citizens of other Member States who are not residents of the Member State in question shall be conditional upon:
2. Notwithstanding paragraph 1 the handing over of a firearm to a person who is not resident in the Member State in question shall be permitted:

- where the person acquiring it has been authorized in accordance with Article 11 himself to effect a transfer to his country of residence;

- where the person acquiring it plans to be in possession of the firearm in the Member State of acquisition, provided that he fulfills the legal conditions for possession in that Member State.

(1) proof of the authorization provided for in the second subparagraph of Article 7(1) or in Article 8(2), as appropriate;

(2) a written declaration by the person acquiring the firearm testifying to his intention to:

(a) transfer the firearm personally to his country of residence, in which case it must be accompanied by the authorization referred to in Article 11, or

(b) be in possession of the firearm in the territory of the Member State of acquisition, provided that he fulfills the legal conditions for possession in that Member State.

2. In any case, the dealer or other person who hands over the firearm shall supply the information provided for in Articles 7 and 8.

2a. Under no circumstances shall a dealer or any other person hand over firearms classified in category A to persons who are not residents of the Member State in which they wish to acquire those firearms.
(Amendment No. 9)

Article 10

No ammunition for a firearm may be handed over in a Member State to a person who is not a resident of that Member State unless that person establishes by producing a European firearms certificate that he lawfully possesses a weapon of a type for which that ammunition is intended.

No ammunition for a firearm may be handed over in a Member State to a person who is not a resident of that Member State unless that person establishes by producing a European weapons card that he lawfully possesses a weapon of a calibre for which that ammunition is intended.

(Amendment No. 20)

Article 11(2), introduction

2. Where a firearm is to be transferred to another Member State or to a third country, the person concerned or his authorized agent shall before it is taken there supply the following particulars to the Member State in which such firearm is situated:

2. Where a firearm is to be transferred to another Member State or to a third country, the person concerned shall before it is taken there supply the following particulars to the Member State in which such firearm is situated:

(Amendment No. 52)

Article 112a (new)

2a. The provisions of the previous paragraph shall also apply to transfers of firearms following a mail order sale.
(Amendment No. 10)

Article 11(3), first subparagraph

Each Member State may grant dealers the right to effect transfers of firearms from its territory to another Member State or to a third country without the prior authorization referred to in paragraph 2. To that end it shall issue a licence, a certified copy of which must accompany the firearm until it reaches its destination; that document must be produced whenever so required by the authorities of the Member States.

Each Member State may grant dealers the right to effect transfers of firearms from its territory to another Member State or to a third country without the prior authorization referred to in paragraph 2. To that end it shall issue a licence, a certified copy of which must accompany the firearm until it reaches its destination; this licence shall be valid for no more than three years and may at any time be suspended or cancelled by reasoned decision of the authorities of the Member States. It must be produced whenever so required by the authorities of the Member States.

(Amendment No. 11)

Article 11(3), third subparagraph

Before transfer the dealer shall communicate to the authorities of the Member State from which the transfer is to be effected all the particulars listed in the first subparagraph of paragraph 2.

Before transfer the dealer shall communicate to the authorities of the Member State from which the transfer is to be effected and the Member State to which the transfer is to be effected all the particulars listed in the first subparagraph of paragraph 2.

(Amendment No. 27)

Article 11(4), first subparagraph

Each Member State may supply the other Member States with a list of firearms whose transfer to its territory may not be authorized without its prior consent.

Each Member State must supply the other Member States with the list of firearms whose transfer to its territory may not be authorized without its prior consent.
(Amendment No. 78)
Article 11(5)

5. Where a firearm is to be imported from a third country, the person concerned, or his authorized agent shall supply the Member State of importation with all the particulars referred to in the first subparagraph of paragraph 2. Where it authorizes importation, the Member State of importation shall issue an import licence. The import licence must accompany the firearm until it reaches its destination; it must be produced whenever so required by the authorities of the Member States.

(Amendment No. 68)
Article 12(1), second paragraph

Member States may grant such authorization for one or more journeys, for a specified or unspecified period. Such authorizations shall be entered on the European firearms certificate which the traveller must produce whenever so required by the authorities of the Member States.
2. Notwithstanding paragraph 1, sportsmen and marksmen may without prior authorization be in possession of one or more firearms classified in categories C and D during a journey through two or more Member States with a view to engaging in game-shooting or taking part in a marksmanship competition provided that for each firearm they possess a European firearms certificate and that they are able to substantiate the reasons for their journey, in particular by producing an invitation.

However, this shall not apply to journeys to a Member State which prohibits the acquisition and possession of the firearm in question; in that case any express statement to that effect shall be entered on the European firearms certificate pursuant to Article 8(3).

(Amendment No. 13)
Article 12(2), third subparagraph (new)

Losing possession of any such weapon, for whatever reason and in whatever circumstances, shall lead automatically to the revocation of the relevant weapons card held by the sportsman or marksman in question.
(Amendment No. 24)
Article 12(3)

3. Under agreements for the mutual recognition of national documents, two or more Member States may provide for arrangements more flexible than those prescribed in this Article for movement with firearms within their territories.

(Amendment No. 22)
Article 13(3)

3. Member States shall set up a network for the exchange of information for purposes of the application of this Article. They shall inform the other Member States and the Commission of the national authorities responsible for transmitting and receiving information and for applying the formalities referred to in Article 11(4).

(Amendment No. 40)
Annex I(2), category A(1)

1. Firearms usually used as military weapons;

(Amendment No. 73)
Annex I(2), category A(2)

2. Automatic firearms, even those which are not military weapons.

(Amendment No. 74)
Annex I(2), category B(1)

1. Short firearms with semi-automatic or repeating mechanisms
2. Short firearms with single-shot mechanisms and centre-fire percussion;

2. Short firearms with single-shot mechanisms and centre-fire or rimfire percussion;

(Amendment No. 71)
Annex I(2), category B(2a)

2a. Long firearms with single-shot mechanisms and rifled barrels;

(Amendment No. 61)
Annex I(2), category C(1)a (new)

1a. Firearms manufactured before, or to a design dating from before 1 January 1870, but which can still fire ammunition intended for prohibited firearms subject to authorization or declaration.

(Amendment No. 70)
Annex I(2), category C(1)a (new)

1a. Long firearms with single-shot mechanisms and smooth-base barrels;

(Amendment No. 30)
Annex I(2), category C, paragraph 2

2. Long firearms with single-shot mechanisms and rifled barrels;

2. Long firearms with a single-shot mechanism per rifled barrel;

(Amendment No. 45)
Annex I(3)(b)

(b) are designed for alarm, signalling, life-saving, animal slaughtering, harpoon-hunting or fishing or industrial or technical purposes provided that they can be used for the stated purpose only;

(b) are designed for alarm, signalling, life-saving, animal slaughtering, harpoon-hunting or fishing or industrial or technical purposes provided that they can be used for the stated purpose only and a model has been approved by the testing authorities;
(Amendment No. 15)
Annex I, point 4, subparagraph (c)

(c) 'automatic mechanism' means a mechanism which returns automatically to a ready-to-fire position each time a round is fired and can fire more than one round from the same barrel each time the trigger is operated;

(Amendment No. 16)
Annex II, subparagraph (f), second indent

- for firearms in categories C and D, the following statement:

"This certificate confers no entitlement to travel to another Member State with the firearm here referred to without the authorization of the authorities of that Member State. Such authorization may be recorded on this certificate.

However, prior authorization is not required for a journey with a view to engaging in game-shooting or taking part in a marksmanhip competition, on condition that the reason for the journey can be established at the request of any authority in the Member State visited."

- for firearms in categories C and D, the following statement:

"This certificate confers no entitlement to travel to another Member State with the firearm here referred to without the authorization of the authorities of that Member State. Such authorization may be recorded on this certificate.

However, Member States may dispense with prior authorization for a journey with a view to engaging in game-shooting or taking part in a marksmanhip competition, on condition that the reason for the journey can be established at the request of any authority in the Member State visited."

Member States making such a dispensation shall be mentioned on the certificate.
Where a Member State has informed the other Member States in accordance with Article 8(3) that the possession of certain firearms in categories C or D is prohibited within its territory, the following statement shall be added:

"The firearm here referred to may not be taken to [name of Member State]."
LEGISLATIVE RESOLUTION

(Cooperation procedure: First reading)

embodying the opinion of the European Parliament on the amended proposal from the Commission to the Council for a directive on control of the acquisition and possession of weapons

The European Parliament,

- having regard to the proposal from the Commission to the Council (COM(87) 383 final),¹
- having regard to the amended proposal from the Commission to the Council (COM(89) 446 final),²
- having been consulted by the Council pursuant to Article 100A of the EEC Treaty (Doc. C 3-28/90 - SYN 98),
- considering the proposed legal basis to be appropriate,
- having regard to the report of the Committee on Economic and Monetary Affairs and Industrial Policy and the opinion of the Committee on Legal Affairs and Citizens' Rights (Doc. A 3-160/90),

1. Approves the Commission proposal subject to Parliament's amendment and in accordance with the vote thereon;

2. Calls on the Commission to amend its proposal accordingly, pursuant to Article 149(3) of the EEC Treaty;

3. Calls on the Council to incorporate Parliament's amendments in the common position that it adopts in accordance with Article 149(2)(a) of the EEC Treaty;

4. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;

5. Instructs its President to forward this opinion to the Council and Commission.

¹ OJ No. C 235, 1.9.1987, p. 8
² OJ No. C 299, 28.11.1989, p. 6
3. Supplementary and amending budget no. 2

Doc. A3-184/90

Approved with the following amendments:

(Amendment No. 2)

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<tr>
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<tr>
<td>Article 130</td>
<td>Own resources accruing from Value Added Tax</td>
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<td>Article 140</td>
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<td>Article 300</td>
<td>Surplus available from the preceding financial year</td>
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NOMENCLATURE: 

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B. EFFECT ON REVENUE:

After account is taken of the impact of these changes on Title 8 of the budget, the overall effect is to increase the revenue requirement in relation to the draft budget by 21 119 801 ECUs thereby bringing total revenue to the figure in the preliminary draft supplementary and amending budget, that being 46 698 406 854 ECUs.

PV 22 II---------46--- PE 143.503---
REMARKS:

Amend as follows:

Item 1300: "the uniform VAT rate is 1.2557%". Furthermore, the contributions of the Member States are amended accordingly to correspond with the Commission figures.

Item 1400: delete the phrase "the GNP-based own resources need not be called up" and replace with "the GNP-based own resources are called up only in connection with the financial compensation for the United Kingdom". The breakdown of payments is as indicated in the preliminary draft.

Article 300: "a provisional amount of ECU 3416 million has been entered for 1989"
(Amendment No. 1)

SECTION III - Part A Commission - Article 68 - FHMASS monitoring operations in relation to the safety of consumer products

REMARKS

Add the following paragraph to the remarks under this article:

"Notwithstanding Article 26, para 3 of the Financial Regulation, the Commission shall consult the budgetary authority before making any transfer to this Article from within Chapter 68."
RESOLUTION

on draft supplementary and amending budget No. 2 for the 1990 financial year, as modified by the Council

The European Parliament,

- having regard to preliminary draft supplementary and amending budget No. 2 for 1990 (SEC(90) 467),
- having regard to the draft supplementary and amending budget drawn up by the Council on 7 May 1990 (C3-129/90),
- having regard to the joint decision of the budgetary authority of 6 June 1990 to revise the financial perspective,
- having regard to letters of amendment Nos. 1 and 2 drawn up by the Council on 11 June 1990 (C3-147/90 and C3-148/90),
- having regard to the decisions it took at the first reading of the draft supplementary and amending budget on 13 June 1990,
- having regard to the Council's deliberations on the draft supplementary and amending budget as amended (C3-189/90),
- having regard to the report by the Committee on Budgets (A3-184/90),

1. Reaffirms that the draft supplementary and amending budget should reflect the decision on own resources and in particular Article 2(4) concerning the application of a uniform rate of VAT;

2. Reiterates its long-established view that Article 203(4) of the EEC Treaty permits the Parliament to adopt amendments to the revenue side of the budget;

3. Instructs its President to forward this resolution, together with the amendments it has adopted to the draft supplementary and amending budget, to the Council and Commission as the outcome of Parliament's second reading.
4. Transit of natural gas

Proposal for a directive COM(89) 334 - SYN 206


Approved with the following amendments:

Text proposed by the Commission of the European Communities

Text amended by Parliament

(Amendment No. 1)
Recital 1a (new)

Whereas development of the internal market in energy will require the development and adoption of an integrated approach to Community energy policy that will eliminate structural differences and be equal to the major challenges of (1) environmental protection, (2) risk minimization, and (3) security of supply;

(Amendment No. 2)
Recital 1b (new)

Whereas the completion of the internal market for gas requires the formulation and adoption by the Community of a global strategy for energy centred on risk reduction;

(Amendment No. 3)
Recital 2a (new)

Whereas a major objective of the Community is to strengthen its reliance on natural gas, both absolutely and by comparison with other sources of energy, which is also important from an environmental standpoint;

1 OJ C 247, 28.9.1989, p. 6

PV 22 II - 20 - PE 143.503
(Amendment No. 4)

Third recital

Whereas the objective of the single natural gas market is to ensure greater profitability and security of supply by freer trade but avoid unacceptable restrictions on competition; whereas the special nature of the natural gas sector must be taken into account in the pursuit of this objective;

(Amendment No. 5)

Recital 3a (new)

Whereas in achieving the internal market in natural gas consideration should be given not only to comparable features in the Member States but also to sometimes significant differences, including:

- the co-existence of gas supply undertakings having the legal status of private entrepreneurially-oriented companies alongside undertakings that are nationalized and consequently are less exposed to the risks of the market;

- vertical integration of transmission and distribution under extensive monopolies on the one hand, and a multiplicity of independent undertakings at all levels on the other;

- state price regulation with a political orientation, or competitive prices;

- wide variation in the distribution of natural gas as between the Member States;
(Amendment No. 6)  
Recital 5a (new)

Whereas this increase in interconnections and greater use of the network will make it advisable to harmonize standards of security and environmental protection throughout the Community at the highest level; where there are projects for new routes or for the upgrading of existing lines and pipelines, there should be a prior assessment of their environmental impact and of possible risks for the population affected by transit through urban regions or close to inhabited areas;

(Amendment No. 7)  
Sixth recital

Whereas in the future interconnections between several Member States will need to be made to allow adequate supply and compliance with the natural gas transit obligation and will have the effect of reducing non-technical obstacles; whereas compliance with this obligation constitutes a first stage in the development of the internal market for natural gas;

Whereas in the future additional interconnections between several Member States will need to be made to allow adequate supplies of natural gas to consumers; whereas it will be essential to eliminate restrictions on pipeline construction and to create a climate favourable to the major investment that will be required;

(Amendment No. 8)  
Seventh recital

Whereas this obligation must, at least at this stage, be confined to the transit of natural gas through high-pressure grids;

Whereas a natural gas transit obligation should however be considered if it appears that voluntary arrangements do not meet with success; whereas the details of transit, in particular the financial, technical and legal conditions, should meanwhile be fixed by the participating companies;
Whereas it is necessary, in order to realize this first stage of the internal energy market in satisfactory competitive conditions, to approximate legislative, regulatory or administrative provisions passed by Member States so as to provide a procedural framework for the formulation of these agreements in the most transparent manner:

Whereas it will be at first necessary, in order to realize the internal energy market in satisfactory competitive conditions, to approximate legislative, regulatory or administrative provisions passed by Member States so as to ensure that the structural differences are eliminated so that citizens of the Community can, on a comparable basis, see for themselves the effects of transit, and to provide a transparent framework for the drawing up of agreements:

Whereas it could prove necessary for the Council to decide, before 1 January 1993, without prejudice to the Commission’s own powers, complementary conditions governing the modalities of intra-Community transit.

Whereas the Commission shall, before the end of 1992, submit the results of a survey conducted to determine whether the voluntary solution has prevented third parties from transiting gas through high-pressure grids:

Whereas transit as an isolated measure conceals the danger that disparities already existing in the Community will be strengthened; whereas consequently it will be appropriate to proceed progressively and with caution; whereas steps should be taken to ensure that sales and transport between companies in different Member States of the Community do not fail because grids in a Member State that has to be crossed cannot be used.
Article 1
Member States shall take the measures necessary to ensure compliance with the obligation for the transit of natural gas through high-pressure gas transmission grids in accordance with the conditions laid down in this Directive.

Article 2(1)
1. Transmission of natural gas under the following conditions shall constitute transit of natural gas through transmission grids within the meaning of this Directive:
(a) the transport is carried out through the high-pressure gas grid on the territory of a Member State;
(b) the transport is carried out between Member States' gas companies.
(Amendment No. 14)
Article 2(3)

3. The high-pressure natural gas transmission grids and the entities responsible for them, which are listed in the Annex, shall be covered by the provisions of this Directive. This list shall be revised whenever necessary by decision of the Commission.

3. The right and obligation of transit shall apply to all undertakings listed in the annex hereto. The list may be amended by decision of the Commission on a proposal from the Member States, and if the name of a new undertaking is added to the list that undertaking must be competent to assume the transit obligations with the high-pressure grid operated by it.

(Amendment No. 15)
Article 3(2), first indent

- any request for transit shall, within eight (8) days, be communicated by the requesting entity or entities to the Commission and the national competent authorities,

- any request for transit shall, within one month, be communicated by the requesting entity or entities to the Commission and the national competent authorities,

(Amendment No. 16)
Article 3(2), third indent

- the transit conditions must be equitable for all the parties concerned and should not include unfair clauses or unjustified restrictions, in particular, payment for transit must take account of the responsibilities of the entity responsible for transit for ensuring security of supply and contractual quality of service,

- the transit conditions must be equitable for all the parties concerned and should not include unfair clauses or unjustified restrictions, in particular, payment for transit must take account of the responsibilities of the entity responsible for transit for ensuring security of supply and contractual quality of service, and of any potential benefits offered to the country through which the gas is transiting,

(Amendment No. 17)
Article 3(2), sixth indent (new)

- the transit must respect all aspects of existing contracts entered into by the entities responsible and must not affect the security of supply for which the gas company is responsible.
(Amendment No. 18)
Article 5
Before 1 January 1993, without prejudice to the Commission's own powers, the Council will decide - as far as it is necessary - complementary conditions governing the detailed rules of intra-Community transit.

(Amendment No. 19)
Article 5a (new)

(Amendment No. 20)
Article 6, first paragraph
Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 July 1990. They shall forthwith inform the Commission thereof and communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof and communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.
LEGISLATIVE RESOLUTION

(Cooperation procedure: first reading)

embodying the opinion of the European Parliament on the proposal from the Commission to the Council for a directive on the transit of natural gas through the major systems.

The European Parliament

- having regard to the proposal from the Commission to the Council (COM(89)334 - final),

- having been consulted by the Council pursuant to Article 100a of the EEC Treaty (C 3-151/89 - SYN 206),

- considering the proposed legal basis to be appropriate,

- having regard to the report of the Committee on Energy, Research and Technology and the opinions of the Committee on Economic and Monetary Affairs and Industrial Policy, the Committee on Legal Affairs and Citizens’ Rights, the Committee on Transport and Tourism and the Committee on the Environment, Public Health and Consumer Protection (Doc. A 3-161/90),

1. Approves the Commission’s proposal subject to Parliament’s amendments and in accordance with the vote thereon;

2. Calls on the Commission to amend its proposal accordingly, pursuant to Article 149(3) of the EEC Treaty;

3. Calls on the Council to incorporate Parliament’s amendments in the Common Position that it adopts in accordance with Article 149(2)(a) of the EEC Treaty;

4. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;

5. Instructs its President to forward this opinion to the Council and Commission.

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1 OJ No. C 247 of 28.9.89, p.6

PV 22 II - 27 - PE 143.503
5. Legal protection of computer programs

Proposal for a directive COM(88) 816 final - SYN 183

Proposal for a Council directive on the legal protection of computer programs.

Approved with the following amendments:

Text proposed by the Commission¹

Text amended by Parliament

(Amendment No. 1)
Article 1(1) and (2)

1. Member States shall protect computer programs by conferring exclusive rights in accordance with the provisions of this Directive.

2. Exclusive rights shall be conferred by the provisions of copyright laws. Protection shall be accorded to computer programs as literary works.

1 For full text see OJ C 91, 12.4.1989, p. 13
(Amendment No. 2)
Article 1(2a) (new)

2a. For the purposes of this Directive a computer program shall be defined as any sequence of instructions intended to be used, directly or indirectly, in a data-processing system in order to carry out a function or obtain a specific result, independently of its form of expression.

The preparatory design material, technical documentation and users’ manuals associated with a computer program shall enjoy the same protection as the program itself.

This definition of a computer program shall also extend to programs generated by the use of another program.

(Amendment No. 3)
Article 1(3)

3. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

3. Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any aspect of a program, including its interfaces, shall not be protected by copyright under this Directive.
(Amendment No. 4)

Article 1(4)

4. (a) A computer program shall not be protected unless it satisfies the same conditions as regards its originality as applied to other literary works.

(b) Programs generated by means of a computer shall be protected in so far as they satisfy the conditions laid down in point (a).

(Amendment No. 22)

Article 2(1)

Authorship of program

1. Subject to the following paragraphs, the author of a computer program is the natural person or group of natural persons who has created the program.

Authorship of program

1. The author of a computer program is the natural person or group of natural persons or, where the law of the Member States permits, the legal person who has created the program. Where collective works are recognized by the law of a Member State, the natural or legal person considered by the law of the Member State to have created the work shall be considered to be its author.

(Amendment No. 5)

Article 2(2)

2. In respect of computer programs created by a group of natural persons, the exclusive rights shall be exercised in common unless otherwise provided by contract.

2. In respect of computer programs created by a group of natural persons, the rights conferred by the protection accorded by Article 1 shall be exercised in common unless otherwise provided by contract.
(Amendment No. 6)
Article 2(4)

4. Where a computer program is created in the course of employment, the employer shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.

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 shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.

(Amendment No. 7)
Article 2(5)

5. In respect of programs which are generated by the use of a computer program, the natural or legal person who causes the generation of subsequent programs shall be entitled to exercise all rights in respect of the programs, unless otherwise provided by contract.

5. Deleted

(Amendment No. 8)
Article 4, introduction and subparagraphs (a) and (b)

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. In so far as they necessitate a reproduction of the program in part or in whole, loading, viewing, running, transmission or storage of the computer program shall be considered restricted acts;

(b) the adaptation of a computer program;

Subject to the provisions of Article 5, the protection accorded by 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, and for whatever purpose. In so far as they necessitate a permanent or temporary reproduction of the program, loading, viewing, running, transmission or storage of the computer program shall be subject to authorization by the right-holder;

(b) the translation, adaptation, arrangement and any other modification of a program and the reproduction of the results thereof;
1. Where a computer program has been sold or made available to the public other than by a written licence agreement signed by both parties, the acts enumerated in Article 4(a) and (b) shall not require the authorization of the right-holder, in so far as they are necessary for the use of the program. Reproduction and adaptation of the program other than for the purposes of its use shall require the authorization of the right-holder.

2. Where a computer program has been sold or made available to the public by means other than a written licence agreement signed by both parties, the exclusive right of the right-holder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.

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 right-holder where they are necessary for the use of the program by the lawful acquiror 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. Where a copy of a computer program has been made available to the public in a legal manner, and in the absence of contractual provisions to the contrary, the right to authorize rental shall not be exercised to prevent normal use of the program in non-profit making public libraries.
Notwithstanding any contractual arrangements to the contrary, the rights enumerated in Article 4(a) and (b) shall 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. This option may only be exercised by the licensee or by another person entitled to use a copy of the program on his behalf by the person authorized to do so and only where the following conditions are fulfilled:

(a) the information necessary to achieve interoperability shall not have been published or made available previously;

(b) the retrieval of information shall be confined to the parts of the original program which are necessary for the achievement of this aim;

(c) the information retrieved may not be communicated to third parties except in so far as this is necessary for the operation of the second program;

(d) the information retrieved may not be used to create or market a program, which violates a copyright or the program of origin.

The provisions of this article may not be interpreted in such a way as to allow information obtained in the application thereof to be used in a manner which unjustifiably damages the legitimate interests of the right-holder or which is contrary to the normal operation of the program.
(Amendment No. 10)
Article 5(2a) (new)

2a. Notwithstanding the provisions of Article 4(a), the legitimate owner of a copy of a program may, without having to request the authorization from the right-holder, observe, study or test the working program in order to determine its underlying ideas, principles and other characteristics where these are not protected by copyright, in the course of loading, viewing, running, transmission or storage in the execution of his contractual duties.

(Amendment No. 12)
Article 7

Protection shall be granted for 50 years from the date of creation.

Protection shall be granted for 50 years from 1 January of the year following publication of the program, or, where a program has not been published, its creation.

(Amendment No. 13)
Article 8

1. The provisions of this Directive shall be without prejudice to any legal provisions concerning patent rights, trade marks, unfair competition, trade secrets or the law of contract in so far as such provisions do not conflict with the principles laid down in the present Directive.

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 or the law of contract.

2. The provisions of this Directive are applicable also in respect of works created prior to [date in Article 9].

2. The provisions of this Directive are applicable also to programs created prior to 1 January 1993.
(Amendment No. 14)

Article 9

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to comply with this Directive by [date].

2. Member States shall ensure that they communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

2a. A Consultative Committee shall be set up by the Commission, to consist of representatives of the Member States and of representative associations of authors and producers of computer programs with the objectives of:

(a) providing the Commission with information on research and on problems arising from the implementation of this Directive;

(b) drawing up proposals with a view to possible changes in the rules which may be required for more effective realization of the Community's objectives.

2b. The Commission shall take all the necessary initiatives in order to ensure the realization, at national and international level, of the objectives set out in this Directive.

2c. The Commission shall, every two years, forward to Parliament and to the Council a report on the implementation of this Directive at national and Community level.
LEGISLATIVE RESOLUTION
(Cooperation procedure: first reading)

embodying the opinion of the European Parliament on the proposal from the Commission to the Council for a directive on the legal protection of computer programs

The European Parliament,

- having regard to the proposal from the Commission to the Council (COM(89) 816 final),

- having been consulted by the Council pursuant to Article 100a of the EEC Treaty (Doc. C 3-56/89 - SYN 183),

- having regard to the report of the Committee on Legal Affairs and Citizens' Rights and the opinions of the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Energy, Research and Technology (Doc. A 3-173/90),

1. Approves the Commission proposal subject to Parliament’s amendments and in accordance with the vote thereon;

2. Calls on the Commission to amend its proposal accordingly, pursuant to Article 149(3) of the EEC Treaty;

3. Asks to be consulted again should the Council intend to make substantial modifications to the Commission proposal;

4. Calls on the Council to incorporate Parliament’s amendments in the common position that it adopts in accordance with Article 149(2)(a) of the EEC Treaty;

5. Instructs its President to forward this opinion to the Council and Commission.

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1 OJ No. C 91, 12.4.1989, p. 13
6. **Standard emergency call number**

Proposal for a decision CON(89) 452 final - SYN 223

Proposal for a Council decision on the introduction of a standard Europe-wide emergency call number

Approved with the following amendments:

Text proposed by the Commission of the European Communities

Text amended by Parliament

(Amendment No. 1)

Third recital

Whereas the effect of such differences is to create problems in contacting the responsible services for citizens, in particular tourists and business travellers, facing emergency situations in other Member States;

(Amendment No. 2)

Ninth recital

Whereas the Council in its Resolution of 13 February 1989 on the new developments in Community cooperation on civil protection has stressed the desirability of a standard Community-wide single additional emergency telephone number which will in particular enable the public in an emergency to call the relevant national emergency services;

(Amendment No. 3)

15th recital

Whereas most Member States could introduce the number 112 by 1992; whereas, however, for a limited number of Member States this would pose a burden since they would need to make unplanned changes or to advance plans already made;

1 For full text see OJ No. C 269, 21.10.1989, p. 8
Whereas the introduction of number 112 will be possible by 1995, even in the few Member States where difficulties exist;

Whereas, in addition to the technical, operational and commercial implications of introducing the chosen number within public telecommunications networks, Member States must make the necessary organizational arrangements best suited to the national organization of the emergency systems, in order to ensure that calls to this number are adequately answered and handled; whereas the standard Europe-wide emergency call number should therefore be used in parallel with other existing national arrangements, where appropriate;

Where particular technical or organizational difficulties in a Member State make the full introduction of the standard Europe-wide emergency call number by the date laid down in Article 2 impossible, the Member State shall inform the Commission of these difficulties.
(Amendment No. 7)
Article 3a (new)

In order to ensure this service in a satisfactory way, some form of financial compensation shall be introduced with the aim of alleviating the widely differing financial efforts which some Member States will have to make for the full introduction of the standard Europe-wide emergency call number.

(Amendment No. 8)
Article 5

Member States shall develop arrangements towards increasing the language capabilities of the operators answering calls to the standard Europe-wide emergency call number, in order to optimize its use. For this purpose they shall ensure the progressive implementation of technical and organizational arrangements, such as the automatic identification of the calling line and the location of the caller and the possibility of automatic transfer to an international operator in case of language difficulties.

Member States shall develop arrangements towards increasing the language capabilities of the operators answering calls to the standard Europe-wide emergency call number, in order to optimize its use. For this purpose, within the technological possibilities of the networks, they shall ensure the progressive implementation of technical and organizational arrangements, such as the automatic identification of the calling line and the location of the caller and the possibility of automatic transfer to an international operator in case of language difficulties.
LEGISLATIVE RESOLUTION
(Cooperation procedure: first reading)

embodied the opinion of the European Parliament on the proposal from the Commission to the Council for a decision on the introduction of a standard Europe-wide emergency call number

The European Parliament,

- having regard to the proposal from the Commission to the Council (COM(89) 452 final)¹,

- having been consulted by the Council pursuant to Article 100a of the EEC Treaty (Doc. C 3-177/89 - SYN 223),

- considering the proposed legal basis to be appropriate,

- having regard to the report of the Committee on the Environment, Public Health and Consumer Protection (Doc. A 3-119/90),

1. Approves the Commission’s proposal subject to Parliament’s amendments and in accordance with the vote thereon;

2. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;

3. Asks to be consulted again should the Council intend to make substantial modifications to the Commission proposal;

4. Instructs its President to forward this opinion to the Council and the Commission.

¹ OJ C 269 of 21.10.1989, p.8
DECISION
(Cooperation procedure: second reading)

concerning the Common Position of the Council with a view to the adoption of a directive on the frequency bands designated for the coordinated introduction of pan-European land-based radio paging in the Community

The European Parliament,

- having regard to the Common Position of the Council (C3-120/90 - SYN 193),
- having regard to the relevant provisions of the EEC Treaty and its Rules of Procedure,

1. Has decided to amend the common position as set out below;

2. Has instructed its President to forward this decision to the Council and Commission.

Common Position of the Council

Text amended by Parliament

(Amendment No. 2)
Article 3 (1)

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than (twelve months after the date of notification of this Directive). They shall forthwith inform the Commission thereof.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 1 January 1991. They shall forthwith inform the Commission thereof.
8. Amendment of Rules 56, 58 and 64
Doc. A3-179/90

TEXT OF THE RULES OF PROCEDURE

Existing text

New text

(Amendments Nos. 1 and 4)

Rule 56

Title unchanged
Paragraphs 1 to 3 unchanged
First two paragraphs of interpretation unchanged

The provisions of Rule 64(5) shall apply by analogy.

Deleted

4. If two or more motions for resolutions are tabled, the committees, political groups or Members tabled the motions may agree among themselves on a joint motion for a resolution. With the formal agreement of the authors, other committees, political groups or individual Members may also sign such a joint motion before the expiry of the deadline for tabling joint motions for resolutions set in the agenda.

A joint motion for a resolution shall replace the previous motions for resolutions tabled by its signatories, but not those tabled by other committees, political groups or Members.

Where a resolution is adopted winding up a debate no further resolutions to wind up the same subject shall be put to the vote, save where the President exceptionally decides otherwise. The decision of the President cannot be contested.
Rule 58

5. In order to wind up the debate on a question under this Rule, any committee or political group, or twenty-three or more Members, may place before the President a motion for a resolution with a request that an early vote be taken on it.

As soon as the motion for a resolution has been distributed, Parliament shall first decide, if necessary after hearing one of the authors, whether an early vote is to be taken.

Should an early vote be decided upon, the motion for a resolution shall be put to the vote at voting time of the next sitting without referral to committee. Only explanations of vote shall be permitted.

Paragraph 5 does not apply to oral questions with debate to be dealt with in a debate pursuant to the fourth subparagraph of paragraph 1.
The vote on a request for an early vote on a motion for a resolution to wind up a debate on an oral question must take place, pursuant to the second sub-paragraph of paragraph 5, as soon as the motion for a resolution has been distributed, if possible at the end of the debate. The vote on the motion for a resolution itself must take place at the next sitting, at a time set by the President.

The provisions of Rule 64(5) shall apply by analogy.

6. The enlarged Bureau may ask the authors of questions to reword them.

6. At the request of the author of a question for oral answer with debate, acting in agreement with any co-authors, the question may be withdrawn by them, but may be immediately taken over by any other Member, under the conditions set out in paragraph 1 above, with the agreement of Parliament deciding by vote without debate.
7. At the request of the author of a question for oral answer with debate, acting in agreement with any co-authors, the question may be withdrawn by them, but may be immediately taken over by any other Member, under the conditions set out in paragraph 1 above, with the agreement of Parliament deciding by vote without debate.

7. In order to wind up the debate on a question under this Rule, any committee or political group, or twenty-three or more Members, may place before the President a motion for a resolution with a request that an early vote be taken on it.

As soon as the motion for a resolution has been distributed, Parliament shall first decide, if necessary after hearing one of the authors, whether an early vote is to be taken.

Should an early vote be decided upon, the motion for a resolution shall be put to the vote at voting time of the next sitting without referral to committee. Only explanations of vote shall be permitted.

If two or more motions for resolutions are tabled, the procedure set out in Rule 56(4) shall apply.

Paragraph 7 does not apply to oral questions with debate to be dealt with in a debate pursuant to the fourth subparagraph of paragraph 1.

The vote on a request for an early vote on a motion for a resolution to wind up a debate on an oral question must take place, pursuant to the second subparagraph of paragraph 7, as soon as the motion for a resolution has been distributed, if possible at the end of the debate. The vote on the motion for a resolution itself must take place at the next sitting, at a time set by the President.
Rule 64

Title unchanged
Paragraphs 1 to 4 unchanged

5. If two or more motions for resolutions are tabled on a single topical and urgent subject of major importance, the political groups or Members tabling the motions may agree among themselves on a joint motion for a resolution. This motion for a resolution shall replace the previous motions for resolutions to which they are signatories, but not those tabled by other Members or political groups.

Motions for resolutions on topical and urgent subjects of major importance shall be put to the vote in the order in which they were tabled. Joint motions for resolutions agreed on by several political groups or Members who have tabled motions for resolutions shall be put to the vote instead of the first of the motions they seek to replace.

If a resolution is adopted, the other motions for resolutions on the same subject shall not be put to the vote, save where the President decides otherwise.
A joint motion for a resolution tabled under Rule 64(5) is intended to replace a number of motions for resolutions tabled previously and should be considered as a compromise text. The new joint text may be signed by political groups or individual Members who had not previously supported the motions for resolutions replaced by the joint motion for a resolution.

Given the timetable for the procedure laid down in Rule 64, a joint motion for a resolution offers sufficient scope for all interested parties to participate even if it is not possible to table amendments to a text which already, by its very nature, constitutes a reworking of previous texts.

Motions for resolutions under Rule 64 are put to the vote in the order in which they were tabled. This objective criterion prevents political groups or Members who have proposed a motion for a resolution from being put at a substantial disadvantage when a joint motion for a resolution is tabled to which it is not possible to table amendments.

Last paragraph of interpretation unchanged
amending Rules 56, 58 and 64 of the Rules of Procedure of the European Parliament with reference to the procedure in cases where two or more motions for resolutions are tabled on the same subject

The European Parliament,

- mindful of the problems which have arisen with the procedures governed by Rules 56(3), 58(5) and 64(5) of its Rules of Procedure in cases where two or more motions for resolutions have been tabled on the same subject,

- seeking to lay down uniform procedural rules for these three similar procedures and at the same time provide clear decision-making criteria,

- intent on thereby ensuring that the resolutions it adopts on any given subject under these procedures are neither repetitive in content nor mutually incompatible,

- concerned to ensure that it should as far as possible express its opinion on any given subject in a single resolution,

- having regard to the proposed amendment to Rule 58 of its Rules of Procedure (Doc. B 3-178/89),

- having regard to Rules 131 and 132 of its Rules of Procedure,

- having regard to the report of the Committee on the Rules of Procedure, the Verification of Credentials and Immunities (Doc. A 3-109/90),

- having regard to the second report of the Committee on the Rules of Procedure, the Verification of Credentials and Immunities (Doc. A3-179/90),

1. Decides to incorporate the foregoing amendments in its Rules of Procedure;

2. Instructs its President to forward this decision to the Council and Commission for their information.
9. Procedures applicable in the context of proposals on German unification

Doc. B3-1423/90

RESOLUTION

on the parliamentary procedures applicable to consideration of the German unification proposals

The European Parliament,

- having regard to Rules 36, 44, 47, 109 and 112 of its Rules of Procedure,

A. having regard to the historical importance of German unification in the process of European integration,

B. having regard to the urgent need for Community measures to accompany the unification process,

C. noting also the need for Parliament to be flexible in its approach to the adoption of especially rapid procedures to take account of the exceptional situation,

D. noting the Commission's undertaking to submit appropriate proposals to it by 12 September 1990, at the latest,

E. whereas this exceptional situation calls for agreement between the Council, the Commission and Parliament as to the procedure to be followed, the choice of the legal basis and compliance with the timetable proposed,

F. whereas it is essential to ensure the best possible coordination of Parliament's work and guarantee its consistent involvement in good time in the procedure under way,

- having regard to its decision of 15 February 1990 to set up a temporary committee to consider the impact of the process of German unification on the European Community,

1. Instructs the temporary committee set up under the decision of 15 February 1990 as the committee responsible to consider the proposals forwarded by the Council or the Commission and to report to it at first reading during the October 1990 part-session and at second reading during the November 1990 part-session; further requests that the temporary committee, in drawing up its report, must have regard to the opinions of the standing committees where these are delivered in time;

2. Calls on the temporary committee closely to involve in its proceedings the Chairmen and rapporteurs of the main standing committees concerned and to coordinate the positions adopted by them pursuant to Rule 112(3) of its Rules of Procedure, while respecting the content thereof;

3. Confirms that the procedure for referral for an opinion provided for in Rule 112(3) remains applicable for the other committees concerned;
4. In view of the timetable envisaged and the importance of this matter, decides to accord it priority;

5. Instructs its President to draw up with the Council and the Commission the agreements that constitute the necessary prerequisite for implementation of this procedure.
10. **European Union**

(a) Doc. A3-165/90

**RESOLUTION**

on the European Parliament's guidelines for a draft constitution for the European Union

The European Parliament,

- having regard to its draft treaty of 14 February 1984,

- having regard to its resolutions of
  - 23 November 1989 on the intergovernmental conference, and in particular paragraph 11 thereof\(^1\),
  - 14 February 1990 on the Commission's legislative programme\(^2\),
  - 14 March 1990 on the intergovernmental conference in the context of Parliament's strategy for European Union\(^3\),
  - 16 May 1990 on Economic and Monetary Union\(^4\),
  - 18 November 1988 on Community regional policy and the role of the regions\(^5\)

- having regard to the motion for a resolution by Mr Luster and others on the drafting of a European Constitution (Doc. B 3-15/89),

- having regard to the Single Act, in particular the first paragraph of the preamble,

- having regard to its resolution of 16 February 1989 on the strategy of the European Parliament for achieving European Union\(^6\),

- having regard to the results of the referendum held in Italy on the occasion of the European elections in which the Italian people voted overwhelmingly in favour of the European Parliament preparing a draft for European Union,

- having regard to the conclusions of the Dublin Summit,

- having regard to the report of its Committee on Institutional Affairs, and the opinion of the Committee on Youth, Culture, Education, the Media and Sport (Doc. A 3-165/90),

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\(^1\) OJ No. C 323, 27.12.1989, p. 111
\(^2\) OJ C 68, 19.3.90, pp. 70 and 74
\(^3\) OJ C 96, 17.4.90, p. 114
\(^6\) OJ No. C 69, 20.3.1989, p. 145
A. whereas the objective of creating a European Union on a federal basis was set right at the beginning of the construction of the Community by its founding fathers; whereas this objective has since been reaffirmed on numerous occasions and whereas the transformation of the EC into a true European Union is more essential than ever for the development of common actions which are stronger and more rooted in popular consent that those carried out hitherto,

B. whereas the constitution for the European Union is an urgent requirement for achieving an ever closer union of the peoples of the Member States, as stipulated in the Treaties, harmonious development of their economies and societies, the development and implementation of practical solidarity between them and full development of their scientific and cultural potential, while respecting and valuing the national and regional differences which make up the cultural wealth of Europe,

C. whereas the Community's institutional structures are proving unable to cope with the extension and development of the Community enterprise, particularly with the establishment of economic and monetary union,

D. whereas the establishment of the European Union is necessary to ensure that all the Member States effectively exercise their responsibilities on the international scene, effectively express and represent the identities, values and interests of their peoples, guarantee peace and security and make a proper contribution to the development of less-favoured areas and environmental protection,

E. whereas recent events in Central and Eastern Europe, German unification and the need to re-design a new European structure in which the Union must be an element of stability, peace, cooperation and the development of democracy, have increased the international responsibilities of the Community of the Twelve and thus require a significant strengthening of its institutional structure,

F. having regard to the characteristics inherent in a federal-type political union, based on the principle of respect for fundamental rights, democracy and the efficiency of the Union's activities,

G. whereas, to be worthy of the name, the Political Union must include among its powers not only those deriving from the existing Treaties (acquis communautaire), including those deriving from the establishment of the Economic and Monetary Union and those relating to the social and environmental sectors, conferred or developed by the Single Act, but also those more essentially political powers necessary to exercise the responsibilities cited above, in particular those relating to foreign policy and security, and to respect the principle of solidarity and the inviolability of the external borders of Member States,

H. whereas the definition of the future powers of the Union will have to be based on the principle of subsidiarity, on the basis of which the Union will have to carry out those tasks which because of their scope or impact or efficient implementation may be better undertaken by the institutions of the Union than by the individual Member States,
I. having regard to the need for any amendments to the Treaties adopted at
the intergovernmental conference on political union to be consistent with
the objectives of a federal type of European Union and, in this spirit,
confirming its conviction that it is necessary and a matter of urgency for
the Member States' governments to undertake to decide to transform the
Community into an effective European Union on the basis of the draft
constitution drawn up by the European Parliament,

J. whereas in the current political climate and in view of the urgent need to
define and achieve a true political Union, it seems increasingly clear
that the European Parliament, the representative of the will of the
people, on the basis of a mandate which it claims for itself once again,
is best placed to determine the objectives and institutions of the Union,
thus interpreting the increasing popular aspirations to this end, through
a draft constitution to be submitted to the parliaments of the Member
States for ratification,

K. whereas such a draft constitution should be based on its draft treaty of
1984, updated to take account of the experience of the Single European
Act,

I. Decides to draw up a draft constitution for the European Union on the
basis of the following guidelines and main points of the draft treaty
approved by Parliament on 14 February 1984:

The Union

I. The European Union meets the aspirations of the democratic peoples of
Europe to tighten the links established hitherto to create a Europe united
by the awareness of a common destiny and by the will to affirm the
European identity, and capable of assuming the responsibilities which
derive from its economic potential and its political role, especially in
the face of the profound changes which are transforming the European
continent and require a new foundation based on the principles of freedom,
democracy and cooperation; the Union has its basis in a constitutional
system inspired by the principles of democracy and guaranteeing the
necessary balance between the Member States and the Union; this system
needs to be constructed around the following essential elements:

- the definition of and full respect for fundamental rights and
freedoms;
- the definition of the rights and obligations of the Member States vis-
à-vis the Union within a federal framework;
- the democratic character of the Union which stems from its citizens
and is based on a democratic institutional structure with appropriate
and effective decision-making procedures;
- respect for the principle of the primacy of the law,
- an allocation of powers based, above all, at the time they are
conferred or, in particular, in the case of concurrent powers, at the
time they are exercised, on the principle of subsidiarity;
the precedence of the law of the Union over national law,

2. The purpose of the Union shall be to:

- bring about harmonious social development on the basis of full employment initiatives, the gradual abolition of existing regional imbalances, environmental protection and the scientific and cultural progress of its peoples;

- guarantee the economic progress of its peoples in the framework of a frontier-free economic area with no differences in the treatment of citizens or undertakings in the Member States and to increase the ability of the Member States, citizens and undertakings jointly to adapt their structures and activities to economic changes;

- promote international peace, cooperation, detente, disarmament, mutual security, the free movement of persons and ideas and better international trade and monetary relations;

- contribute to the harmonious and just development of all peoples in the world in order to enable them to emerge from a state of underdevelopment and hunger and fully exercise their political, economic and social rights;

A. Democratic legitimacy

3. The Constitution shall guarantee respect for the rights and fundamental freedoms set out therein, those provided for in the Community Treaties or established by the Court of Justice, those contained in the declaration adopted by the European Parliament on 12 April 19891 as well as those contained in international agreements to which the Union has acceded; the obligations of citizens and lawfully resident non-Community citizens towards the Union shall be those deriving from the legal system of the Union;

4. The Member States shall have, vis-à-vis the Union, the rights and obligations laid down in the Constitution, the Treaties establishing the Communities and the legal system of the Union;

5. The Union’s legitimacy shall be based on institutions directly or indirectly elected by the people and in particular on a legislative and budgetary power consisting of the European Parliament and the Council;

6. Parliament shall represent all the citizens of the Union, by whom it shall be elected, in accordance with a uniform electoral procedure, in general, equal, secret and free elections;

7. The Council shall represent the Member States, without prejudice to the weighting of votes;

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1 OJ No. C 120, 16.5.1989, p. 51

PV 22 II - 54 - PE 143.503
8. Legislative and budgetary power and the power to authorize the ratification of treaties shall be conferred on the European Parliament and the Council; they shall exercise these powers in accordance with co-decisional procedures which shall entail:

- the consensus of both, determined by the majorities laid down in the Constitution (depending on whether ordinary laws, laws requiring a special majority, budgetary law or law authorizing the ratification of treaties are involved);

- in cases of disagreement, a conciliation procedure;

- in cases to be defined, the final say of Parliament;

9. The President of the Commission shall be elected by the Parliament on a proposal from the European Council; the members of the Commission shall be appointed by its President; the Commission thus constituted shall present itself to Parliament for a vote of confidence;

10. The Council shall hold its legislating meetings in public;

11. The Parliament must be involved, through the assent procedure, in the appointment of the judicial and control bodies and of those responsible for administering the Union's monetary powers;

12. The Court of Justice, consolidating its role as the Supreme Court of the Union, shall have wider competences with regard to the verification of legitimacy, fundamental rights, relations between the institutions and relations with and among the Member States; it shall have jurisdiction, as stipulated in the existing treaties, regarding the demarcation of powers between the Member States and the Union laid down in the Constitution, taking account of the principle of subsidiarity; provision shall be made for appropriate sanctions against Member States which fail to apply Community legislation or comply promptly with its decisions;

13. Relations and the dialogue between the European Parliament and the parliaments of the Member States must be strengthened, in order to guarantee more effective control at the various levels;

14. Appropriate importance must be assigned to the role of the regions, both when the laws of the Union are drafted and when they are implemented, by assigning consultative powers to the Committee of local and regional authorities, with due regard for the constitutional structures of each state;

B. Efficiency of the institutions

15. The European Council shall have the task of guiding and giving impetus to the action of the European Union;
16. The decisions of the European Parliament shall be adopted by a simple majority, save where otherwise provided by the Constitution, and in particular in the case of amendments to the Constitution, including the accession of new Member States; the first exercise of concurrent competences; the election of the President of the Commission and the vote of no-confidence; assent on appointments to the legal and auditing organs and to the organs of the Central Bank, in which cases an absolute majority of its members shall be required;

17. The decisions of the Council shall be adopted by a majority of its members; they shall always be taken by qualified majority, in accordance with the provisions of the Constitution, when the Council exercises its responsibilities with regard to foreign policy and security, the adoption of laws, the budget and authorization of the ratification of international treaties;

18. The Commission shall be the governing body of the Union; it shall also have the power of initiative in respect of legislation and the budget, as already established in the Community Treaties; the Parliament and the Council may ask the Commission to introduce a draft law; should the Commission refuse, they may introduce a draft law in line with their original request;

19. The Commission shall enforce laws and also international policy decisions falling within its jurisdiction, and shall implement the budget and the international treaties of the Union, under the political control of Parliament and the Council; the Commission shall issue regulations within the framework of a general law of the Union;

20. The Commission shall, as far as possible, delegate its duties to the national, regional and local authorities, but shall remain responsible for these duties and may, where necessary, take them on itself;

21. The Commission shall have a general power of control with regard to compliance with the Constitution, in accordance with procedures similar to those laid down in the Community Treaties;

22. The Central Bank of the Union shall enjoy the necessary constitutional autonomy, with due respect for the role of the political institutions in matters of economic policy;

C. Competences of the Union

23. The Union shall have all the competences provided for in the Constitution or exercised as a consequence of the Constitution, in accordance with the principles laid down in the Draft Treaty establishing the European Union of February 1984;
24. The Union shall conduct common foreign, security and defence policies in all areas where the Member States share essential interests; it shall define the aims of these policies and implement them at the level of the Union, where necessary, in order to respond effectively to the requirements of the international situation and ensure the unity and coherence of the Union's international action;

25. The Council, with the participation of the Commission, shall lay down the general guidelines for the Union's security and foreign policies and Parliament shall approve them; the institutions of the Union and the Member States shall implement them within their respective areas of competence;

26. The security and foreign policy guidelines shall be binding on the Union and the Member States;

27. The Union shall have competences in matters of internal security, which it shall exercise in accordance with the principle of subsidiarity;

28. A constitutional review procedure shall be required for the allocation of new competences to the Union, other than concurrent or potential competences;

29. In the course of the budgetary procedure, the Union shall determine its income; this income shall be made up of taxes existing at national level or of appropriate taxes determined by the Union, within the limits fixed in the multiannual financial programme and in accordance with the principle of not increasing the overall fiscal burden on the citizens of the Union;

30. In the sectors for which it is competent, the Union shall ensure coherence between its own policies and those of the Member States, particularly in the economic, social and monetary sectors and with regard to cooperation with the developing countries and environmental policy;

D. Entry into force and amendment of the Constitution

31. Amendments to the Constitution, including new accessions to the Union, shall be subject to a procedure involving the assent of the European Parliament and the Council and ratification by the parliaments of the Member States; the Constitution shall stipulate the cases of constitutional amendment which may be decided on the basis of a simplified procedure;

32. The European Parliament shall propose the procedures under which the draft Constitution, drawn up on the basis of the mandate assigned to it, shall be converted into a European Constitution, by decisions of the European institutions and the responsible bodies of the Member States;

33. Should certain Member States not be prepared to accept this Constitution, provision shall be made for procedures to ensure that it may nevertheless enter into force in the Member States that have accepted it, while at all events safeguarding the close ties between all the Member States;
II. Instructs its Committee on Institutional Affairs to prepare a draft constitution in accordance with these guidelines and taking into account the results of the intergovernmental conferences;

III. Instructs its President to forward this resolution to the Council, the Commission and the parliaments and governments of the Member States.
RESOLUTION

on the Intergovernmental Conference in the context of Parliament’s strategy for European Union

The European Parliament,

- having regard to its resolution of 14 March 19901 on the Intergovernmental Conference,

- having regard to the Community Charter for Regionalization attached to its resolution of 18 November 19882

- having regard to the second interim report of its Committee on Institutional Affairs and the opinion of the Committee on Youth, Culture, Education, the Media and Sport (Doc. A 3-166/90),

A. WHEREAS there have been a number of significant developments since, and partly in response to, the adoption of Parliament’s resolution, notably:

* the aide-memoire of the Belgian Government of 20 March 1990, which supports most of the key points in the Parliament’s resolution;

* the three resolutions adopted by the Italian Parliament on 21 March 1990 explicitly supporting the European Parliament’s resolution and agreeing to host with the European Parliament the ‘assizes’ of national parliaments and the European Parliament in October 1990;

* the letter sent by President Mitterrand and Chancellor Kohl to the President-in-Office of the European Council calling for a second intergovernmental conference on political union in order to ‘strengthen the democratic legitimacy of the union, render its institutions more efficient, ensure unity and coherence of the union’s economic, monetary and political action and to define and implement a common foreign and security policy’, this letter following on from the desire expressed on 25 March 1990 by President Mitterrand to see European political union completed by 31 December 1992;

* the initiative of Felipe Gonzalez, the Spanish Prime Minister, for a citizen’s Europe;

* the ETUC declaration on the political union of Europe;

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1 OJ C 96 of 17.4.1990, p. 114
the special meeting of the European Council in Dublin on 28 April 1990 at which the European Council 'confirmed its commitment to political union' and charged the foreign ministers with preparing 'proposals to be discussed at the European Council in June with a view to a decision on the holding of a second intergovernmental conference to work in parallel with that on EMU with a view to ratification in the same timeframe';

the aide-memoires of the Greek, Dutch and Danish Governments, most aspects of which also support key points in Parliament's resolution;

the discussions that took place at the first meeting of the interinstitutional preparatory conference held in Strasbourg on 17 May 1990;

the informal meeting of the Foreign Ministers of the Community's Member States at Parknasilla on 18 and 19 May 1990 and the meeting of the General Affairs Council in Luxembourg on 18 and 19 June 1990;

the meeting of the European Council of 25 and 26 June 1990 in Dublin which agreed to convene the two intergovernmental conferences,

1. Welcomes the fact that the agenda of the forthcoming reform of the Treaties is to be widened beyond economic and monetary union; underlines, however, its grave concern at the emergence of some positions within the Council defining 'political union' as merely a reinforcement of the intergovernmental level of cooperation among the governments of the Member States of the EC;

2. Recalls its preference for a single intergovernmental conference possibly with two working groups, but accepts the proposal for two intergovernmental conferences provided that they are closely coordinated and that they aim for a single coherent package for ratification;

3. Considers that the term 'political union' refers to the same aspirations as those which lay behind Parliament's draft Treaty on European Union of February 1984; reaffirms the essential elements of such a political union to be:
- economic and monetary union with a single currency and an autonomous central bank;
- a common foreign policy, including joint consideration of the issues of peace, security and arms control;
- a completed single market with common policies in all the areas in which the economic integration and mutual interdependence of the Member States require common action notably to ensure economic and social cohesion and a balanced environment;
- elements of common citizenship and a common framework for protecting basic rights;
- an institutional system which is sufficiently efficient to manage these responsibilities effectively and which is democratically structured, notably by giving the European Parliament a right of initiative, of co-decision with the Council on Community legislation, the right to ratify all constitutional decisions requiring the ratification of the Member States also and the right to elect the President of the Commission;

with these responsibilities being exercised on the basis of the principle of subsidiarity, which will enable the Union to develop dynamically;

4. Believes that a reform of the Treaties that would achieve these objectives would bring the European Community closer to the 'European Union of federal type' advocated by the European Parliament in its resolution of 14 March 1990 and considers, therefore, that such changes should be consolidated in a 'constitution' which the European Parliament should prepare; recalls its resolution of 11 July 1990\(^1\) on this draft, which is based on its draft treaty of European Union of 1984, and which should become the basis for the transformation of the Community into a genuine union of federal type;

5. Regards it as essential, at the intergovernmental conference, to amend in a coherent manner all the Treaties establishing the European Communities, in particular the ECSC, EEC, EURATOM and Merger Treaties;

6. Reaffirms the areas in which it would like to see treaty reform, namely those listed in paragraph 4 of its resolution of 14 March 1990, and spells out as follows the precise changes that it would seek to achieve for each of the areas listed in that resolution;

ECONOMIC AND MONETARY UNION

7. Economic and monetary union should be established in accordance with a specific, automatic and mandatory timetable, between the 12 Member States of the European Community or, if appropriate, between those willing, in accordance with the criteria spelt out in Parliament's resolutions of 25 October 1989\(^2\) and 16 May 1990\(^3\) on economic and monetary union;

\(^1\) Part II, Item 10(a) of these Minutes
\(^2\) OJ C 304, 4.12.1989, p. 43
\(^3\) See Minutes of that sitting, Part II, Item 2.
COMMUNITY FOREIGN POLICY

8. Considers that Article 30 of the Single European Act should be revised in order to provide for matters currently dealt with under EPC to be dealt with in the Community framework with appropriate procedures; believes that the current division between external economic relations handled by the Community institutions with the Commission acting as the Community's external representative, and political cooperation handled by EPC with the EPC President acting as external representative, is increasingly difficult to maintain in practice; considers that any genuine attempt 'to assure unity and coherence in the Community's international action' must abolish this increasingly artificial distinction;

9. Calls therefore for the Council (rather than a separate framework of foreign ministers) to be given the prime responsibility for defining policy; for the Commission to have a right of initiative in proposing policies to Council and to have a role in representing the Community externally, including appropriate use of its external missions in third countries; and for the functions of the EPC secretariat to be absorbed by the Commission and Council; and for the Community's foreign policy to be subject to scrutiny by the Community's elected Parliament;

10. Calls for the scope of the Community's foreign policy to include issues of security, peace and disarmament, with a close coordination of national security policies, and to respect the principle of solidarity and the inviolability of the external borders of Member States;

11. Considers that in all these areas, the Community should aim to have common policies on all matters in which the Member States share essential interests;

12. Considers that membership of international organizations should be adjusted accordingly, with the Community as such seeking membership and representing the Member States in those areas where Community competence has been established, and it should therefore belong notably to the Council of Europe;

BETTER TREATY PROVISIONS IN THE SOCIAL, ENVIRONMENTAL, RESEARCH AND CULTURAL SECTORS

13. Considers that, in order to ensure a balanced development of the internal market, the social and environmental provisions of the treaties should be among those in which majority voting in Council applies; believes this could be best achieved in the context of the improved legislative procedure outlined below;
14. Considers that the objectives of social policy, as defined in the treaties, should be extended, improved and completed, notably by:

- adding to Article 3 EEC the objective of common action in the field of social affairs and employment, which implies the affirmation of the right of workers to be informed and consulted before any decision affecting them;

- deleting paragraph 2 of Article 100a EEC and including social protection in matters concerned by paragraph 3;

- adding to Article 8a EEC that the completion and further evolution of the internal market necessarily imply provisions to secure the convergence, at a higher level, of living and working conditions;

- adding to Article 101 EEC the possibility of Commission intervention in cases where Community action in Member States causes serious economic or social distortion or where the intervention of the structural funds is insufficient;

- adding to the objectives of Article 117 EEC improved training and working conditions, equal opportunities, and access to education and culture, to be granted to all citizens of the Member States and to all persons legally resident in the Community;

- adding to the first paragraph of Article 118 of the EEC Treaty the indication that the Commission's task in the social sphere is to implement the common policy in the social affairs and employment sphere and to promote collaboration between the Member States;

- adding to the objectives of Article 118a EEC the improvement, achieving progress, of living standards and social provisions, equal opportunities, training, minimum levels of social security and welfare, minimum provisions for union law and collective bargaining, covering also workers from third countries;

- amending Article 118b of the EEC Treaty by indicating that the Community must adopt a legal framework which enables the dialogue between the two sides of industry to develop so that European collective bargaining may be undertaken;

- establishing, through Article 128 EEC, a common policy providing for all persons in the Community to have access to appropriate vocational training throughout working life;

- modifying the last words of Article 130a EEC to refer to least-favoured regions and population groups;

- adding to the objectives of Article 119 EEC, concerning equal pay for men and women, the objective of equal opportunities at work and in society;
15. considère que les objectifs de la politique de l'environnement tels que définis dans les traités, devraient être étendus, améliorés et complétés, notamment par:
- l'adjonction à l'article 130R, paragraphe 1 du traité CEE de l'objectif visant la contribution et l'action internationale contre les risques qui menacent l'équilibre écologique de la planète;
- la modification de l'article 130R, paragraphe 4 du traité CEE afin que soit précisé que la Communauté contribue à la réalisation des objectifs énoncés au paragraphe 1, par la création d'un Fonds européen de l'environnement;

16. considère en outre que la Communauté doit ratifier la Charte sociale du Conseil de l'Europe et les Conventions de l'Organisation internationale du Travail se rapportant aux droits sociaux fondamentaux et aux domaines couverts par le droit communautaire;

17. juge suffisantes les compétences conférées à la Communauté dans le domaine de l'environnement à condition que l'exercice de ces compétences respecte la procédure de codécision décrite ci-après;

DROITS ET LIBERTES FONDAMENTAUX ET EUROPE DES CITOYENS

18. demande l'inscription dans les traités de la Déclaration des droits et libertés fondamentaux adoptée par le Parlement européen le 12 avril 1989 ; demande l'inscription dans les traités de la Déclaration solennelle contre le racisme et la xénophobie adoptée par le Parlement le 11 juin 1986; demande que la protection de ces droits fondamentaux vis-à-vis de la Communauté soit du ressort de la Cour de justice avec une possibilité d'accès direct des citoyens de la Communauté européenne à la Cour de justice après l'épuisement des voies de recours nationales ; estime en outre que la Communauté devrait adhérer à la Convention européenne des droits de l'homme du Conseil de l'Europe afin que les procédures communautaires protègent les droits fondamentaux puissent faire l'objet de recours auprès d'un organe extérieur, au moins dans les domaines couverts par la Convention (de même que les États individuels, y compris ceux disposant de chartes de droits propres, s'en remettent à la Convention européenne);

19. demande l'inclusion dans les traités de dispositions visant à développer des formes communes de citoyenneté européenne, par le biais de mesures telles que le droit de vote, aux élections municipales et européennes, pour les citoyens de la Communauté dans l'État membre où ils résident;
20. Believes that unanimity should no longer be required for decision-taking in Council, except for constitutional matters (revision of the treaties), accession of new Member States and extension of the field of Community responsibilities (Article 235); considers that the requirement for unanimity for ordinary Community legislation and policies is tantamount to the dictatorship of the minority; considers that the experience of the recent extension of the field of majority voting shows that a significant improvement in the decision-taking capacity of the Council can be achieved by this means;

21. Considers that Council should hold its meetings in public when adopting Community legislation, in order to allow more openness and better scrutiny;

22. Considers it essential to ensure the participation of the regions by means of a body consisting of representatives of the regional authorities in the Member States, whose function would be comparable to that of the Economic and Social Committee in its specific field;

23. Is aware that many national parliaments are seeking to improve their scrutiny over their country's member of Council; expresses its readiness to assist the parliaments of the Member States with access to information; will continue to cooperate with the parliaments of the Member States in the now regular meetings that take place at various levels between these parliaments and the European Parliament; considers, however, that it would not be useful to set up a new institution or 'chamber of national parliaments' alongside the European Parliament, as:

- experience of the European Parliament prior to direct elections shows the practical limitations of such a body;
- Community institutions already include a body representing Member States (the Council) and a body representing the electorate directly (the European Parliament);
- decision-taking would become even more complex and therefore less transparent;

and instructs its Committee on Institutional Affairs to prepare practical proposals for improving cooperation with national parliaments;

STRENGTHENING THE COMMISSION'S IMPLEMENTING POWERS

24. Considers that the amendment of Article 145 EEC by Article 10 of the Single European Act has not been properly implemented and Declaration No. 1 annexed to the Single Act has not been respected;

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1 OJ C 120, 16.5.1989, p. 51
25. Calls for an amendment to Article 155 of the EEC Treaty and a corresponding deletion in Article 145 of the EEC Treaty in order to clarify that implementing powers should in all cases be conferred on the Commission which, for this purpose, may be assisted by an advisory committee (purely consultative) or a management committee (able, by a qualified majority, to suspend Commission decisions and refer them to the legislative authority (Parliament and Council));

26. Considers that democratic scrutiny of Commission implementing provisions should be ensured by means of an obligation on the Commission to inform Parliament and Council immediately of any such measures and to discuss them with the appropriate organ of Parliament or Council when requested, and that Parliament should have a period of one month after publication of such provisions in which to decide whether it wishes to subject them to the legislative procedure;

27. Believes that the Commission’s responsibility to implement the budget as adopted should not be fettered by any committees other than advisory committees;

STRENGTHENING THE COMMUNITY’S ABILITY TO ENFORCE APPLICATION OF ITS LAW

28. Believes that in order to be in a position to check on the implementation of Community law, the Commission must be reinforced by the creation of European Inspectorates working with or within it, most notably and urgently in the field of the environment, and that such Inspectorates should have the task of checking that national authorities are properly applying EC law;

29. Considers it necessary for the Court of Justice to be given powers, to be written into the Treaties, to impose sanctions, including financial sanctions, on Member States which fail to apply Community legislation or implement Court judgments;

REFORMING THE FINANCIAL ARRANGEMENTS AND IN PARTICULAR THE SYSTEM OF OWN RESOURCES

30. Considers that, with the achievement of economic and monetary union and political union, the financial arrangements laid down in the Treaties are no longer adequate; considers, therefore, that there is a need for an overall review of those financial arrangements on the basis of a greater balance between the two branches of the budgetary authority and, in particular, that:

- Article 199 of the EEC Treaty should cover the financial activities of all the Communities, including those (e.g. EDF, ECSC) which have for various reasons not hitherto been included in the budget, and should also cover borrowing and lending operations;

- Article 201 should outline a full own resources regime which would ensure complete financial autonomy and self-sufficiency for the Community; at all events, in order to ensure coverage of all budget expenditure, Article 200 should be updated,
- the multiannual financial estimates, as drawn up and periodically updated by the Council and Parliament, should form the basis of the budgetary procedure;

- in Article 203, all the special rules concerning compulsory expenditure should be deleted; the maximum rate rule should be replaced by a multiannual and annually rolling expenditure plan, to be determined jointly by Parliament and the Council;

- Articles 204 to 209 should be adapted in accordance with the plan to increase the powers of Parliament;

RECOGNIZING THE DUALITY OF COMMUNITY LEGITIMACY: COUNCIL AND PARLIAMENT

31. Considers it to be absolutely essential that Community legislation should be adopted by a procedure of co-decision between Parliament and Council;

32. Believes that the proposal contained in the memorandum of the Belgian Government represents a significant step towards a co-decision procedure, but considers that such a method gives too much weight to the final possibility for the Parliament to reject legislation in what amounts to a third reading and a simple veto power might cast Parliament in a negative light, as holding up the progress of the Community and causing interinstitutional conflict;

33. Calls for Parliament and the Council to be given equal rights and equal weight in the legislative process, provision being made for a mechanism to settle disputes between the two bodies which compels them to cooperate on an equal footing in accordance with the following procedure:

(a) Commission proposals should be forwarded to Parliament which would have the right to approve, amend or reject them; amendments rejected by the Commission would require the support of a majority of the Members of Parliament;

(b) Council could then approve, amend or reject such proposals; it could approve by a majority any text in the form adopted by Parliament; it could amend such texts by a qualified majority where the Commission approved of such amendment or by unanimity where the Commission disapproved; it would require unanimity to approve a proposal rejected by Parliament;

(c) At first reading, flexible deadlines should be set to permit either of the two branches of legislative power to request application of the urgency procedure to a proposal which is being blocked by the other;

(d) If the text approved by Council conformed to that of Parliament, it would be definitively adopted; where it differed from that of Parliament, Council's position would be referred back to Parliament for a second reading;
(e) Parliament, in its second reading, could, by simple majorities, either approve Council's text, or request the opening of the conciliation procedure; should a proposal not be approved within 3 months, it would be referred to the Conciliation Committee;

(f) The Conciliation Committee would comprise an equal number of members of both institutions; members would not be bound by instructions;

The Commission would participate in the work of the committee;

The text agreed on by the committee would be forwarded to the Council and to Parliament for their decision. No further amendments would be admissible;

Should it not secure a majority in one of the two institutions, the legislative procedure would be closed;

(g) Proposals adopted by both Council and Parliament would become law upon the signature of the Presidents of the two institutions;

34. Calls for Parliament also to be given the right to initiate legislative proposals in cases where the Commission fails to respond within a specified deadline to a specific request adopted by a majority of Members of Parliament to introduce proposals; in such cases a Parliament proposal adopted by a majority of Members would be the basis for the subsequent stages of the legislative procedure described above;

35. Calls for Parliament to be given the right to elect the President of the Commission on a proposal from the European Council; the President should, with the agreement of Council, choose the Members of the Commission; the debate and the vote of confidence in a new Commission, which Parliament has held since 1981, should now be formalized in the Treaties;

36. Considers that the procedure whereby Parliament gives its opinion on each nomination to the Court of Auditors should be modified to provide for Parliament to give its approval by a simple majority to nominations to the Court of Auditors and that the same procedure should apply to nominations to the Court of Justice;

37. Calls for the budgetary control powers of the European Parliament to be enhanced and democratic control reinforced, and in particular:

(a) calls for the principle that the observations made in the discharge decisions are binding on all the institutions to be enshrined in the Treaty;

(b) calls for the discharge authority's right to ask the Court of Auditors to carry out investigations and submit reports to be enshrined in the Treaty;

38. Calls for the essential right to go to the Court of Justice for annulment should be explicitly granted to the European Parliament in the Treaties;
39. Demands that each of the three other institutions be entitled to consult the Court of Justice in respect of any matter regarding the interpretation of the Treaties;

40. Considers that Parliament should have a right, enshrined in the Treaties, to establish committees of inquiry to investigate alleged contraventions of Community law or instances of maladministration with respect to Community responsibilities; the Treaties should provide for an express obligation on Community institutions and other Community and Member State authorities to cooperate with such an inquiry;

41. Calls for Articles 216(EEC), 77(ECSC) and 189(BAEC) to be amended to give the European Parliament the right to fix its own seat unless, within two years, the Member States can finally agree (after a delay of over 30 years) to exercise their power and responsibility 'to determine the seat of the institutions of the Community' under the existing Articles;

42. Believes that the assent procedure should be extended to include Treaty amendments (Article 236 EEC and its equivalents in the other Treaties), the uniform electoral system and all significant international agreements entered into by the Community;

43. Undertakes to submit appropriate drafts of Treaty articles and amendments conforming to the above requests in due time before the beginning of the intergovernmental conferences as part of its formal opinion required under Article 236(EEC) for the convening of the conferences; expects the intergovernmental conferences to examine Parliament's requests and either to incorporate them as such in the Treaty revision or to agree with Parliament on alternative possibilities, in accordance with the procedure put forward in paragraph 5 of its resolution of 14 March 1990;

44. Confirms its decision to deliver an opinion pursuant to Article 236 of the EEC Treaty on the convening of the Intergovernmental Conference on political union, on the basis of the results of the preparatory interinstitutional conference and in particular the consensus reached with the governments of the Member States and the Commission on the agenda for the conference and the role of the European Parliament;

45. Calls for a move from the present Community based on Treaties to a Union of federal type on a constitutional basis and demands therefore the amendment of Article 236 of the EEC Treaty, the new version of which should provide for approval of constitutional amendments by the two legislative arms (Council and Parliament) and their subsequent ratification by the Member State parliaments;

46. Considers in any event that such a major revision of the Treaties should be elaborated and agreed jointly by the representatives of the Member States and the representatives elected by the citizens of Europe to the European Parliament;
47. Instructs its President to forward this resolution to the Commission, the Council, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the governments and the parliaments of the Member States and Applicant States and the consultative committee of local and regional authorities and to use this resolution for his submissions to preparatory meetings of the IGC, to 'the Assizes' and to European Council meetings.
Article 1(3)

3. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

Article 1(4)

4. A computer program shall not be protected unless it satisfies the same conditions as regards its originality as applied to other literary works.

(b) Programs generated by means of a computer shall be protected in so far as they satisfy the conditions laid down in point (a).

Article 2(1)

1. Subject to the following paragraphs, the author of a computer program is the natural person or group of natural persons who has created the program.

1. The author of a computer program is the natural person or group of natural persons or, where the law of the Member States permits, the legal person who has created the program. Where collective works are recognized by the law of a Member State, the natural or legal person considered by the law of the Member State to have created the work shall be considered to be its author.

Article 2(2)

2. In respect of computer programs created by a group of natural persons, the exclusive rights shall be exercised in common unless otherwise provided by contract.

2. In respect of computer programs created by a group of natural persons, the rights conferred by the protection accorded by Article 1 shall be exercised in common unless otherwise provided by contract.

Article 2(4)

4. Where a computer program is created in the course of employment, the employer shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.

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 shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.
5. In respect of programs which are generated by the use of a computer program, the natural or legal person who causes the generation of subsequent programs shall be entitled to exercise all rights in respect of the programs, unless otherwise provided by contract.

5. Deleted

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. In so far as they necessitate a reproduction of the program in part or in whole, loading, viewing, running, transmission or storage of the computer program shall be considered restricted acts;

(b) the adaptation of a computer program;

Subject to the provisions of Article 5, the protection accorded by 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, and for whatever purpose. In so far as they necessitate a permanent or temporary reproduction of the program, loading, viewing, running, transmission or storage of the computer program shall be subject to authorization by the right-holder;

(b) the translation, adaptation, arrangement and any other modification of a program and the reproduction of the results thereof;

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 right-holder 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. Where a copy of a computer program has been made available to the public in a legal manner, and in the absence of contractual provisions to the contrary, the right to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.
2a. Notwithstanding the provisions of Article 4(a), the legitimate holder of a copy of a program may, without having to request the authorization from the right-holder, observe, study or test the working program in order to determine its underlying ideas, principles and other characteristics where these are not protected by copyright, in the course of loading, viewing, running, transmission or storage.

Article 5a (new)

Article 5a

Notwithstanding any contractual arrangements to the contrary, the rights enumerated in Article 4(a) and (b) shall 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.

This option may only be exercised by the licensee or by another person entitled to use a copy of the program on his behalf by the person authorized to do so and only where the following conditions are fulfilled:

(a) the information necessary to achieve interoperability shall not have been published or made available previously;

(b) the retrieval of information shall be confined to the parts of the original program which are necessary for the achievement of this aim;

(c) the information retrieved may not be communicated to third parties except in so far as this is necessary for the operation of the second program;

(d) the information retrieved may not be used to create or market a program which violates a copyright or the program of origin.

The provisions of this article may not be interpreted in such a way as to allow information obtained in the application thereof to be used in a manner which unreasonably prejudices the legitimate interests of the right-holder or which conflicts with a normal exploitation of the program.
Protection shall be granted for 50 years from the date of creation.

1. The provisions of this Directive shall be without prejudice to any legal provisions concerning patent rights, trade marks, unfair competition, trade secrets or the law of contract as far as such provisions do not conflict with the principles laid down in the present Directive.

2. The provisions of this Directive are applicable also in respect of works created prior to [date in Article 9].

1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to comply with this Directive by [date].

2. Member States shall ensure that they communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

2a. A Consultative Committee shall be set up by the Commission, to consist of representatives of the Member States and of representative associations of authors and producers of computer programs with the objectives of:

(a) providing the Commission with information on research and on problems arising from the implementation of this Directive;

(b) drawing up proposals with a view to possible changes in the rules which may be required for more effective realization of the Community’s objectives.

2b. The Commission shall take all the necessary initiatives in order to ensure the realization, at national and international level, of the objectives set out in this Directive.

2c. The Commission shall, every two years, forward to Parliament and to the Council a report on the implementation of this Directive at national and Community level.
LEGISLATIVE RESOLUTION  
(Cooperation procedure: first reading) 

embodying the opinion of the European Parliament on the proposal from the Commission to the 
Council for a directive on the legal protection of computer programs

The European Parliament,
— having regard to the proposal from the Commission to the Council (COM(89) 816 
final) (1),
— having been consulted by the Council pursuant to Article 100a of the EEC Treaty (Doc. 
C3-56/89 — SYN 183),
— having regard to the report of the Committee on Legal Affairs and Citizens' Rights and the 
opinions of the Committee on Economic and Monetary Affairs and Industrial Policy and 
the Committee on Energy, Research and Technology (Doc. A3-173/90),

1. Approves the Commission proposal subject to Parliament’s amendments and in accord-
ance with the vote thereon;
2. Calls on the Commission to amend its proposal accordingly, pursuant to Article 149(3) of 
the EEC Treaty;
3. Asks to be consulted again should the Council intend to make substantial modifications to 
the Commission proposal;
4. Calls on the Council to incorporate Parliament’s amendments in the common position that 
it adopts in accordance with Article 149(2)(a) of the EEC Treaty;
5. Instructs its President to forward this opinion to the Council and Commission.


6. Standard emergency call number ** I

— Proposal for a decision COM(89) 452 final — SYN 223

Proposal for a Council decision on the introduction of a standard Europe-wide emergency call 
number

Approved with the following amendments:

TEXT PROPOSED BY THE COMMISSION 
OF THE EUROPEAN COMMUNITIES (*) 

(TEXT AMENDED 
BY THE EUROPEAN PARLIAMENT)

(Amendment No 1)

Third recital

Whereas the effect of such differences is to create prob-
lems in contacting the responsible services for citizens, in 
particular tourists and business travellers, facing emer-
gency situations in other Member States;

Whereas the effect of such differences is to create prob-
lems in contacting the responsible services for citizens 
facing emergency situations in other Member States;
SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)

on: 17 and 18 July 1990

No. prev. doc.: 7417/90 PI 38
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. At its meeting on 17 and 18 July 1990 the Working Party on Intellectual Property (Computer programs) (1) held a preliminary discussion on the amendments proposed by the European Parliament to the proposal for a Council Directive on the legal protection of computer programs (Part I below); it also continued examining questions concerning Article 4(c) and (d) (Part II) and measures against piracy (Section III).

(1) The Luxembourg delegation was not represented at this meeting.
I. AMENDMENTS PROPOSED BY THE EUROPEAN PARLIAMENT

2. The Working Party held a preliminary discussion on the Opinion of the European Parliament, which was delivered on 11 July 1990 (2). For every amendment, the Commission representative stated the position adopted by Mr BANGEMANN, Vice-President, at the Parliament's plenary sitting. Since certain delegations had not been informed of the Parliament's proposed amendments, before the Working Party meeting, their reactions were only provisional.

3. Article 1(1) and (2)

The Commission had accepted this amendment.

The Spanish delegation upheld its reservation on the expression "literary work".

Although the other delegations agreed in principle to the European Parliament's amendments, they preferred the wording of the provision set out in 7010/90 PI 32.

(2) This Opinion is given in 7897/90 PE-RESOL 30, pages 25 to 32.
4. **Article 1(2)(a) (new)**

The Commission had rejected this amendment on the grounds that it was not compatible with the Berne Convention for the Protection of Literary and Artistic Works in that it stipulated that users' manuals should enjoy the same protection as the programme itself, whereas the Berne Convention specified separate protection for such manuals.

All delegations supported the Commission position. Furthermore, the majority of delegations expressed serious misgivings as to the wisdom of incorporating in the Directive the definition of a computer program proposed by the Parliament.

5. **Article 1(3)**

The Commission had accepted this amendment. Nevertheless, the Commission representative thought that the wording of the corresponding provision (Article 1(2)) appearing in 7010/90 PI 32 was more specific.

A majority of delegations shared the Commission representative's view.
The Netherlands delegation remained opposed to the second sentence of this paragraph and the United Kingdom delegation said that its agreement to this sentence was subject to entry in the Council minutes of the statement which the Commission representatives had proposed drawing up (see 7417/90 PI 38, point 15).

6. **Article 1(4)**

The Commission had accepted this amendment.

A number of delegations, while agreeing in principle to the Parliament's amendment, said that they preferred the wording of the corresponding provision (Article 1(3)(a)) appearing in 7010/90 PI 32.

After agreeing in principle to the Parliament's amendment, the Commission representative and the United Kingdom and Irish delegations withdrew their reservations on the deletion of paragraph 4(b) from the Commission proposal.
7. Article 2(1)

The Commission had agreed to this amendment.

Delegations accepted this amendment as well, although some of them would prefer the wording of the provision set out in 7010/90 PI 32.

8. Article 2(2)

The Commission had rejected this amendment on the grounds that it no longer referred to exclusive rights.

Delegations supported the Commission position.

9. Article 2(3)

Since the European Parliament had proposed no amendments to this provision, the Commission representative and the Italian delegation changed their reservation on the Working Party's deletion of this paragraph to a provisional reservation.
10. Article 2(4)

The Commission had agreed to this amendment.

While accepting in principle the Parliament's amendment, the majority of delegations said they preferred the wording of this provision set out in 7010/90 PI 32.

The Netherlands delegation was opposed to the amendment by the European Parliament, as it favoured the text given in 7010/90 PI 32.

11. Article 2(5)

The Commission had accepted the deletion of this paragraph as proposed by the European Parliament; the Commission representative therefore withdrew his reservation.

Delegations supported the position of the Commission.

The United Kingdom and Irish delegations withdrew their reservations.
12. Article 3(2)

Since the European Parliament had not proposed any amendments to this provision, the Commission representative changed his reservation on the Working Party's deletion of this paragraph to a provisional reservation.

13. Article 4, introductory sentence

The Commission had rejected this amendment on the grounds that it no longer mentioned exclusive rights.

The delegations endorsed the Commission's position.

14. Article 4(a)

The Commission had agreed to this amendment.

A number of delegations objected to the expression "and for whatever purpose" in the first sentence. The Commission representative said he was willing to use the corresponding sentence in 7010/90 PI 32.
The Commission representative said that the expression "viewing" in the second sentence should be replaced by "displaying".

Subject to that clarification, the Belgian, Danish, Spanish, French, Netherlands, Portuguese and United Kingdom delegations accepted the amendment to this sentence proposed by the European Parliament and in particular the clarification "permanent or temporary reproduction".

The German and Italian delegations objected to this last clarification since they preferred the wording in 7010/90 PI 32.

The Greek and Irish delegations also preferred that text.
15. **Article 4(b)**

The Commission had accepted this amendment.

The majority of delegations preferred the text given in 7010/90 PI 32 on the grounds that the amendment proposed by the Parliament made no mention of the rights of the person who translated the programs.

16. **Article 5(1)**

It was pointed out that the amendment proposed by the Parliament corresponded to the wording given in 7010/90 PI 32, at least in the English version, and that the other language versions should be aligned on that text.

The Commission had accepted this amendment.

The majority of delegations supported the Commission's position.

The German and Netherlands delegations tabled reservations on this paragraph which they considered should be amended to read: "Notwithstanding any contractual provisions to the contrary, the acts ..."."
The Netherlands delegation's reservation also extended to the absence of an exemption for the use of programs for archiving or financial auditing.

17. Article 5(2)

See Section II below.

18. Article 5(2a) (new)

The Commission had rejected this amendment on the grounds that it omitted the words "in execution of his contract", at least in the French version, which appeared in the corresponding text (Article 5(2)) in 7010/90 PI 32; however, the Commission had noted in the meantime that the words "in the execution of his contractual duties" appeared in the English version of the Parliament's amendments which contained further discrepancies with the French version. In these circumstances, the Commission representative proposed seeking clarification from the European Parliament as to the precise wording of the amendment proposed and he reserved his position pending such clarification.

The majority of delegations preferred the version of Article 5(2) in 7010/90 PI 32.
The Danish, Spanish and Netherlands delegations, on the other hand, preferred the European Parliament's amendment, but without the words "in the execution of his contractual duties".

19. Article 5a (new)

The Commission had not adopted a position on this amendment as such; it had, on the other hand, stated that it was in favour of two further proposals for amendments which had not been adopted by the European Parliament but which corresponded to various points in Article 5(3) and (4) as given in 7010/90 PI 32.

Several delegations said they preferred the amendment proposed by Parliament; other delegations preferred the text given in 7010/90 PI 32.

A number of delegations had misgivings regarding the expression "the maintenance of the programme" in the opening section of Article 5a as proposed by the Parliament.

The majority of delegations said they preferred Article 5a(a) in the Parliament's text to the version of Article 5(3)(b) in 7010/90 PI 32.
The majority of delegations felt that the final paragraph of Article 5a as proposed by the Parliament should appear in the recitals to the Directive rather than in its enacting terms.

20. Article 7

The Commission had rejected this amendment on the grounds that it was not in line with Article 7 of the Berne Convention.

All delegations endorsed the Commission's position. With the exception of the German delegation, they supported the wording in 7010/90 PI 32.

The German delegation upheld its reservation regarding the latter wording for the reasons stated at previous meetings of the Working Party. A compromise suggestion made by the Netherlands delegation to insert the words "for at least" before the words "50 years after his death" would have been acceptable to it.

The Commission representative could not agree to this suggestion on the grounds that it would mean that the term of protection would be only partially harmonized within the Community; under Court of Justice case
law, differences in the term of protection from one Member State to another might justify goods being held up at frontiers between Member States, which would conflict with the aims of the Single Market. It would therefore be essential to have full harmonization of the term of protection in the Community and not merely to have a minimum term as allowed by the Berne Convention.

21. Article 8(1) and (2)

The Commission had accepted the amendments proposed by the European Parliament to the two paragraphs.

Most delegations preferred the text contained in 7010/90 PI 32, in particular as regards paragraph 2.

22. Article 9

The Commission had rejected this amendment on the grounds that the setting up of a consultative committee to formulate proposals was contrary to the Commission's policy concerning committee procedure.

Delegations were in favour of the amendments proposed to paragraphs 1 and 2. With regard to paragraphs 2a, 2b and 2c, they either rejected
these provisions or reserved their positions on them.

23. The Commission representative said that the Commission intended to submit its amended proposal for a Directive before the Working Party's next meeting.

II. DISTRIBUTION, RENTAL AND COMMUNICATION TO THE PUBLIC

24. The European Parliament did not propose any amendment to Article 4(c) of the Commission proposal. However, it did propose an amendment to Article 5(2).

25. On the basis of the Working Party's earlier discussions, the Commission representative had proposed separating the right to distribute to the public and the right to rent (Article 4(c) and (d) respectively in 7010/90 PI 32 + COR 1(f)).
(a) **Right of distribution**

26. Delegations agreed on the principle underlying Article 4(c) as proposed in 7010/90 PI 32.

27. The United Kingdom delegation asked whether the exhaustion of rights in the second sentence of subparagraph (c) was to apply on a Community level or world-wide. All the delegations were of the opinion that it should apply on a Community level in that the first sale in the Community of a copy of a program by the author or with his consent would exhaust the right of the author to control the sale of that copy in the Community.

(b) **Right of rental**

28. As the European Parliament had not proposed any amendment to Article 4 as regards right of rental, the Commission representative said the Commission intended to retain an exclusive right of rental in its amended proposal for a Directive. Furthermore, since the Commission had agreed to the need to strengthen copyright, an exclusive right of rental
for authors would be proposed in the proposal for a Directive on rental which the Commission was preparing. The Commission representative therefore retained Article 4(d) as proposed in 7010/90 PI 32 + COR 1(f).

The Danish, German and Netherlands delegations thought that the question of rental should be covered in the new Directive announced by the Commission rather than in the present Directive, which covered only computer programs. In addition, the German and Netherlands delegations pointed out that the Member States should be able to choose between an exclusive right and a right to payment.

While the United Kingdom delegation's position was more in line with that of the Danish, German and Netherlands delegations, it could accept the Commission's position if a majority were to emerge in that direction.
The Belgian, Greek, French, Irish, Italian and Portuguese delegations backed subparagraph (d) as proposed in 7010/90 PI 32 + COR 1(f).

While subscribing to the views of the latter delegations, the Spanish delegation could accept the position of the Danish, German and Netherlands delegations if it obtained a majority.

(c) Right of communication to the public

29. The Netherlands delegation had tabled a reservation on the absence of a further subparagraph in Article 4 with the wording: "the communication to the public of a computer program in whole or in part" (see 7010/90 PI 32, footnote 9 on page 5).

The German, Spanish, French, Irish and Portuguese delegations were willing to agree to the new subparagraph if a consensus could be reached.
The Belgian, Danish, Greek, Italian and United Kingdom delegations, on the other hand, voiced doubts as to the practical significance of such a provision and hence preferred not to accept it.

The German delegation pointed out that the absence of such a provision in the Directive would not prevent a corresponding provision being retained in Netherlands law; it consequently asked whether the Netherlands delegation could waive its reservation. The Netherlands delegation would look into that suggestion.

III. ANTI-PIRACY MEASURES

30. The European Parliament had not proposed any amendment to Article 6; it rejected an amendment replacing the word "possession" by "acquisition". In the circumstances the Commission representative said he was obliged not to depart too much from the Commission's original proposal.

31. The Working Party resumed its examination of the two variants of Article 6 contained in 7010/90 PI 32 + COR 1(f).
32. The Greek delegation withdrew its scrutiny reservation on paragraph 1(c) of the first variant.

33. The Danish delegation explained its reservation on paragraph 2 of the first variant: it thought that when the means mentioned in paragraph 1(c) and paragraph 2 were press articles, seizure would be too severe a penalty and would not be compatible with the freedom of the press.

In response to the Danish delegation's concern,

(a) The United Kingdom delegation suggested that the devices referred to in paragraph 1(c) and in paragraph 2 should be described as "technical means" and that a new subparagraph (d) in paragraph 1 should require Member States to take appropriate remedies against persons publishing information which facilitated the unauthorized removal or circumvention of any technical means which may have been applied to protect a computer program.
(b) the French delegation suggested that the following be added to paragraph 2: "except where national laws on freedom of communication prevent this".

(c) the Italian delegation suggested that paragraph 2 be confined to the seizure of infringing copies of a computer program and that a new paragraph 3 simply provide for the possibility of seizing the technical means referred to in paragraph 1(c) and the information published.

34. The German delegation thought that the first variant of Article 6 was not consistent in that it imposed measures against the acts mentioned in paragraph 1(c) but did not impose any measures on persons reproducing a computer program without the authorization of the right-holder.

35. At this stage of the discussions the Chairman of the Working Party circulated a text of Article 6, the aim of which was to try to take account of the different points raised; the text is set out in the Annex hereto.
This text elicited the following reactions:

(a) Most delegations took the view that the reference in the introduction to paragraph 1 to Article 4 should be confined to Article 4(a).

(b) Several delegations thought that the word "instruments" in paragraph 1(c) was too vague and should be replaced by a word which expressly mentioned the publication of information.

(c) The French, Irish and United Kingdom delegations asked that paragraph 3 be made compulsory subject, in the case of the French delegation, to the addition concerning freedom of communication mentioned in point 33(b) above; the Portuguese delegation had doubts about the need for such a paragraph.

(d) The German delegation said it was willing to agree to the text subject to the comments in (a) and (b) above and with the exception of paragraph 1(c).
(e) The Spanish delegation maintained its preference for variant 2 of Article 6 in 7010/90 PI 32.

(f) The Belgian delegation said it preferred variant 1 in 7010/90 PI 32 subject to the addition suggested by the French delegation to paragraph 2 (point 33 (b) above).

The Commission representative took note of the various comments.
(1) Member States shall provide, in accordance with their national legislations, appropriate remedies against persons committing, without the authorization of the rightholder, the acts listed in Article 4 as well as 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) the possession for commercial purposes of or any acts of putting into circulation of technical devices or instruments the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical means which may have been applied to protect a program.
(2) An infringing copy of a computer program shall be liable to seizure in accordance with the national legislation of each Member State.

(3) Member States may provide for the seizure of the technical devices or instruments referred to in paragraph 1(c).
Amended Proposal for a
COUNCIL DIRECTIVE

ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS

(presented by the Commission pursuant to Article 149 (3)
of the EEC Treaty)
Amended proposal for a Council Directive
on the legal protection of computer programs
(presented by the Commission pursuant to Article 149 paragraph 3 of the EEC Treaty).

On 5 January 1989, the Commission presented to the Council its proposal for a Council directive on the legal protection of computer programs.

The Economic and Social Committee delivered an opinion on the proposal on 18 October 1989.

The European Parliament, consulted under the cooperation procedure, discussed the proposal in detail in its Committees and on July 9/10 1990 debated the report drawn up on behalf of the Committee on Legal Affairs and Citizens' rights by Mme Salema, voting in support of the proposed directive as amended by Parliament on 11 July 1990.

The amended proposal for a Directive presented by the European Commission is intended to take into account the Opinion of the European Parliament.

The amended proposal contains three major modifications to the original proposal.

(a) As regards the scope of protection given by the application of copyright to computer programs, the original proposal has been abridged and simplified as proposed by the European Parliament to make clear the basic doctrine of copyright law which the Directive seeks to apply. That doctrine, widely applied in the jurisprudence of the Member States even if not always articulated explicitly in each national legislation, is that copyright protection only applies to the expression of an idea or principle, and not to the idea or principle itself.

(b) As regards the exclusive rights of the author to prevent the performance of certain acts in relation to a copy of his work, the amended proposal clarifies the position of the lawful acquirer of a copy of a computer program. It further ensures that the licensee may perform at least the otherwise infringing act of reproducing the program in order to load it and run it in a
computer for the purpose of its intended use. Other acts not strictly necessary for use remain subject to control by the right holder.

Similarly, the act of making a back-up copy of the program is to be allowed if it is necessary for the use of the program.

Where a copy of a program has been sold, or where the licence does not contain specific contractual provisions, the addition of the words "the correction of errors" makes explicit that in particular the correction of errors by the lawful acquirer in order to maintain his normal use of the program is no longer to be made subject to the authorization of the right holder, in response to concern expressed in the European Parliament as regards the maintenance of the program.

In clarifying the position of the user of a copy of a program it has also been explicitly stated, for the avoidance of doubt, and also in response to concern expressed in the European Parliament, that a lawful acquirer of a copy of a program can not be prevented from studying the program. This was not the intended purpose of the original proposal of the Commission. The amended proposal makes clear that non-infringing means can be used to study how the program works and to derive information from it without committing a breach of the author's exclusive rights.

(c) In response to concerns expressed by the European Parliament and by part of the Industry, a further exception to the author's exclusive rights for the purpose of creating an interoperable program has been accepted.

Computer programs have to interoperate with hardware and other software in order to perform their functions and in order to form systems and networks. If a manufacturer wishes to interconnect his products with others supplied by a different manufacturer he may need information from that manufacturer about how his products are designed to interconnect.

Such information may be at the present time usually available through materials supplied by manufacturers or by the growing move towards the use of publicly available 'open standards' where the means to interconnect have been standardized and are described and documented by international standards bodies.
However if information is not forthcoming or if the design for the means of interconnection is a non-standard proprietary one, manufacturers could find themselves unable to derive sufficient detailed information without committing acts which technically violate the author’s exclusive rights to prevent the reproduction and translation of his program. These acts 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 are often referred to loosely as ‘reverse engineering’ the program.

Although a dominant supplier who refused to make information available to provide for interoperability between programs or between programs and hardware could be subject to the application of the competition rules under Articles 85 and 86 of the EEC Treaty, the Commission has been persuaded that the original proposal, which left the matter of ‘reverse engineering’ not explicitly regulated, lacks sufficient clarity. It is therefore proposed that an additional Article 5bis dealing with a derogation allowing ‘reverse engineering’ of programs for the purposes of interoperability of the program should be added. Nothing in this Directive should prevent however the ‘reverse engineering’ of a program, whether incorporated into hardware or not, under the conditions of Article 5bis for the purpose of independently creating an interoperable program, wherever it may be incorporated.

In adopting a limitative approach to the “reverse engineering” question the Commission has now clearly excluded that the acts of reproduction and translation can be performed for other more general purposes such as study, research or private use, irrespective of whether such acts are committed in the work place or at home. The Commission has also clearly rejected the idea that adaptation of a program should be outside the control of the right holder in any circumstances other than those provided for in Article 5. This is all the more important to note since ‘reverse engineering’ does not require that adaptations of the original work be made, but only that the form of the code be modified by the act of translating it into other types of computing languages than the machine code version in which it has been supplied.

A few other minor linguistic changes have been introduced to take account of comments which have indicated a need in some instances to bring the text of the original proposal closer to the language of the Berne Convention.
Commentary on the recitals

No amendments to recitals were adopted by Parliament. The Commission has introduced additional recitals as appropriate to correspond to the additions or amendments to Articles of the Directive.

Commentary on the Articles

Article 1

In conformity with the opinion of the European Parliament, Article 1.1 now contains a reference to the provisions of the Berne Convention for the Protection of Literary and Artistic Works in order to make clear that protection of computer programs by copyright as literary works brings programs clearly within the scope of this international convention. The proposal also takes up the clarification proposed by Parliament that preparatory design work leading to the development of a computer program is protected as a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

Paragraph 2 of the original proposal has become redundant by virtue of the amendments of the Parliament to paragraph 1 which the Commission has accepted.

Article 1.2.

The Commission has accepted the amendment of the Parliament to the text of Article 1.3. of the original proposal which re-states, in a simplified form, the general principle of copyright law on which the scope of protection of this proposal is based. That principle is the following: copyright protects the way in which an idea is expressed, but does not give a monopoly in the idea itself. A second author may take up an idea which he has found in an existing work and re-formulate it, using a different expression, and acquiring his own copyright in that new expression. The text proposed by the Parliament makes clear that this copyright principle is to be applied to every part of a program: it is therefore a formulation capable of being interpreted
by national courts across a broad range of situations. The amended proposal corrects an translation error in relation to the original Portuguese text in some language versions of the amendment proposed by the Parliament in the phrase 'Including its interfaces' which, for the avoidance of doubt, should read 'Including those which underlie its interfaces'.

**Article 1.3.**

The Commission's original proposal in its Article 1.4., indicated that the normal criteria regarding the originality of literary works should be applied to computer programs. There has been a clear expression of concern in many circles that, absent a more specific definition of what these criteria should be in relation to computer programs, existing divergences as regards the threshold for eligibility for protection as a work would be perpetuated.

The Parliament has proposed a clarification that to qualify for protection as a literary work the only requirement to be met should be that the program is the author's own intellectual creation. A computer program should not have to meet any additional requirements, as to, for example, its aesthetic or qualitative merits.

Article 1.4b has been deleted from the Commission's original proposal, in line with the view expressed by the Parliament that the present rapidly evolving state of the art does not allow a satisfactory definition of computer generated works and it would therefore be premature to regulate this aspect of the protection of computer programs explicitly in the present Directive.

**Article 2.**

This Article is intended to regulate the question of the authorship of programs in the context of sole authorship, joint authorship, authorship under a contract for the commissioning of a work, and authorship of a work under a contract of employment. The Parliament has proposed a number of clarifications which the Commission has accepted as far as possible.
The Commission has in this respect followed the opinion of Parliament in not seeking at this stage to harmonize the more general issues relating to authorship by legal persons and of collective works, but merely recognizing that different regimes of authorship may exist, especially in relation to the ownership of rights in collective works.

The Commission has likewise followed the opinion of Parliament in respect of computer programs created in the context of employment, to make clear that the employer will be entitled to exercise the economic rights in a program created by an employee in the execution of his duties. The addition of the term 'economic' serves to identify more explicitly that moral rights fall outside the scope of this paragraph.

Article 2. paragraph 5 of the original proposal has been deleted as a consequence of the deletion of Article 1.4b of the original text.

Article 3

No amendments were proposed by the European Parliament.

Article 4.

The amended proposal takes into account the suggestion of Parliament to make more explicit that because the acts of loading, displaying, running, transmission or storage do at the present time involve an act of reproduction of the program, and since all kinds of reproduction, both permanent and temporary are technically a violation of the author's rights in the program, any such reproduction requires the authorization of the rightholder.

The Commission's amended proposal also adopts the wording of the Parliament's amendment to Article 4b to bring the text more in conformity with the wording of the Berne Convention on adaptation, translation, arrangement and other alterations of a program.
This does not represent a change in substance since the specific provisions of the Explanatory Memorandum of the original proposal indicated that the term 'adaptation' had been used to cover all forms of translation or other changes to the program.

**Article 5**

The amended proposal takes up the simplification of the Commission's original text suggested by the Parliament. The phrase "sold or made available to the public other than by a written licence agreement signed by both parties" is replaced by "when a copy of a computer program has been sold".

In order to make clear that the provisions of Article 5.1 allow a purchaser of a computer program in particular to correct any errors in order to maintain his own continued use of the program in accordance with its intended purpose, the original proposal has been rendered more explicit on this point, to take into account the concerns of the Parliament in respect of maintenance of the program.

Similarly, for the avoidance of doubt, paragraph 2 of Article 5 of the amended proposal now indicates that if the licence does not contain explicit provisions as regards these restricted acts, the provisions of paragraph 1 apply.

In any event, minimum acts necessary for the licencsee to be able to use the program, namely loading the program and running it, cannot be excluded by the contract although the circumstances in which those acts are to be performed will still be subject to contract if the rightholder so wishes. So, for example the licence to use a copy of a program may not prohibit the licencsee from running the program at all in any circumstances, but it may limit its use to a specific machine or impose other similar restrictions.

As suggested by the Parliament, the amended proposal also permits the making of a back-up copy to the extent necessary for the intended use of the original.
The Commission has likewise reflected in its amended proposal the Opinion of Parliament in respect of the use of programs in non-profit making public libraries.

A further provision has been incorporated into Article 5 of the amended proposal in line with the opinion of Parliament. Paragraph 5 is intended to make clear that a person who has a right to use a copy of a computer program is not prevented, as some commentators have suggested, from studying how the program functions. The form in which a computer program is usually supplied is not readily accessible to the human user. It is in a form known "as object" or "machine-readable" code, which, even when rendered visible to the human observer, is difficult to decipher in large quantities. Nevertheless, as the program is run, a person skilled in the art may observe and test the functioning of the program by a variety of means, including the use of electronic testing and monitoring techniques. The use of such techniques does not involve reproducing, translating or adapting the program. Such techniques do not therefore infringe the author's rights in his program.

The amended proposal makes clear that if a person has a right to use a program, that right must include at least the ability to load and run the program. During such running of the program any non-infringing act necessary to observe, study or test the functioning of the program may be carried out.

If in addition to loading and running the program, the user is also entitled to display, transmit or store the program, he may observe, study or test the functioning of the program during these operations also. He may not, however, claim rights to perform acts beyond these necessary for use or permitted under the licence merely in order to carry out additional study of the functioning of the program.
Article 5bis

This new Article of the amended proposal reflects a concern first voiced by the Parliament, widely debated among interested circles, and eventually resolved by the Parliament after a variety of amendments containing many common elements had been proposed.

The problem which this Article addresses stems from the nature of the computer program highlighted in the context of Article 5 paragraph 5 above, that is to say, the fact that it cannot be easily "read" by a human user.

However, a computer program may be required to interconnect and interact with other computer programs, for example, an applications program with an operating system. In order for the creators of computer programs to understand how their creations can interconnect and interact with those of others, they must be able to perceive in detail how the first manufacturer has provided for the exchange of data between his program and other programs.

In many instances the creator of the original program will have made available through published manuals or on request, sufficient information about the parts of his program whose function is to provide for its interoperation with other programs. In other instances, the design of these parts of the program will be standardized and publicly documented for all creators of programs to work to a common agreed interface specification. In a certain number of cases it may be that information is not forthcoming by either of these means. In such cases the creator of the original program, by withholding information from competitors, can ensure that only he can supply the range of other programs which will interoperate with his original program.
Article 5 paragraph 5 is intended to permit much of the information required for the purpose of interoperability to be derived from observation, study or testing of the program without committing infringements of the author's exclusive rights. These techniques will be adequate in many circumstances. However, where their use does not produce sufficient information and where other non-infringing means such as the use of publicly available material or published documentation is also inadequate, the Commission's amended proposal ensures, that as a last resort, a person having a right to use a copy of a program may commit acts of reproduction and translation of the machine-readable form of the code in which the copy has been supplied without the authorization of the right holder, subject to certain limitations.

In this way, the amended proposal provides a safety mechanism by which an independently created program can be made to be interoperable with an existing program, even when the creator of the existing program has chosen not to reveal to third parties the specifications of the interfaces whose function is to provide a means of interconnection with other elements of a computer system.

The Commission's amended proposal takes into account almost every element of the numerous amendments proposed during the procedure leading to the European Parliament's opinion.

However the amended proposal of the Commission cannot follow exactly the wording of the amendment accepted by the Parliament in its opinion. Although that amendment contains many elements which the Commission's amended proposal also contains, certain key elements are missing from the text of the Parliament.

On two points of substance the Commission's amended proposal does not therefore reflect the text of the amendment adopted by Parliament. These points concern the scope of the derogation for interoperable programs to be created, and the maintenance of programs.
The Commission accepts that a derogation to the normal rules of copyright may in some circumstances be justified if acts are performed without authorization of the right holder, provided that the derogation comes into play when non-infringing means are not available. There seems to be no justification for a policy which permits authors' rights to be infringed when circumstances do not demand it. The amended proposal therefore limits the application of the exception to circumstances where non-infringing means are not adequate.

The amended proposal also makes clear that the purpose of allowing such an exception is to encourage the development of a coherent interoperable product range so that users and consumers can connect elements of a system from different manufacturers together through standard, publicly available interface connections. It is precisely to avoid the risk that products would be developed in a non-interoperable fashion that this exception has been admitted. If now it were to be available to provide incoherent points of attachment between different manufacturers, it would exacerbate rather than cure the problem of interoperability, for users. The promotion of open systems would be rendered more difficult rather than enhanced.

The Commission's amended proposal therefore restricts the application of the derogation to those parts of the original program whose function is to provide for its interconnection with other elements in a system. It does not permit the user of a program to reproduce and translate parts of the program which are not relevant to its interconnection with other programs.

Second, the purpose of this derogation is to allow the independent creation of a program which can interconnect and interact with an existing program. It follows that the creator of the second program will need, having created his work, to ensure that it always functions in the way it was intended to function.
If the manufacturer of the original program changes the characteristics in its interfaces, the second independently created program may no longer function satisfactorily. The second creator may therefore need to repeat his study and analysis of the means of interconnection of the original program any number of times in order to maintain the interoperability of his own program.

However, this derogation is not intended to provide a means by which a licensee can perform acts such as enhancement or updating on the original program, which would entail performance of the restricted acts of reproduction, translation, or adaptation. To allow performance of all or any of these acts under the pretext that they are for the "maintenance" of the program would be unacceptable.

**Article 6**

No amendments were proposed by the European Parliament.

**Article 7**

The Commission's amended proposal does not follow the line taken by the Parliament. In its original proposal the Commission had wished to indicate its preference for a single term of protection of 50 years from the date of creation, irrespective of whether the work was created by a natural or legal person or as a collective work. However, such a term does not correspond to the terms currently provided for under the Berne Convention. Strong opposition has been manifested to such a departure from the internationally recognized term of the life of the author plus 50 years following his death or in the case of anonymous or pseudonymous works, of 50 years from the first publication of the work.
On the issue of term of protection therefore, the amended proposal reverts to a position which is in conformity with the Berne Convention. In view of the strong pressure on the Commission to change its text on this point to remain compatible with the international convention, it is not possible to accept the amendment of Parliament as an acceptable substitute.

However the Commission can accept the Parliament’s suggestion that the period would start on the 1 of January of the year following the relevant event.

**Article 8**

The Commission’s amended proposal follows the improvements suggested by the Parliament.
The Council of the European Communities,

Having regard to the Treaty establishing the European Economic Community and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament

Having regard to the opinion of the Economic and Social Committee,

Whereas computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

Whereas the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently;
<table>
<thead>
<tr>
<th>Original Proposal</th>
<th>Amended Proposal</th>
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<tr>
<td>Whereas computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community's industrial development;</td>
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<tr>
<td>Whereas certain differences in the legal protection of computer program offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;</td>
<td>unchanged</td>
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<tr>
<td>Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;</td>
<td>unchanged</td>
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<tr>
<td>Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to</td>
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Proposing the program under copyright law as literary works and further in establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts, and for how long the protection should apply;

Whereas the Community is fully committed to the promotion of international standardization;

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and 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 they are intended to function:

Whereas for the purpose of this Directive the term “Computer program” shall include programs in any form, including those which are incorporated into hardware; that this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;

Whereas in respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied;
The principles describing any such means of interconnection and interaction are generally known as "an interface". Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as "interfaces".

Whereas this functional interconnection and interaction is generally known as "interoperability": whereas such interoperability can be defined as the ability to exchange information and to mutually use the information which has been exchanged.

Whereas for the avoidance of doubt it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive;

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;
Whereas, in accordance with the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright.

Whereas the exclusive rights of the author to prevent the unauthorized reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by its lawful acquiree;

Whereas a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program provided that these acts do not infringe the copyright in the program;

Whereas the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author;
Whereas, nevertheless, circumstances may exist when such a reproduction of the code and translation of its form are indispensable to obtain the necessary information to ensure that a new interoperable program can be created or can function;

Whereas it has therefore to be considered that in these limited circumstances, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice, and must therefore be deemed not to require the authorization of the rightholder;

Whereas such an exception to the author's exclusive rights may not be applied in a way which prejudices the legitimate interests of the rightholder, or which conflicts with a normal exploitation of the program;
Whereas protection of computer programs under copyright laws should be without prejudice to the application in appropriate cases of other forms of protection;

unchanged

Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the EEC Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive;

Whereas the provisions of this Directive should be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunication sector or Decisions of the Council relating to standardization in the field of information technology and telecommunication;

HAS ADOPTED THIS DIRECTIVE
CHAPTER 1

Article 1

Object of protection

1. Member States shall protect computer programs by conferring exclusive rights in accordance with the provisions of this Directive.

2. Exclusive rights shall be conferred by the provisions of copyright laws. Protection shall be accorded to computer programs as literary works.

AMENDED PROPOSAL

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.
3. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

4. (a) A computer program shall not be protected unless it satisfies the same conditions as regards its originality as apply to other literary works.

(b) Programs generated by means of a computer shall be protected insofar as they satisfy the conditions laid down in 4(a) above.

Deleted

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.
ORIGINAL PROPOSAL

Article 2

Authorship of programs

1. Subject to the following paragraphs, the author of a computer program is the natural person or group of natural persons who has created the program.

2. In respect of computer programs created by a group of natural persons, the exclusive rights shall be exercised in common unless otherwise provided by contract.

3. Where a computer program is created under a contract, the natural or legal person who commissioned the program shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.

AMENDED PROPOSAL

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.

2. Unchanged

3. Unchanged
4. Where a computer program is created in the course of employment, the employer shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.

5. In respect of programs which are generated by the use of a computer program, the natural or legal person who causes the generation of subsequent programs shall be entitled to exercise all rights in respect of the programs, unless otherwise provided by contract.

**ORIGINAL PROPOSAL**

**AMENDED PROPOSAL**

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 shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.

**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. In the case referred to in Article 2(2) the computer program shall be protected in favour of all authors if at least one author is a beneficiary of protection in accordance with paragraph 1 of this Article.

Deleted

**Article 3**

**Beneficiaries of protection**

Unchanged
ORIGINAL PROPOSAL

Article 4

Restricted acts

Subject to the provisions of Article 5, the exclusive rights referred to in Article 1 shall include the right to do or 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, viewing, running, transmission or storage of the computer program shall be considered restricted acts.

b) the adaptation of a computer program

c) the distribution of a computer program by means of sale, licensing, lease, rental and the importation for these purposes. The right to control the distribution of a program shall be exhausted in respect of its sale and its importation following the first marketing of the program by the right holder or with his consent.

AMENDED PROPOSAL

Article 4

Restricted acts

Subject to the provisions of Article 5, the exclusive rights of the author 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, and for whatever purpose. In so far as they necessitate a permanent or temporary reproduction of the program, loading, displaying, running, transmission or storage of the computer program shall be subject to authorization by the right holder;

b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof;

Unchanged
ORIGINAl PROPOSAL

Article 5

Exceptions to the restricted acts
1. Where a computer program has been sold or made available to the public other than by a written license agreement signed by both parties, the acts enumerated in Article 4 (a) and (b) shall not require the authorization of the rightholder, insofar as they are necessary for the use of the program. Reproduction and adaptation of the computer other than for the purpose of its use shall require the authorization of the rightholder.

AMENDED PROPOSAL

Article 5

Exceptions to the restricted acts
1. When a copy of a computer program has been sold, 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, including for error correction.

2. The provisions of paragraph 1 shall also apply to a licensee when the licence to use a copy of a computer program does not contain specific provisions dealing with such acts. The licence may not prevent the loading and running of a copy of a computer program necessary for its use by the licensee in accordance with its intended purpose.
2. Where a computer program has been sold or made available to the public by means other than a written license agreement signed by both parties, the exclusive right of the rightholder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.

AMENDED PROPOSAL

3. 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.

4. Where a copy of a computer program has been made lawfully available to the public and in the absence of contractual provisions to the contrary, the right to authorize rental shall not be exercised to prevent normal use of the program in non-profit making public libraries.

5. Subject to the provisions of Article 4(a) the person having a right to use a copy of a program shall be entitled, without the authorization of the right-holder, to observe, study or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright, 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 5b1s

1. Notwithstanding contractual provisions to the contrary, the authorization of the owner of the rights shall not be required where reproduction of the code and translation of its form are indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program, 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 authorised to do so;

b) the information necessary to achieve interoperability has not previously been published, or made available to the persons referred to in subparagraph a); and

c) these acts are confined to the parts of the original program which are necessary to achieve interoperability with it.
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 creation or marketing of a program which infringes copyright in respect of the original program, and in particular of a program substantially similar in its expression.

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.
ORIGINAL PROPOSAL

Article 6

Secondary Infringement

1. It shall be an infringement of the author's exclusive rights in the computer program to import, possess or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

2. It shall be an infringement of the author's exclusive rights in the computer program to make, import, possess or deal with articles intended specifically to facilitate the removal or circumvention of any technical means which have been applied to protect a program.

Article 7

Term of protection

Protection shall be granted for fifty years from the date of creation.

AMENDED PROPOSAL

Article 6

Secondary Infringement

Unchanged

Article 7

Term of protection

Protection shall be granted for the life of the author and for fifty years after his death; where the computer program is an anonymous or pseudonymous work, 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.
ORIGINAL PROPOSAL

CHAPTER 11

Article 8

Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to any legal provisions concerning patent rights, trade marks, unfair competition, trade secrets or the law of contract insofar as such provisions do not conflict with the principles laid down in the present Directive.

2. The provisions of this Directive are applicable also in respect of works created prior to (date in article 9).

AMENDED PROPOSAL

CHAPTER 11

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.
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 ensure that they communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

Article 10

This Directive is addressed to the Member States.

Done at Brussels For the Council

The President

AMENDED PROPOSAL

CHAPTER III

Article 9

Final provisions

Unchanged

2. Member States shall communicate to the Commission the provisions of national law which they adopt in order to transpose this Directive.

Article 10

Unchanged

This Directive is addressed to the Member States.
SUMMARY OF PROCEEDINGS

of: Working Party on Intellectual Property (Computer programs)
on: 18 and 19 October 1990

No. prev. doc.: 9398/90 PI 61
No. Cion 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 18 and 19 October 1990 the Working Party on Intellectual Property examined the Commission's amended proposal for a Council Directive on the legal protection of computer programs. Since delegations had not received the amended proposal before the meeting, they could express only provisional positions, subject to further consideration; the positions summarized below are therefore subject to a general scrutiny reservation. The Working Party was unable to examine the preamble to the Commission's amended proposal through lack of time, half a day of meeting time having been lost following the last-minute assignment of the interpreters to another meeting. The Presidency, delegations and Commission representatives regretted these circumstances.

2. The Presidency informed the Working Party that the amended proposal would be the subject of a policy debate in the Council (Internal Market) at its session on 8 November 1990, which would be prepared by the Permanent Representatives Committee on 31 October 1990. A report to the Permanent

1 The Luxembourg delegation was not represented at this meeting.
2 Doc. 9397/90 PI 62 COM(90) 509 final SYN 183.
Representatives Committee would be drawn up, to which a consolidated text of the amended proposal resulting from the Working Party's meeting would be annexed.

**Article 1(1)**

3. The Working Party approved the Commission's amended proposal subject to a reservation by the Spanish delegation on the term "literary". While agreeing that computer programs should be protected by copyright under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), it did not agree that computer programs should be referred to as "literary works".

**Article 1(2)**

4. At the request of the United Kingdom delegation, the Commission representative proposed a statement relating to this paragraph to be included in the Council minutes. The Working Party approved the paragraph and the accompanying statement, although the Greek delegation would have preferred the wording proposed by the European Parliament in its opinion to that contained in the Commission's amended proposal with regard to interfaces.

**Article 1(3)**


**Article 2(1)**

6. Although a number of delegations would have preferred the text of this provision as set out in document 7010/90, all were prepared to accept the Commission's amended proposal.

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3 Doc. 9398/90 PI 63.
4 See footnote 3 on page 13 of doc. 9398/90 PI 63.
5 Doc. 7897/90 PE-RESOL 30, pages 25-32.
Article 2(2)

7. All delegations were in favour of replacing this paragraph by the text set out in document 7010/90. The Commission representative was prepared to accept this amendment.

Article 2(3)

8. All delegations were in favour of deleting this paragraph. The Commission representative was prepared to accept this deletion.

Article 2(4)

9. Although a number of delegations would have preferred the text of this provision as set out in document 7010/90, a compromise solution was reached whereby the Commission's amended proposal was accepted, subject to the addition of the word "exclusively".6

Article 2(5)

10. All delegations welcomed the deletion of this paragraph.

Article 3(1)


Article 3(2)

12. All delegations were in favour of deleting this paragraph. The Commission representative was prepared to accept this deletion.

6 See doc. 9398/90 PI 63, page 14.
Article 4 - Title

13. The French delegation reserved the right to propose an amendment to the French version of the title of Article 4.

Article 4 - Opening wording

14. Following observations by the Italian and United Kingdom delegations that the term "the author" was too restrictive in the light of Article 2, the Commission representative agreed to replace this term by the words "the rightholder within the meaning of Article 2". The Working Party agreed to this amendment.

Article 4(a)

15. The German delegation entered a scrutiny reservation on the inclusion of temporary reproduction of a computer program among the acts requiring authorization. The other delegations and the Commission agreed that it would be clearer to move the reference to "permanent or temporary reproduction" to the beginning of this provision.

16. Several delegations having objected to the inclusion of the words "and for whatever purpose", it was agreed that they would be deleted.

Article 4(b)

17. The Working Party agreed to add to this provision the words "without prejudice to the rights of the person who alters the program". It was noted that the terms "translation, adaptation, arrangement and any other alteration", as well as the verb "alters", should correspond in all the language versions to the terms used in Article 2(3) of the Berne Convention.
Article 4(c)

18. Although the Commission had not proposed any amendment to Article 4(c) in its amended proposal, since the European Parliament had not adopted any amendment in respect of this provision, the Commission representative indicated that the Commission services were prepared to take account of previous discussions in the Working Party by amending this provision along the lines of Article 4(c) and (d) in document 7010/90 PI 32.

19. A number of delegations reiterated the view that the question of rental right should be left to the forthcoming proposal for a directive on rental of copyrighted works in general, and that therefore the Directive under discussion, which was limited to computer programs, should not contain any provision on rental right which might prejudice the contents of the broader directive. In an attempt to meet this concern, the Commission representative proposed a compromise solution whereby:

(a) the Directive under discussion would contain a provision making it clear that the rightholder would have an exclusive right to control rental of his computer program;

(b) a statement in the Council minutes would make it clear that this provision would be without prejudice to the positions of the Commission and of the Member States in relation to the broader instrument, and that the Commission undertook to propose an amendment to this provision if this were to be necessary in the light of the solution adopted in the broader instrument. 7

The majority of delegations were able to accept this compromise proposal.

7 See the statement in footnote 6 on page 16 of doc. 9398/90 PI 63.
The German and Netherlands delegations maintained a reservation, however, as they considered 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.

20. The Danish delegation considered that the separation of rental right from distribution right resulting from Article 4(c) and (d) in document 7010/90 would pose problems, as rental is a form of distribution; it therefore proposed that (c) and (d) be replaced by a single provision which would make it clear that the exclusive right to distribute the computer program to the public includes the right to rent it out, but that the right to control rental of the program would not be exhausted, as the general distribution right would, by the first sale of the program in the Community by the rightholder or with his consent.

This proposal was accepted by the Working Party 8, subject to the reservation by the German and Netherlands delegations mentioned above.

21. In reply to a request by the French delegation that it be made clear what effect the new Article 4(c) had on the lending of computer programs by non-profit making public libraries, the Commission services agreed to add a new recital 9 drawing a clear distinction between rental and public lending, and making it clear that public lending remains outside the scope of the Directive under discussion, with the result that Member States remain free to determine whether and how public lending of computer programs should be regulated.

22. In the light of the explanations given by the German delegation at the Working Party's previous meeting (see doc. 8216/90, point 29), the Netherlands delegation withdrew its

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8 The resulting text appears on page 16 of doc. 9398/90 PI 63.
9 See the recital in footnote 5 on page 16 of doc. 9398/90 PI 63.
reservation on the absence of a provision which would include the communication to the public of a computer program among the exclusive rights of the rightholder.

The Working Party agreed not to include such a provision.

Article 5(1), (2) and (3)

23. In its amended proposal, the Commission has proposed separate paragraphs to cover:

(a) the case where a copy of a computer program has been sold (Article 5(1)),

(b) the case where a copy of a computer program has been licensed (Article 5(2)), and

(c) the making of a back-up copy (Article 5(3)).

The majority of delegations considered that this separation into three paragraphs created more problems than it solved and left uncertainty as to which paragraph would apply where the sale involved a licensing agreement; objections were raised against the second sentence of Article 5(2) in particular. They therefore preferred to replace these three paragraphs by a single paragraph as previously approved by the Working Party in document 7010/90 PI 32.

The Commission representative entered a scrutiny reservation on the text preferred by the majority of delegations, to the extent that it does not refer explicitly to the case where a copy of the computer program has been sold, and to the extent that it does not refer specifically to error correction. The majority of delegations consider that error correction is covered by the terms "use of the program by the lawful acquiror in accordance with its intended purpose" and need not be mentioned specifically.
**Article 5(4)**

24. In the light of the recital concerning public lending proposed in relation to Article 4(c) (see point 21 above), the Commission representative agreed to the deletion of this paragraph.

**Article 5(5)**

25. The Working Party agreed that the words "Subject to the provisions of Article 4(a)" were not necessary and deleted them.

26. The Working Party agreed to align the words "ideas, principles and other elements which underlie the program and which are not protected by copyright" on the wording of Article 1(2).

27. The German delegation expressed doubts with regard to the words "which he is entitled to do" at the end of this paragraph. The Commission representative explained that this restriction was necessary for example in the case where the user had a licence to use a computer program on a specific number of terminals: without this restriction, there was a danger that the user might take advantage of this provision to use the program on terminals not covered by his licensing agreement.

**Article 5bis (1) and (2)**

28. The Danish and Portuguese delegations expressed scrutiny reservations on the inclusion of Article 5bis (1) and (2) in the proposed Directive.

29. With regard to the introductory wording of Article 5bis (1), a difference of opinion emerged in respect of decompilation for the purpose of maintenance. The European Parliament 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 considered this wording to be too broad with regard to maintenance and therefore open to abuse; accordingly it proposed wording in its amended proposal which restricted "maintenance" to the maintenance of an independently created interoperable program¹⁰. A number of delegations considered that the wording proposed by the Commission was still too broad.

The majority of delegations were prepared to support wording proposed by the United Kingdom delegation which omits any explicit reference to maintenance¹¹, although the German, French and Netherlands delegations expressed scrutiny reservations on this point. The Danish and Portuguese delegations, while maintaining their scrutiny reservations in respect of Article 5bis (1) and (2), considered the wording proposed by the United Kingdom delegation to be an improvement on the wording proposed by the Commission. The Commission representative also expressed a scrutiny reservation on this departure from its amended proposal, while the Greek delegation expressed a substantive reservation, preferring the broader wording proposed by the European Parliament.

30. The Working Party agreed to replace the wording of Article 5bis (2)(c) by the wording of Article 5(4)(b) and (c) in document 7010/90.

Article 5bis (3)

31. The majority of delegations considered that this provision should appear in the preamble to the Directive, not in Article 5bis. The Commission representative entered a reservation on the transfer of this provision to the preamble,

¹⁰ "... indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program."

¹¹ "... indispensable to obtain the information necessary to achieve the interoperability of an independently created program with the original program".
on the grounds that the inclusion of this paragraph in Article 5bis represented a compromise between the various political groups in the European Parliament.

Article 6

32. Although the Commission had not proposed any amendment to Article 6 in its amended proposal on the grounds that the European Parliament had not adopted any amendment to this Article, the Commission representative indicated that the Commission services could accept changes to this Article which had been proposed in the Working Party with a view to overcoming a number of difficulties raised by the text of the Commission's original proposal (see Annex to document 8216/90 PI 46). The majority of delegations and the Commission were therefore able to agree to Article 6 as set out in the Annex to document 9398/90 PI 63.

The German delegation maintained a scrutiny reservation on paragraph 1(c) of this Article on the grounds that its transposition into national law would affect German criminal law and that it was not clear how this provision would relate to the making of back-up copies authorized under Article 5(1).

The Greek and Netherlands delegations also entered scrutiny reservations on parts of paragraph 1(c): the Greek delegation on the words "or the possession for commercial purposes" and the Netherlands delegation on the words "any means".

Article 7

33. The German delegation maintained its reservation on the absence of an option for Member States to grant a term of protection longer than fifty years after the death of the author, while recognizing that this is a hypothetical problem. It suggested that consideration be given to the following as possible compromise solutions:
(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 in this respect);

(b) the text of Article 7 would remain as approved by the majority of delegations and the Commission, and would be accompanied by a statement in the Council minutes similar to the statement in respect of Article 4(c) (see point 19 above).

The Commission representative undertook to examine these suggestions, indicating that it was unlikely that it could accept the suggestion under (a) unless the German delegation were to withdraw all its reservations on other aspects of the proposed Directive.

34. At the request of the Spanish delegation, it was agreed that the words "or where a legal person is designated as the author by national legislation in accordance with Article 2(1)" should be added after "pseudonymous work", as previously agreed by the Working Party (see doc. 7010/90 PI 32).

35. At the suggestion of the Chairman of the Working Party, it was agreed that the case of joint ownership provided for in Article 7bis of the Berne Convention should be covered by adding "or after the death of the last surviving author" after the words "after his death".

12 Wording taken from Article 7bis of the Berne Convention.
Article 8

36. The Commission representative explained that in making its amended proposal, it had transferred to the last recital of the preamble a provision which had been included in document 7010/90 PI 32 as Article 8(3). While the majority of delegations were able to accept this transfer, the Belgian, French, Netherlands and United Kingdom delegations entered scrutiny reservations, pending consultation with the relevant authorities.

Articles 9 and 10

37. No observations were made in respect of Articles 9 and 10 of the Commission’s amended proposal.

Statements concerning the relationship between the Directive and the Berne Convention

38. The Working Party agreed that the two statements set out on page 2 of document 7010/90 PI 32 would be appended to Article 1.

39. In this context, the Danish delegation asked for clarification whether the normal rules of copyright relating to the copying of literary works by means such as photocopying would apply to the copying of source code of a computer program appearing in written form, or whether the rules of the Directive would apply.
The Commission representative explained that the manuals accompanying computer programs were not covered by the protection afforded to the computer programs, but enjoyed their own protection under the Berne Convention; therefore they did not come within the scope of the Directive. Where the source code of a computer program had been published in a book or a journal with the consent of the rightholder, making photocopies of the text concerned would be regulated by national law, not by the Directive.
Sir,

This is to inform you that the Commission has decided, further to the Opinion of the European Parliament and pursuant to Article 149(3) of the Treaty establishing the European Economic Community, to amend its proposal for a Council Directive on the legal protection of computer programmes, which it referred to the Council on 5 January 1989 (COM(88) 816 final SYN 183).

Please find enclosed the text of the amended proposal.

(Complimentary close).

(s.) Karel VAN MIERT
Member of the Commission

Encl.: COM(90) 509 final SYN 183
Amended Proposal for a
COUNCIL DIRECTIVE

ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS

(presented by the Commission pursuant to Article 149 (3)
of the EEC Treaty)
Amended proposal for a Council Directive
on the legal protection of computer programs
(presented by the Commission pursuant to Article 149 paragraph 3 of the EEC Treaty).

On 5 January 1989, the Commission presented to the Council its proposal for a Council directive on the legal protection of computer programs.

The Economic and Social Committee delivered an opinion on the proposal on 18 October 1989.

The European Parliament, consulted under the cooperation procedure, discussed the proposal in detail in its Committees and on July 9/10 1990 debated the report drawn up on behalf of the Committee on Legal Affairs and Citizens' rights by Mme Salema, voting in support of the proposed directive as amended by Parliament on 11 July 1990.

The amended proposal for a Directive presented by the European Commission is intended to take into account the Opinion of the European Parliament.

The amended proposal contains three major modifications to the original proposal.

(a) As regards the scope of protection given by the application of copyright to computer programs, the original proposal has been abridged and simplified as proposed by the European Parliament to make clear the basic doctrine of copyright law which the Directive seeks to apply. That doctrine, widely applied in the jurisprudence of the Member States even if not always articulated explicitly in each national legislation, is that copyright protection only applies to the expression of an idea or principle, and not to the idea or principle itself.

(b) As regards the exclusive rights of the author to prevent the performance of certain acts in relation to a copy of his work, the amended proposal clarifies the position of the lawful acquirer of a copy of a computer program. It further ensures that the licensee may perform at least the otherwise infringing act of reproducing the program in order to load it and run it in a
computer for the purpose of its intended use. Other acts not strictly necessary for use remain subject to control by the rightholder.

Similarly, the act of making a back-up copy of the program is to be allowed if it is necessary for the use of the program.

Where a copy of a program has been sold, or where the licence does not contain specific contractual provisions, the addition of the words "the correction of errors" makes explicit that in particular the correction of errors by the lawful acquirer in order to maintain his normal use of the program is no longer to be made subject to the authorization of the right holder, in response to concern expressed in the European Parliament as regards the maintenance of the program.

In clarifying the position of the user of a copy of a program it has also been explicitly stated, for the avoidance of doubt, and also in response to concern expressed in the European Parliament, that a lawful acquirer of a copy of a program can not be prevented from studying the program. This was not the intended purpose of the original proposal of the Commission. The amended proposal makes clear that non-infringing means can be used to study how the program works and to derive information from it without committing a breach of the author's exclusive rights.

(c) In response to concerns expressed by the European Parliament and by part of the Industry, a further exception to the author's exclusive rights for the purpose of creating an interoperable program has been accepted.

Computer programs have to Interoperate with hardware and other software in order to perform their functions and in order to form systems and networks. If a manufacturer wishes to interconnect his products with others supplied by a different manufacturer he may need information from that manufacturer about how his products are designed to interconnect.

Such information may be at the present time usually available through materials supplied by manufacturers or by the growing move towards the use of publicly available 'open standards' where the means to interconnect have been standardized and are described and documented by International standards bodies.
However if information is not forthcoming or if the design for the means of interconnection is a non-standard proprietary one, manufacturers could find themselves unable to derive sufficient detailed information without committing acts which technically violate the author's exclusive rights to prevent the reproduction and translation of his program. These acts 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 are often referred to loosely as 'reverse engineering' the program.

Although a dominant supplier who refused to make information available to provide for interoperability between programs or between programs and hardware could be subject to the application of the competition rules under Articles 85 and 86 of the EEC Treaty, the Commission has been persuaded that the original proposal, which left the matter of 'reverse engineering' not explicitly regulated, lacks sufficient clarity. It is therefore proposed that an additional Article 5bis dealing with a derogation allowing 'reverse engineering' of programs for the purposes of interoperability of the program should be added. Nothing in this Directive should prevent however the 'reverse engineering' of a program, whether incorporated into hardware or not, under the conditions of Article 5bis for the purpose of independently creating an interoperable program, wherever it may be incorporated.

In adopting a limitative approach to the "reverse engineering" question the Commission has now clearly excluded that the acts of reproduction and translation can be performed for other more general purposes such as study, research or private use, irrespective of whether such acts are committed in the work place or at home. The Commission has also clearly rejected the idea that adaptation of a program should be outside the control of the right holder in any circumstances other than those provided for in Article 5. This is all the more important to note since 'reverse engineering' does not require that adaptations of the original work be made, but only that the form of the code be modified by the act of translating it into other types of computing languages than the machine code version in which it has been supplied.

A few other minor linguistic changes have been introduced to take account of comments which have indicated a need in some instances to bring the text of the original proposal closer to the language of the Berne Convention.
Commentary on the recitals

No amendments to recitals were adopted by Parliament. The Commission has introduced additional recitals as appropriate to correspond to the additions or amendments to Articles of the Directive.

Commentary on the Articles

Article 1

In conformity with the opinion of the European Parliament, Article 1.1. now contains a reference to the provisions of the Berne Convention for the Protection of Literary and Artistic Works in order to make clear that protection of computer programs by copyright as literary works brings programs clearly within the scope of this international convention. The proposal also takes up the clarification proposed by Parliament that preparatory design work leading to the development of a computer program is protected as a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

Paragraph 2 of the original proposal has become redundant by virtue of the amendments of the Parliament to paragraph 1 which the Commission has accepted.

Article 1.2.

The Commission has accepted the amendment of the Parliament to the text of Article 1.3. of the original proposal which re-states, in a simplified form, the general principle of copyright law on which the scope of protection of this proposal is based. That principle is the following: copyright protects the way in which an idea is expressed, but does not give a monopoly in the idea itself. A second author may take up an idea which he has found in an existing work and re-formulate it, using a different expression, and acquiring his own copyright in that new expression. The text proposed by the Parliament makes clear that this copyright principle is to be applied to every part of a program: it is therefore a formulation capable of being interpreted
by national courts across a broad range of situations. The amended proposal corrects an translation error in relation to the original Portuguese text in some language versions of the amendment proposed by the Parliament in the phrase 'including its interfaces' which, for the avoidance of doubt, should read 'including those which underlie its interfaces'.

Article 1.3.

The Commission's original proposal in its Article 1.4., indicated that the normal criteria regarding the originality of literary works should be applied to computer programs. There has been a clear expression of concern in many circles that, absent a more specific definition of what these criteria should be in relation to computer programs, existing divergences as regards the threshold for eligibility for protection as a work would be perpetuated.

The Parliament has proposed a clarification that to qualify for protection as a literary work the only requirement to be met should be that the program is the author's own intellectual creation. A computer program should not have to meet any additional requirements, as to, for example, its aesthetic or qualitative merits.

Article 1.4b has been deleted from the Commission's original proposal, in line with the view expressed by the Parliament that the present rapidly evolving state of the art does not allow a satisfactory definition of computer generated works and it would therefore be premature to regulate this aspect of the protection of computer programs explicitly in the present Directive.

Article 2.

This Article is intended to regulate the question of the authorship of programs in the context of sole authorship, joint authorship, authorship under a contract for the commissioning of a work, and authorship of a work under a contract of employment. The Parliament has proposed a number of clarifications which the Commission has accepted as far as possible.
The Commission has in this respect followed the opinion of Parliament in not seeking at this stage to harmonize the more general issues relating to authorship by legal persons and of collective works, but merely recognizing that different regimes of authorship may exist, especially in relation to the ownership of rights in collective works.

The Commission has likewise followed the opinion of Parliament in respect of computer programs created in the context of employment, to make clear that the employer will be entitled to exercise the economic rights in a program created by an employee in the execution of his duties. The addition of the term 'economic' serves to identify more explicitly that moral rights fall outside the scope of this paragraph.

Article 2. paragraph 5 of the original proposal has been deleted as a consequence of the deletion of Article 1.4b of the original text.

Article 3

No amendments were proposed by the European Parliament.

Article 4.

The amended proposal takes into account the suggestion of Parliament to make more explicit that because the acts of loading, displaying, running, transmission or storage do at the present time involve an act of reproduction of the program, and since all kinds of reproduction, both permanent and temporary are technically a violation of the author's rights in the program, any such reproduction requires the authorization of the rightholder.

The Commission's amended proposal also adopts the wording of the Parliament's amendment to Article 4b to bring the text more in conformity with the wording of the Berne Convention on adaptation, translation, arrangement and other alterations of a program.
This does not represent a change in substance since the specific provisions of the Explanatory Memorandum of the original proposal indicated that the term 'adaptation' had been used to cover all forms of translation or other changes to the program.

Article 5

The amended proposal takes up the simplification of the Commission's original text suggested by the Parliament. The phrase "sold or made available to the public other than by a written licence agreement signed by both parties" is replaced by "when a copy of a computer program has been sold".

In order to make clear that the provisions of Article 5.1 allow a purchaser of a computer program in particular to correct any errors in order to maintain his own continued use of the program in accordance with its intended purpose, the original proposal has been rendered more explicit on this point, to take into account the concerns of the Parliament in respect of maintenance of the program.

Similarly, for the avoidance of doubt, paragraph 2 of Article 5 of the amended proposal now indicates that if the licence does not contain explicit provisions as regards these restricted acts, the provisions of paragraph 1 apply.

In any event, minimum acts necessary for the licencee to be able to use the program, namely loading the program and running it, cannot be excluded by the contract although the circumstances in which those acts are to be performed will still be subject to contract if the rightholder so wishes. So, for example the licence to use a copy of a program may not prohibit the licencee from running the program at all in any circumstances, but it may limit its use to a specific machine or impose other similar restrictions.

As suggested by the Parliament, the amended proposal also permits the making of a back-up copy to the extent necessary for the intended use of the original.
The Commission has likewise reflected in its amended proposal the Opinion of Parliament in respect of the use of programs in non-profit making public libraries.

A further provision has been incorporated into Article 5 of the amended proposal in line with the opinion of Parliament. Paragraph 5 is intended to make clear that a person who has a right to use a copy of a computer program is not prevented, as some commentators have suggested, from studying how the program functions. The form in which a computer program is usually supplied is not readily accessible to the human user. It is in a form known "as object" or "machine-readable" code, which, even when rendered visible to the human observer, is difficult to decipher in large quantities. Nevertheless, as the program is run, a person skilled in the art may observe and test the functioning of the program by a variety of means, including the use of electronic testing and monitoring techniques. The use of such techniques does not involve reproducing, translating or adapting the program. Such techniques do not therefore infringe the author's rights in his program.

The amended proposal makes clear that if a person has a right to use a program, that right must include at least the ability to load and run the program. During such running of the program any non-infringing act necessary to observe, study or test the functioning of the program may be carried out.

If in addition to loading and running the program, the user is also entitled to display, transmit or store the program, he may observe, study or test the functioning of the program during these operations also. He may not, however, claim rights to perform acts beyond these necessary for use or permitted under the licence merely in order to carry out additional study of the functioning of the program.
Article 5bis

This new Article of the amended proposal reflects a concern first voiced by the Parliament, widely debated among interested circles, and eventually resolved by the Parliament after a variety of amendments containing many common elements had been proposed.

The problem which this Article addresses stems from the nature of the computer program highlighted in the context of Article 5 paragraph 5 above, that is to say, the fact that it cannot be easily "read" by a human user.

However, a computer program may be required to interconnect and interact with other computer programs, for example, an applications program with an operating system. In order for the creators of computer programs to understand how their creations can interconnect and interact with those of others, they must be able to perceive in detail how the first manufacturer has provided for the exchange of data between his program and other programs.

In many instances the creator of the original program will have made available through published manuals or on request, sufficient information about the parts of his program whose function is to provide for its interoperation with other programs. In other instances, the design of these parts of the program will be standardized and publicly documented for all creators of programs to work to a common agreed interface specification. In a certain number of cases it may be that information is not forthcoming by either of these means. In such cases the creator of the original program, by withholding information from competitors, can ensure that only he can supply the range of other programs which will interoperate with his original program.
Article 5 paragraph 5 is intended to permit much of the information required for the purpose of interoperability to be derived from observation, study or testing of the program without committing infringements of the author's exclusive rights. These techniques will be adequate in many circumstances. However, where their use does not produce sufficient information and where other non-infringing means such as the use of publicly available material or published documentation is also inadequate, the Commission's amended proposal ensures, that as a last resort, a person having a right to use a copy of a program may commit acts of reproduction and translation of the machine-readable form of the code in which the copy has been supplied without the authorization of the right holder, subject to certain limitations.

In this way, the amended proposal provides a safety mechanism by which an independently created program can be made to be interoperable with an existing program, even when the creator of the existing program has chosen not to reveal to third parties the specifications of the interfaces whose function is to provide a means of interconnection with other elements of a computer system.

The Commission's amended proposal takes into account almost every element of the numerous amendments proposed during the procedure leading to the European Parliament's opinion.

However the amended proposal of the Commission cannot follow exactly the wording of the amendment accepted by the Parliament in its opinion. Although that amendment contains many elements which the Commission's amended proposal also contains, certain key elements are missing from the text of the Parliament.

On two points of substance the Commission's amended proposal does not therefore reflect the text of the amendment adopted by Parliament. These points concern the scope of the derogation for interoperable programs to be created, and the maintenance of programs.
The Commission accepts that a derogation to the normal rules of copyright may in some circumstances be justified if acts are performed without authorization of the right holder, provided that the derogation comes into play when non-infringing means are not available. There seems to be no justification for a policy which permits authors' rights to be infringed when circumstances do not demand it. The amended proposal therefore limits the application of the exception to circumstances where non-infringing means are not adequate.

The amended proposal also makes clear that the purpose of allowing such an exception is to encourage the development of a coherent interoperable product range so that users and consumers can connect elements of a system from different manufacturers together through standard, publicly available interface connections. It is precisely to avoid the risk that products would be developed in a non-interoperable fashion that this exception has been admitted. If now it were to be available to provide incoherent points of attachment between different manufacturers, it would exacerbate rather than cure the problem of interoperability, for users. The promotion of open systems would be rendered more difficult rather than enhanced.

The Commission's amended proposal therefore restricts the application of the derogation to those parts of the original program whose function is to provide for its interconnection with other elements in a system. It does not permit the user of a program to reproduce and translate parts of the program which are not relevant to its interconnection with other programs.

Second, the purpose of this derogation is to allow the independent creation of a program which can interconnect and interact with an existing program. It follows that the creator of the second program will need, having created his work, to ensure that it always functions in the way it was intended to function.
If the manufacturer of the original program changes the characteristics in its interfaces, the second independently created program may no longer function satisfactorily. The second creator may therefore need to repeat his study and analysis of the means of interconnection of the original program any number of times in order to maintain the interoperability of his own program.

However, this derogation is not intended to provide a means by which a licensee can perform acts such as enhancement or updating on the original program, which would entail performance of the restricted acts of reproduction, translation or adaptation. To allow performance of all or any of these acts under the pretext that they are for the "maintenance" of the program would be unacceptable.

Article 6

No amendments were proposed by the European Parliament.

Article 7

The Commission's amended proposal does not follow the line taken by the Parliament. In its original proposal the Commission had wished to indicate its preference for a single term of protection of 50 years from the date of creation, irrespective of whether the work was created by a natural or legal person or as a collective work. However, such a term does not correspond to the terms currently provided for under the Berne Convention. Strong opposition has been manifested to such a departure from the internationally recognized term of the life of the author plus 50 years following his death or in the case of anonymous or pseudonymous works, of 50 years from the first publication of the work.
On the issue of term of protection therefore, the amended proposal reverts to a position which is in conformity with the Berne Convention. In view of the strong pressure on the Commission to change its text on this point to remain compatible with the international convention, it is not possible to accept the amendment of Parliament as an acceptable substitute.

However, the Commission can accept the Parliament's suggestion that the period would start on the 1st of January of the year following the relevant event.

Article 8

The Commission's amended proposal follows the improvements suggested by the Parliament.
Having regard to the Treaty establishing the European Economic Community and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament

Having regard to the opinion of the Economic and Social Committee,

Whereas computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

Whereas the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently;
Whereas computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community's industrial development;

Whereas certain differences in the legal protection of computer program offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;

Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;

Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to
computer programs under copyright law as literary works and further in establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts, and for how long the protection should apply;

Whereas the Community is fully committed to the promotion of international standardization;

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and 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 they are intended to function:

Amended Proposal

Whereas for the purpose of this Directive the term "Computer program" shall include programs in any form, including those which are incorporated into hardware; that this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;

Whereas in respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied;
The principles describing any such means of interconnection and interaction are generally known as "an Interface". Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as "Interfaces".

Whereas this functional interconnection and interaction is generally known as "Interoperability": whereas such interoperability can be defined as the ability to exchange information and to mutually use the information which has been exchanged.

Whereas for the avoidance of doubt it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive;

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;
Whereas, in accordance with the legislation and jurisprudence of the Member States and the International copyright conventions, the expression of those ideas and principles is to be protected by copyright.

Whereas the exclusive rights of the author to prevent the unauthorized reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by its lawful acquirer;

Whereas a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program provided that these acts do not infringe the copyright in the program;

Whereas the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author;
Whereas, nevertheless, circumstances may exist when such a reproduction of the code and translation of its form are indispensable to obtain the necessary information to ensure that a new interoperable program can be created or can function;

Whereas it has therefore to be considered that in these limited circumstances, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice, and must therefore be deemed not to require the authorization of the rightholder;

Whereas such an exception to the author's exclusive rights may not be applied in a way which prejudices the legitimate interests of the rightholder, or which conflicts with a normal exploitation of the program;
Original Proposal

Whereas protect lcn of carp.lter progrerns under copyr lght laws shruld be wtlhrut prejudice to the appl I cat Ion In apprc;i,r late cases of other forms of protect Im;

HAS ADOPTED THIS DIRECTIVE

Amended Proposal

Whereas in order to remain in accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the term of protection should be the life of the author and fifty years from the first of January of the year following the year of his death, or in the case of an anonymous or pseudonymous work, 50 years from the first of January of the year following the year in which the work is first published.

Whereas protection of computer programs under copyright laws should be without prejudice to the application in appropriate cases of other forms of protection;

Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the EEC Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive;

Whereas the provisions of this Directive should be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunication sector or Decisions of the Council relating to standardization in the field of information technology and telecommunication;

HAS ADOPTED THIS DIRECTIVE
CHAPTER 1

Article 1

Object of protection

1. Member States shall protect computer programs by conferring exclusive rights in accordance with the provisions of this Directive.

2. Exclusive rights shall be conferred by the provisions of copyright laws. Protection shall be accorded to computer programs as literary works.

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.
3. 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, principles, logic, algorithms or programming languages underlying the program. Where the specification of interfaces constitutes ideas and principles which underlie the program, those ideas and principles are not copyrightable subject matter.

4. (a) A computer program shall not be protected unless it satisfies the same conditions as regards its originality as apply to other literary works.

(b) Programs generated by means of a computer shall be protected insofar as they satisfy the conditions laid down in 4(a) above.

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. Subject to the following paragraphs, the author of a computer program is the natural person or group of natural persons who has created the program.

2. In respect of computer programs created by a group of natural persons, the exclusive rights shall be exercised in common unless otherwise provided by contract.

3. Where a computer program is created under a contract, the natural or legal person who commissioned the program shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.

AMENDED PROPOSAL

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.

Unchanged

Unchanged
4. Where a computer program is created in the course of employment, the employer shall be entitled to exercise all rights in respect of the program, unless otherwise provided by contract.

5. In respect of programs which are generated by the use of a computer program, the natural or legal person who causes the generation of subsequent programs shall be entitled to exercise all rights in respect of the programs, unless otherwise provided by contract.

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. In the case referred to in Article 2(2) the computer program shall be protected in favour of all authors if at least one author is a beneficiary of protection in accordance with paragraph 1 of this Article.

AMENDED PROPOSAL

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 shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.

Deleted

Article 3

Beneficiaries of protection

Unchanged

Unchanged

Unchanged
ORIGINAL PROPOSAL

Article 4

Restricted acts

Subject to the provisions of Article 5, the exclusive rights referred to in Article 1 shall include the right to do or 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, viewing, running, transmission or storage of the computer program shall be considered restricted acts.

b) the adaptation of a computer program

c) the distribution of a computer program by means of sale, licensing, lease, rental and the importation for these purposes. The right to control the distribution of a program shall be exhausted in respect of its sale and its importation following the first marketing of the program by the right holder or with his consent.

AMENDED PROPOSAL

Article 4

Restricted acts

Subject to the provisions of Article 5, the exclusive rights of the author 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, and for whatever purpose. In so far as they necessitate a permanent or temporary 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;

Unchanged
**ORIGINAL PROPOSAL**

**Article 5**

Exceptions to the restricted acts

1. Where a computer program has been sold or made available to the public other than by a written license agreement signed by both parties, the acts enumerated in Article 4 (a) and (b) shall not require the authorisation of the rightholder, insofar as they are necessary for the use of the program. Reproduction and adaptation of the computer other than for the purpose of its use shall require the authorization of the rightholder.

**AMENDED PROPOSAL**

**Article 5**

Exceptions to the restricted acts

1. When a copy of a computer program has been sold, 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, including for error correction.

2. The provisions of paragraph 1 shall also apply to a licensee when the licence to use a copy of a computer program does not contain specific provisions dealing with such acts. The licence may not prevent the loading and running of a copy of a computer program necessary for its use by the licensee in accordance with its intended purpose.
2. Where a computer program has been sold or made available to the public by means other than a written license agreement signed by both parties, the exclusive right of the rightholder to authorize rental shall not be exercised to prevent use of the program by the public in non-profit making public libraries.

3. 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.

4. Where a copy of a computer program has been made lawfully available to the public and in the absence of contractual provisions to the contrary, the right to authorize rental shall not be exercised to prevent normal use of the program in non-profit making public libraries.

5. Subject to the provisions of Article 4(a) the person having a right to use a copy of a program shall be entitled, without the authorization of the right-holder, to observe, study or test the functioning of the program in order to determine the ideas, principles and other elements which underlie the program and which are not protected by copyright, 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.
1. Notwithstanding contractual provisions to the contrary, the authorization of the owner of the rights shall not be required where reproduction of the code and translation of its form are indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program, 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 authorised to do so;

b) the information necessary to achieve interoperability has not previously been published, or made available to the persons referred to in subparagraph a); and

c) these acts are confined to the parts of the original program which are necessary to achieve interoperability with it.
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 creation or marketing of a program which infringes copyright in respect of the original program, and in particular of a program substantially similar in its expression.

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.
ORIGINAL PROPOSAL

Article 6

Secondary Infringement

1. It shall be an infringement of the author’s exclusive rights in the computer program to import, possess or deal with an infringing copy of the program, knowing or having reason to believe it to be an infringing copy of the work.

2. It shall be an infringement of the author’s exclusive rights in the computer program to make, import, possess or deal with articles intended specifically to facilitate the removal or circumvention of any technical means which have been applied to protect a program.

Article 7

Term of protection

Protection shall be granted for fifty years from the date of creation.

AMENDED PROPOSAL

Article 6

Secondary Infringement

Unchanged

Article 7

Term of protection

Protection shall be granted for the life of the author and for fifty years after his death; where the computer program is an anonymous or pseudonymous work, 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.
ORIGINAL PROPOSAL

CHAPTER 11

Article 8

Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to any legal provisions concerning patent rights, trade marks, unfair competition, trade secrets or the law of contract insofar as such provisions do not conflict with the principles laid down in the present Directive.

2. The provisions of this Directive are applicable also in respect of works created prior to (date in article 9).

AMENDED PROPOSAL

CHAPTER 11

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 semiconductor 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.
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 ensure that they communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

Article 10

This Directive is addressed to the Member States.

Done at Brussels For the Council

The President

AMENDED PROPOSAL

CHAPTER III

Article 9

Final provisions

Unchanged

2. Member States shall communicate to the Commission the provisions of national law which they adopt in order to transpose this Directive.

Unchanged

Article 10

Unchanged
DOCUMENTS

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REPORT

from: Presidency

to: Permanent Representatives Committee

No. prev. doc.: 8216/90 PI 46
No. Com 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\textsuperscript{2} and 11 July 1990\textsuperscript{3} respectively.

The Commission sent the Council an amended proposal under cover of a letter dated 18 October 1990\textsuperscript{4}.

2. The Working Party on Intellectual Property (Computer Programs) examined the Commission's amended proposal at its meeting held on 18 and 19 October 1990\textsuperscript{5}. Since delegations had not received the amended proposal before the meeting, they could express only provisional positions, subject to further consideration. The Working Party was unable to examine the preamble to the Commission's amended proposal through lack of time, half a day of meeting time having been lost following the last-minute assignment of the interpreters to another meeting. The Presidency, delegations and Commission representatives regretted these circumstances.

3. Part II of this report sets out the main points on which problems of substance remain; part III sets out other points on which problems remain\textsuperscript{6}; and part IV states the action

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\textsuperscript{2} Official Journal No C 329 of 30.12.89, pages 4 to 9.
\textsuperscript{3} Doc. 7897/90 PE-RESOL 30, pages 25-32.
\textsuperscript{4} Doc. 9397/90 PI 62 COM(90) 509 Final SYN 183.
\textsuperscript{5} The Luxembourg delegation was not represented at this meeting.
\textsuperscript{6} Points on which agreement has been reached are not discussed in this report.
which the Permanent Representatives Committee is requested to take.

The text of the amended proposal as it results from the Working Party's discussions is set out in the Annex to this report; all delegations have a general scrutiny reservation on this text for the reasons explained under point 2 above.

II. Main points on which problems of substance remain

4. Rental right

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 (Article 4(c)). 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 undertook 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 16).

The majority of delegations are prepared to accept this compromise proposal. The German and Netherlands delegations maintain a reservation on Article 4(c), as they 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.

5. Decompilation

Subject to scrutiny reservations by the Danish and Portuguese delegations, there is now broad agreement on Article 5bis, which provides an exception to the rightholder's exclusive rights for the purpose of creating an interoperable program: decompilation, or "reverse engineering", may be carried out under carefully defined conditions by a person having a right to use the protected program where the information necessary to achieve interoperability is not otherwise available to him. However,
there is still a difference of opinion with regard to decompilation for the purpose of maintenance. The European Parliament 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 considered this wording to be too broad with regard to maintenance and therefore open to abuse; accordingly it proposed wording in its amended proposal which restricted "maintenance" to the maintenance of an independently created interoperable program. A number of delegations considered that the wording proposed by the Commission was still too broad and preferred to use wording which omits any explicit reference to maintenance.

The majority of delegations were in favour of this last form of words, although the Danish, German, French, Netherlands and Portuguese delegations expressed scrutiny reservations. The Commission representative also expressed a scrutiny reservation on this departure from its amended proposal, while the Greek delegation expressed a substantive reservation, preferring the broader wording proposed by the European Parliament.

7 "... indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program."
8 "... indispensable to obtain the information necessary to achieve the interoperability of an independently created program with the original program."
6. Term of protection

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 (Article 7), 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. The Commission and the majority of delegations are opposed to such an option on the grounds that they consider that it is necessary to harmonize the term of protection 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 in this...
respect); in return the German delegation would drop all its reservations on other aspects of the proposed Directive:

(b) the text of Article 7 would remain as approved by the majority of delegations and the Commission 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.

III. Other points on which problems remain

7. Protection given

The Commission proposes that computer programs should be protected by copyright as literary works within the meaning of the Berne Convention (Article 1(1) of the Commission's amended proposal). The majority of the delegations support this proposal. The Spanish delegation, however, has entered a reservation as it takes the view that computer programs should be protected as works within the meaning of the Berne Convention, without specifying that they are literary works.
8. Temporary reproduction of a computer program

The Commission's amended proposal has taken over a suggestion made by the European Parliament that it be made clearer that both permanent and temporary reproduction of a computer program require the authorization of the rightholder (Article 4(a)). This amendment is supported by the majority of the delegations. The German delegation, however, has entered a scrutiny reservation on inclusion of temporary reproduction among the acts requiring authorization.

9. Exceptions to the restricted acts

In its amended proposal, the Commission has proposed separate paragraphs to cover:

(a) the case where a copy of a computer program has been sold (Article 5(1)),

(b) the case where a copy of a computer program has been licensed (Article 5(2)), and

(c) the making of a back-up copy (Article 5(3)).

The majority of delegations considered that this separation into three paragraphs created more problems than it solved and left uncertainty as to which paragraph would apply where the sale involved a licensing agreement. They
therefore preferred to replace these three paragraphs by a single paragraph as previously approved by the Working Party and set out as Article 5(1) in the Annex hereto.

The Commission representative entered a scrutiny reservation on the text preferred by the majority of delegations, to the extent that it does not refer explicitly to the case where a copy of the computer program has been sold, and to the extent that it does not refer specifically to error correction. The majority of delegations consider that error correction is covered by the terms "use of the program by the lawful acquiror in accordance with its intended purpose" and need not be mentioned specifically.

10. Reference to Article 9(2) of the Berne Convention

The Commission's amended proposal takes over a provision proposed by the European Parliament which makes it clear that the derogation permitting decompilation may not be interpreted in such a way as to allow it to be applied contrary to Article 9(2) of the Berne Convention (Article 5 bis (3)). The majority of delegations consider that this provision should appear in the preamble to the Directive, not in Article 5 bis. The Commission representative has entered a reservation on the transfer of this provision to the preamble, on the grounds that the inclusion of this paragraph in Article 5 bis represented a compromise between the various political groups in the European Parliament.
11. Special measures of protection

Although the Commission had not proposed any amendment to Article 6 in its amended proposal on the grounds that the European Parliament had not adopted any amendment to this Article, the Commission representative indicated that the Commission services could accept changes to this Article which had been proposed in the Working Party with a view to overcoming a number of difficulties raised by the text of the Commission's original proposal. The majority of delegations and the Commission were therefore able to agree to Article 6 as set out in the Annex hereto.

The German delegation maintains a scrutiny reservation on paragraph 1(c) of this Article on the grounds that its transposition into national law would affect German criminal law and that it was not clear how this provision would relate to the making of back-up copies authorized under Article 5(1).

The Greek and Netherlands delegations also entered scrutiny reservations on parts of paragraph 1(c).

12. Reference to Community law in respect of telecommunications

The Commission's amended proposal transferred to the last recital of the preamble a provision which had earlier been inserted in the proposed Directive by the Working Party as
Article 8(3)⁹. While the majority of delegations were able to accept this transfer, the Belgian, French, Netherlands and United Kingdom delegations entered scrutiny reservations on this transfer, pending consultation with the relevant authorities.

IV. Action which the Permanent Representatives Committee is requested to take

13. The Presidency requests the Permanent Representatives Committee to:

(a) attempt to resolve the outstanding problems set out under parts II and III of this report;
(b) consider whether any problems which it is unable to resolve should be submitted to the Council (Internal Market) at its meeting on 8 November 1990 for a policy debate;
(c) note with approval the progress made on the other aspects of the proposed Directive;
(d) note that the Working Party will examine the recitals of the amended proposal and any other outstanding questions at its meeting on 21 and 22 November 1990.

⁹ Doc. 7010/90 PI 32.
CONSOLIDATED TEXT OF THE AMENDED PROPOSAL DRAWN UP FOLLOWING THE PROCEEDINGS OF THE WORKING PARTY ON 18 AND 19 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.

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.

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.
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;

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4 Scutiny 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.

5 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."

6 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."

7 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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8 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).

9 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, 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, or made available to the persons referred to in subparagraph (a); and

10 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.
(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.

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.

II 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 5 bis. 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 purposes¹² of any means¹³ whose sole intended purpose is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a program¹⁴.

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

¹² Scrutiny reservation by the Greek delegation on the words "or the possession for commercial purposes."
¹³ Scrutiny reservation by the Netherlands delegation on the words "any means".
¹⁴ Scrutiny reservation by the German delegation on paragraph 1(c).
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.\(^\text{15}\)

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.

\(^{15}\) Reservation by the German delegation which considers that Member States should have the option of granting a longer term of protection.
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.

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

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16 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.
Item 10. Preparation for the Council meeting (Internal Market) on 8 November 1990


- Policy debate

9397/90 PI 62
9398/90 PI 63
1. The Committee took note of the amended Commission proposal (9397/90 PL 62) and the Presidency's report (9398/90 PL 63), as well as of the consolidated text annexed to the latter, noting a scrutiny reservation by the Spanish delegation on the Presidency's report and scrutiny reservations by all the delegations with regard to the consolidated text.

2. As regards the questions raised in Part II of the Presidency's Report, the Committee:

- noted that the German and Netherlands delegations upheld their reservations regarding the question of the rental right, but examined in a positive spirit the compromise solution proposed;

- noted that, as regards the question of decompilation:

  - there was a strong tendency in favour of the principles contained in the new Article 5a;

  - the positions outlined in the Presidency's report on the subject of maintenance of a computer program remained unchanged;

  - the United Kingdom delegation considered that it was necessary to re-examine the term, "published" appearing in paragraph 1(b) of Article 5a;

  - the United Kingdom delegation considered that paragraph 2 of Article 5a was redundant in the light of the content of paragraph 1 of that Article:
- noted that the German delegation, while upholding its reservation regarding Article 7, was examining in a positive manner the compromise solutions put forward as well as the possibility of combining them;

- decided to submit these questions to the Council (Internal Market) for a policy debate.

3. Concerning the other aspects of the proposal for a Directive, the Committee:

- noted a question from the Belgian delegation as to whether paragraph 4 of Article 2 needed to be included in the Directive;

- took note of a reservation by the Netherlands delegation on the phrase "in the absence of specific contractual provisions" in Article 5(1);

- noted with satisfaction that the German, Greek and Netherlands delegations were withdrawing their scrutiny reservations on Article 6;

- noted the German delegation's request that the Commission should indicate in an appropriate manner its intention to take action on the European Parliament's request that the Commission submit a report every two years on the state of implementation of the Directive;

- agreed to instruct the Working Party to continue examination of these points as well as of any other questions outstanding, with a view to the adoption of a common position by the Council at its meeting on 13 December 1990.
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 where 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.
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.

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.

4 The Belgian delegation questions whether it is necessary to include the provision contained in this paragraph in the Directive.
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 program¹², 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 published¹³, 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.  

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.  

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.

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.

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
SUMMARY OF PROCEEDINGS

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

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

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\(^1\) 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 2.

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.

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)".

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.
Article 7

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\(^4\). 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.

\(^4\) 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 PI 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.
EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 26 November 1990

10259/90
RESTREINT
PI 77

NOTE

from: Presidency

to: Permanent Representatives Committee/Internal Market Council

No. prev. doc.: 9713/90 PI 69
No. Gion 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
- consolidated text

The Permanent Representatives Committee and the Council will find attached:


- in ANNEX II, statements to be entered in the Council minutes.
Amended proposal for a Council Directive on the legal protection of computer programs

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

Whereas the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently;

Whereas computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community's industrial development;

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1 Doc. 9397/90 PI 62 COM(90) 509 final SYN 183.
Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;

Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;

Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and further in establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts, and for how long the protection should apply;

Whereas for the purpose of this Directive the term "computer program" shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;

Whereas in respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied;

Whereas the Community is fully committed to the promotion of international standardization;

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and 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 they are intended to function;

Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as "interfaces";

Whereas this functional interconnection and interaction is generally known as "interoperability": whereas such interoperability can be defined as the ability to exchange information and to mutually use the information which has been exchanged;

Whereas for the avoidance of doubt it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive;

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; 4

Whereas, in accordance with the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright;

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;

4 Reservation by the Greek delegation on this recital.

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Whereas the exclusive rights of the author to prevent the unauthorized reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by its lawful acquiror; whereas this should apply in the absence of specific contractual provisions, including when a copy of the program has been sold;

Whereas a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program provided that these acts do not infringe the copyright in the program;

Whereas the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author;

Whereas, nevertheless, circumstances may exist when such a reproduction of the code and translation of its form within the meaning of Article 4(a) and (b) are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs;

Whereas it has therefore to be considered that in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice, and must therefore be deemed not to require the authorization of the rightholder;

Whereas such an exception to the author's exclusive rights may not be used in a way which prejudices the legitimate interests of the rightholder, or which conflicts with a normal exploitation of the program;
Whereas in order to remain in accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the term of protection should be the life of the author and fifty years from the first of January of the year following the year of his death, or in the case of an anonymous or pseudonymous work, 50 years from the first of January of the year following the year in which the work is first published;

Whereas protection of computer programs under copyright laws should be without prejudice to the application in appropriate cases of other forms of protection; however, any contractual provisions contrary to Article 5bis or to the exceptions provided for in Article 5(3) and (5) should be without effect and void;

Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the EEC Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive;

Whereas the provisions of this Directive should be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunication sector or Decisions of the Council relating to standardization in the field of information technology and telecommunication;

Whereas this Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive;

HAS ADOPTED THIS DIRECTIVE
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.

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.
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.

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.

5 The Belgian delegation reserves the right to make a unilateral statement in relation to this paragraph.
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;

(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 Reservation by the Netherlands delegation on the transposition into national law of "the right to control further rental".
Article 5

Exceptions to the restricted acts

1. In the absence of specific contractual provisions\(^7\) 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 acquiror in accordance with its intended purpose, including for error correction.

2. Replaced by paragraph 1.

3. 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.

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 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.

\(^7\) Reservation by the Netherlands delegation on the words "In the absence of specific contractual provisions".
Article 5 bis

Decompiilation

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4(a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created program with other programs, 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 readily available to the persons referred to in subparagraph (a); and

(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;

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8 Reservation by the German and Greek delegations, which consider that interoperability between programs and hardware should also be covered.
(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.

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.

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;

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(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

1. 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.
2. Member States which already have a term of protection longer than that provided for in paragraph 1 are allowed to maintain their present term until such time as the term of protection for copyright works is harmonized by Community law in a more general way.

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. Any contractual provisions contrary to Article 5bis or to the exceptions provided for in Article 5(3) and (5) shall be without effect and void.

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.
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
STATEMENTS
for entry in the minutes of the Council meeting
at which the Directive is adopted

1. Re Article 1(1)

"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."

2. Re 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."

3. Re 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."
4. **Re Article 8(2)**

"The Council and the Commission agree that the provision of Article 8(2) allows Member States to adopt transitional measures to protect rights acquired before 1 January 1993, including those in respect of the rental of computer programs or of copies thereof where such rental was already authorized before that date."

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10259/90  prk  EN - 17 -
1. The points which, after the Working Party's proceedings, are still subject to reservations are set out below. The text of the proposal to emerge from the Working Party's proceedings is given in 10259/90 PI 77.

2. **Decompilation (Article 5a)**

The majority of delegations and the Commission representative were able to accept Article 5a as set out in 10259/90 PI 77: 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 to achieve the interoperability of an independently created program with other programs".

The German and Greek 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.

The majority of delegations and the Commission representative opposed extending coverage, on the grounds that it was technically unnecessary and would broaden the derogation for decompilation in a way that could not be controlled.

The German delegation intended to reconsider its position so that it could support the majority.

3. 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".

4. 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 representative believed that the rightholder should indeed be entitled to do so.
5. 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.

6. 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;"
When the Directive was last discussed by the Permanent Representatives Committee, on 31 October 1990, the Belgian delegation raised the possibility of making Article 2(4) optional. It may wish to make a unilateral statement on the subject.
CORRIGENDUM TO NOTE

from: Presidency

to: Permanent Representatives Committee/Internal Market Council

Subject: Amended proposal for a Council Directive on the legal protection of computer programs
- consolidated text

The following amendments and corrections should be made to 10259/90 PI 77:

1. Page 5, 4th recital (concerns French text only)

2. Page 6, 2nd recital (concerns French text only)

3. Page 6, 4th recital (concerns French text only)
4. Page 8, Article 2(4)

Footnote 5 should be deleted.

5. Page 9, Article 4, heading

The words "Subject to the provisions of Article 5" should read "Subject to the provisions of Articles 5 and 5a".

6. Page 9, Article 4(b) (concerns French text only)

7. Page 11, Article 5a(1), heading (concerns French text only)

8. Page 14, Article 8(1) (concerns French text only)

9. Page 16, statement No 3 (concerns French text only)
10. Page 17

The following should be added:

"5. Statement by the Belgian delegation re Article 2(4)

"The Belgian delegation thinks that the question of a computer program created by an employee should be examined in the more general context of copyright.""

6. The Irish delegation proposed the following statement re Article 8(1):

"The Council and the Commission agree that Article 8(1), second sentence, when applied to Article 5 bis (1)(b), does not preclude the possibility of the rightholder making available the information necessary to achieve the interoperability of an independently created programme with other programmes in return for reasonable remuneration.""
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).

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(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.

(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.
CORRIGENDUM TO THE AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS

No. Cion prop.: COM(90) 509 final/4 SYN 183


Encl.: COM(90) 509 final/4 SYN 183

1 Concerns the English version only.
Amended Proposal for a
COUNCIL DIRECTIVE

ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS

(presented by the Commission pursuant to Article 149 (3) of the EEC Treaty)
Article 5bis

1. Notwithstanding contractual provisions to the contrary, the authorization of the owner of the rights shall not be required where reproduction of the code and translation of its form are indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program, 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 authorised to do so;

   b) the information necessary to achieve interoperability has not previously been published, or made available to the persons referred to in subparagraph a); and

   c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.
DRAFT
COMMON POSITION
ADOPTED BY THE COUNCIL ON ..............
WITH A VIEW TO THE ADOPTION OF A DIRECTIVE
ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS
COUNCIL DIRECTIVE

of

on the legal protection
of computer programs

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

In co-operation with the European Parliament (2),

Having regard to the Opinion of the Economic and Social Committee (3).

(1) OJ No C 91, 12.4.1989, p. 4 and OJ No C ....
Whereas computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

Whereas the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently;

Whereas computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community's industrial development;

Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;

Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;
Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts and for how long the protection should apply:

Whereas, for the purpose of this Directive, the term "computer program" shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage:

Whereas, in respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied:

Whereas the Community is fully committed to the promotion of international standardization:

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, 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:
Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as "interfaces":

Whereas this functional interconnection and interaction is generally known as "interoperability"; whereas such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged;

Whereas, for the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive;

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;

Whereas, in accordance with the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright;

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; whereas this term does not include public lending, which, accordingly, remains outside the scope of this Directive;
Whereas the exclusive rights of the author to prevent the unauthorized reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by its lawful acquirer; whereas this should apply in the absence of specific contractual provisions, including when a copy of the program has been sold:

Whereas a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program, provided that these acts do not infringe the copyright in the program:

Whereas the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author:

Whereas, nevertheless, circumstances may exist when such a reproduction of the code and translation of its form within the meaning of Article 4(a) and (b) are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs:

Whereas it has therefore to be considered that in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorization of the rightholder;
Whereas such an exception to the author’s exclusive rights may not be used in a way which prejudices the legitimate interests of the rightholder or which conflicts with a normal exploitation of the program;

Whereas, in order to remain in accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the term of protection should be the life of the author and fifty years from the first of January of the year following the year of his death or, in the case of an anonymous or pseudonymous work, 50 years from the first of January of the year following the year in which the work is first published;

Whereas protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection; whereas, however, any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) should be null and void;

Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive;
Whereas the provisions of this Directive should be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunications sector or Council Decisions relating to standardization in the field of information technology and telecommunication;

Whereas this Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive,

HAS ADOPTED THIS DIRECTIVE:

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.
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 computer 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.

2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.
3. 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.

Article 3

Beneficiaries of protection

Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works.

Article 4

Restricted Acts

Subject to the provisions of Articles 5 and 6, 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. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts 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;

(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.

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 authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.
3. The person having a right to use a copy of a computer 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 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 6

Decomilation

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4(a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, 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 readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.
2. The provisions of paragraph 1 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 computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

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.

**Article 7**

**Special measures of protection**

1. Without prejudice to the provisions of Articles 4, 5 and 6, 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 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 the sole intended purpose of which is to facilitate the
unauthorized removal or circumvention of any technical device which may have
been applied to protect a computer 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 8

Term of protection

1. 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
abovementioned events.
2. Member States which already have a term of protection longer than that provided for in paragraph 1 are allowed to maintain their present term until such time as the term of protection for copyright works is harmonized by Community law in a more general way.

Article 9

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. Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) shall be null and void.

2. The provisions of this Directive shall apply also to programs created before 1 January 1993 without prejudice to any acts concluded and rights acquired before that date.

Article 10

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993.
When Member States adopt these measures, the latter shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field governed by this Directive.

Article 11

This Directive is addressed to the Member States.

Done at Brussels,

For the Council

The President
COMMON POSITION
ADOPTED BY THE COUNCIL ON 13 DECEMBER 1990
WITH A VIEW TO THE ADOPTION OF A DIRECTIVE
ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS
COUNCIL DIRECTIVE

of

on the legal protection
of computer programs

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

In co-operation with the European Parliament (2),

Having regard to the Opinion of the Economic and Social Committee (3),

(1) OJ No C 91, 12.4.1989, p. 4 and amendment transmitted on 18 October 1990.
Whereas computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

Whereas the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently;

Whereas computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community's industrial development;

Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject:

Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising:
Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts and for how long the protection should apply;

Whereas, for the purpose of this Directive, the term "computer program" shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;

Whereas, in respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied;

Whereas the Community is fully committed to the promotion of international standardization;

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, 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;
Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as "interfaces";

Whereas this functional interconnection and interaction is generally known as "interoperability"; whereas such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged;

Whereas, for the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive;

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;

Whereas, in accordance with the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright;

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; whereas this term does not include public lending, which, accordingly, remains outside the scope of this Directive;
Whereas the exclusive rights of the author to prevent the unauthorized reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by the lawful acquirer:

Whereas this means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of correction of its errors, may not be prohibited by contract; whereas, in the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy;

Whereas a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program, provided that these acts do not infringe the copyright in the program;

Whereas the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author;

Whereas, nevertheless, circumstances may exist when such a reproduction of the code and translation of its form within the meaning of Article 4(a) and (b) are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs:
Whereas it has therefore to be considered that in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorization of the rightholder;

Whereas an objective of this exception is to make it possible to connect all components of a computer system, including those of different manufacturers, so that they can work together;

Whereas such an exception to the author's exclusive rights may not be used in a way which prejudices the legitimate interests of the rightholder or which conflicts with a normal exploitation of the program;

Whereas, in order to remain in accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the term of protection should be the life of the author and fifty years from the first of January of the year following the year of his death or, in the case of an anonymous or pseudonymous work, 50 years from the first of January of the year following the year in which the work is first published;

Whereas protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection; whereas, however, any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) should be null and void:
Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive;

Whereas the provisions of this Directive should be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunications sector or Council Decisions relating to standardization in the field of information technology and telecommunication;

Whereas this Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive,

HAS ADOPTED THIS DIRECTIVE:

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.
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 computer 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.

2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.
3. 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.

Article 3

Beneficiaries of protection

Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works.

Article 4

Restricted Acts

Subject to the provisions of Articles 5 and 6, 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. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts 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;

(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.

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 authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.
3. The person having a right to use a copy of a computer 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 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 6

Decompilation

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4(a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, 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 readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.
2. The provisions of paragraph 1 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 computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

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.

Article 7

Special measures of protection

1. Without prejudice to the provisions of Articles 4, 5 and 6, 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 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 the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer 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 8

Term of protection

1. 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 abovementioned events.
2. Member States which already have a term of protection longer than that provided for in paragraph 1 are allowed to maintain their present term until such time as the term of protection for copyright works is harmonized by Community law in a more general way.

Article 9

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. Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) shall be null and void.

2. The provisions of this Directive shall apply also to programs created before 1 January 1993 without prejudice to any acts concluded and rights acquired before that date.

Article 10

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993.
When Member States adopt these measures, the latter shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field governed by this Directive.

Article 11

This Directive is addressed to the Member States.

Done at Brussels,  

For the Council  
The President  

10652/1/90
COMMON POSITION ADOPTED BY THE COUNCIL ON 13 DECEMBER 1990
WITH A VIEW TO THE ADOPTION OF A DIRECTIVE
ON THE LEGAL PROTECTION
OF COMPUTER PROGRAMS

THE COUNCIL'S REASONS
Subject: Common position adopted by the Council on 13 December 1990 with a view to the adoption of a Directive on the legal protection of computer programs

1. On 5 January 1989 the Commission submitted to the Council a proposal for a Directive on the legal protection of computer programs (1). It based its proposal on Article 100a EEC.

The European Parliament and the Economic and Social Committee delivered their Opinions on the proposal on 11 July 1990 (2) and 18 October 1989 (3) respectively.

In its Opinion, the European Parliament approved the substance of the Commission proposal; it proposed a number of amendments which the Commission has, to a large extent, incorporated in its amended proposal of 18 October 1990 (4).

On 13 December 1990 the Council unanimously adopted a common position within the meaning of Article 149(2) of the EEC Treaty, the text of which is set out in 10652/1/90 P1 82 PRO-COOP 148.

(1) OJ No C 91, 12. 4.89, p. 4.
(2) Not yet published in the Official Journal.
(3) OJ No C 329, 30.12.89, p. 4.
1. Points on which the amended Commission proposal differs, as to the
substance, from the European Parliament's Opinion

2. The Commission has not included the new paragraph 2a of Article 1,
proposed by the European Parliament. It felt that the proposed
definition of computer program was unnecessary in the context of this
Directive and that user's guides should not enjoy the same protection as
the program itself, since they enjoyed protection in their own right
under the Berne Convention for the Protection of Literary and Artistic
Works.

The Council endorsed the grounds used by the Commission in rejecting the
Parliament's proposal.

3. The amended Commission proposal includes the amendment proposed by the
European Parliament involving the introduction of a new Article 5a (now
Article 6) which provides for an additional derogation from the exclusive
rights of the author so as to permit the creation of an interoperable
program. However, the amended Commission proposal does not go along with
the amendment proposed by the European Parliament on the following
question of substance: whereas the amendment proposed by the European
Parliament refers to "any act essential to ensure the maintenance of the
program and the creation or operation of interoperable programs", the
amended Commission proposal specifies that the derogation is limited to
"the reproduction of the code and translation of its form ...........
indispensable to achieve the creation, maintenance or functioning of an independently created interoperable program". The aim of this clarification was to:

(a) limit the number of acts which could be the subject of the derogation to acts involving the reproduction of the code or the translation of its form in order to ensure that the adaptation of the program, which was not necessary for decompilation, did not benefit from the derogation;

(b) ensure that "the maintenance of the program" was limited to the maintenance of the interoperability of the independently created program, since the derogation should be granted only for the purposes of interoperability. The text proposed by the European Parliament could be interpreted as permitting the acquirer of the protected program to benefit from the derogation to carry out acts subject to restrictions, for the purposes of updating or improving the program on the pretext that such acts were intended to "maintain" the program, which was unacceptable to the Commission.

The Council endorsed the Commission's view as regards point (a) above.

As regards point (b), the Council, while sharing the Commission's concern, held the view that the terms used by the Commission could be interpreted too broadly and it preferred to replace "indispensable to achieve the creation, maintenance or functioning of an independently
created interoperable program by "indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs", in order to underline further that interoperability was the only grounds for the derogation and to specify that interoperability was achieved between an independently created program and one or more other programs.

4. As regards Article 7 (now Article 8), the Commission accepted the amendment proposed by the European Parliament that the term of protection should begin on the first of January of the year following the event in question, but did not adopt the amendment concerning the length of the term of protection, on the grounds that it did not correspond to the terms laid down in the Berne Convention; accordingly the amended Commission proposal was aligned on the Berne Convention.

The Council endorsed the reasoning of the Commission in adopting its common position, while making a number of clarifications to the amended Commission proposal to take account of works of joint authorship (Article 7a of the Berne Convention) and of the case where a legal person was considered the author under national legislation pursuant to Article 2(1) of the Directive.

The Council also added a new paragraph 7 to the Article to permit the Federal Republic of Germany, whose current legislation provides for a longer term of protection than that laid down in paragraph 1 (the life of
the author and seventy years after his death instead of the life of the
author and fifty years after his death), to maintain the current term
until such time as the term of protection for copyright works is
harmonized by Community law in a more general way.

5. The Commission did not adopt the new paragraphs 2a, 2b and 2c of
Article 9 (now Article 10) proposed by the European Parliament on the
grounds that paragraph 2a did not correspond to Commission policy on the
committee procedure, that paragraph 2b was superfluous and that it would
be excessive to forward a report on the implementation of the Directive
(paragraph 2c) every two years. However, on this latter point, the
Commission agreed in a statement in the Council minutes to forward such a
report by the end of 1996.

The Council endorsed the grounds used by the Commission in rejecting the
amendments proposed by the European Parliament.

II. Points on which the Council's common position differs, as to the substance,
from the European Parliament's Opinion and the amended Commission proposal

6. The European Parliament did not propose any amendment to Article 2(3) nor
did the Commission amend its proposal on this provision.

The Council held the view that, where a computer program was created
under a contract, the parties involved should be free to specify in the
contract which of the parties would be entitled to exercise all rights in respect of the program; it accordingly deleted the paragraph.

7. The European Parliament did not propose any amendment to Article 3(2) nor did the Commission amend its proposal on this provision.

The Council did not share the view that where a computer program was created jointly by several natural persons, the right to protection should be granted automatically to all authors if at least one author was the beneficiary of protection under national copyright legislation as applied to literary works; it argued that this provision would have the effect of granting the right to protection to one or more persons not covered by the categories of persons listed in Article 3 of the Berne Convention and that such an effect was undesirable. The Council accordingly deleted the provision.

8. The Commission adopted the amendment to Article 4(b) proposed by the European Parliament.

The Council, while accepting the amendment, added "without prejudice to the rights of the person who alters the program", in order to take account of the Article 2(3) of the Berne Convention.

9. The European Parliament did not propose any amendment to Article 4(c) nor did the Commission amend its proposal on this provision.
The Council introduced a number of changes to the provision in order to clarify that:

- the distribution right covered every form of distribution to the public, including rental;

- the exhausting of the distribution right applied at Community level;

- the exhausting of the distribution right did not extend to the right to control the rental of the sold program or of a copy. On this latter point there are two statements in the Council minutes to the effect that this provision does not prejudge the solution to be adopted in a future Community instrument relating more generally to the rental of works of art protected by copyright and that Article 8(2) (now Article 9(2)) permits Member States to adopt transitional measures to protect rights acquired prior to 1 January 1993, including those relating to the rental of computer programs or copies of those programs where the rental was already authorized before that date.

10. The Commission adopted the amendment to Article 5(2) proposed by the European Parliament (Article 5(4) of the amended Commission proposal).

The Council reached the conclusion that the lending to the public of computer programs by public libraries should be left to national legislation and should not be included in the Directive. It accordingly
deleted the provision and added a recital that specifies clearly that "rental" within the meaning of Article 4(c) does not include public lending, which remains outside the scope of the Directive.

III. Drafting amendments

11. Finally, the Commission and the Council made a number of drafting amendments to several provisions of the Directive in order to clarify their content.
FOLLOW-UP TO THE GREEN PAPER

Working programme of the Commission
in the field of copyright and neighbouring rights

(Communication from the Commission)
INTRODUCTION

This paper sets out to define a general policy programme outlining the steps the Commission will be taking in respect of copyright and neighbouring rights(1) following publication of the Green Paper on Copyright and the Challenge of Technology (COM(88) 172 final, June 1988) and the reactions it elicited. This action programme covers the period up to 31 December 1992, the date by which the internal market is to be established.

The 1988 Green Paper was a consultative document intended to provide a basis for wide-ranging discussion particularly among those directly involved both in the Community and internationally. It represented neither a definitive statement of the Commission’s position nor an exhaustive study of the problems at issue.

Before embarking on a programme of specific measures to harmonize legislation in the field, the Commission felt it would be advisable to seek the opinion of all those concerned so as to be able to make a proper assessment of the interests affected, that is to say the interests of authors, artists, the cultural industries, and consumers, and to identify the areas to which priority should be given.

In this extensive process of consultation the views of interested parties were put forward both in the form of written comments and at hearings arranged for the purpose. Four hearings were held. The first took place on 6 and 7 October 1988, and dealt with the legal protection of computer programs (Chapter 5 of the Green Paper). The second was held on 1 and 2 December 1988, and dealt with audio-visual home copying (Chapter 3 of the Green Paper). The third took place on 18 and 19 September 1989 and was devoted to rental rights (Chapter 4 of the Green Paper) and certain aspects of piracy (Chapter 2 of the Green Paper). Finally, the fourth hearing took place on 26 and 27 April 1990; it dealt with the protection of data bases (Chapter 6 of the Green Paper).

Chapters 2 to 7 of the present document follow the order of the corresponding chapters of the Green Paper.

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(1) In this paper the term "neighbouring rights" refers to the rights of performers, producers of phonograms and broadcasting organizations guaranteed by the Rome Convention of 26 October 1961.
CHAPTER 1: COPYRIGHT, NEIGHBOURING RIGHTS AND THE EUROPEAN COMMUNITY - THE NEED FOR A GLOBAL APPROACH

1.1. The emergence of new technologies in the last ten years has aroused fresh interest in the subject of copyright and neighbouring rights. The new technologies have brought three main developments with them:

(i) the increasing role played by copyright and neighbouring rights in the economy, particularly in the western countries, with their growing orientation towards goods and services with a high value-added content;

(ii) the internationalization of questions of copyright and neighbouring rights, as the new technologies have removed or at least blurred the frontiers between countries so that difficulties can no longer be contained within a single state and dealt with at a purely domestic level;

(iii) profound changes in the use made of goods and services with links with copyright, neighbouring rights and the cultural sector in general.

These aspects are closely bound up together. The new uses of copyright and neighbouring rights which have been made possible by technological advances are in many cases practiced on an international scale. The approach taken consequently has to operate in a multilateral and Community context to take account of this new dimension.

1.2. The new technologies represent both an opportunity and a challenge: an opportunity, because of the scope they open up for individuals to improve their quality of life and businesses their effectiveness, by providing access to literary and artistic works and to information and data, frequently on a real-time basis; and a challenge, because of the scope for large-scale and uncontrolled copying of works, with no proper return to the holders of the rights involved.

1.3. In the face of these developments, and given the imminent establishment of the 1993 single market, the Community has a duty to act.

Copyright provides a basis for intellectual creation. To protect copyright is to ensure that creativity is sustained and developed, in the interest of authors, the cultural industries, consumers, and ultimately of society as a whole. Neighbouring rights underpin these objectives in various ways, particularly by guaranteeing a proper return to performing artists and those who invest in the provision of these cultural goods and services.
1.4. The Commission will be guided by two principles here: firstly, the protection of copyright and neighbouring rights must be strengthened; secondly, the approach taken must as far as possible be a comprehensive one.

1.5. The changes which technological advance has brought make it urgently necessary to strengthen the protection of copyright and neighbouring rights, if an important economic and cultural asset in the Member States is not to be lost.

The rights existing under the international conventions must be adapted to the changed technology, in ways which improve the protection given to authors, and new rights must be conferred on authors to prevent their creative efforts and their investments from being unlawfully appropriated by others.

1.6. The author's exclusive right to exploit his work or to authorize others to do so is the fundamental economic element in copyright. Holders of neighbouring rights have similar entitlements in respect of certain uses.\(^{(1)}\)

The holder of an exclusive right may exercise it himself, and thus himself determine the extent of dissemination of his work and the financial terms for its exploitation. But when an international system of copyright was set up it was immediately clear that certain rights, notably the right of public performance of musical works, would be difficult to exercise on an individual basis. As technology progressed the areas in which individual exercise was difficult or impractical expanded. In recent times the technological developments which have permitted new forms of use on an international scale, and no longer at a purely domestic level, have added a new dimension to the question of individual or collective rights management. The problem is rendered all the more important by the prospect of the adaptation of existing rights and the conferring of new rights on authors.

The completion of the internal market requires that authors and other right holders will find a level of protection at least comparable if they wish to exploit their rights in other Member States. Thus the conferring of a right and the practical management of that right are more and more closely bound up together.

\(^{(1)}\) For other uses holders of neighbouring rights have a claim to remuneration.
Under these circumstances, the Commission has also to consider the question of the management of copyright and neighbouring rights in the light of the completion of the Internal market in 1993. The Commission has the intention of carrying out in the near future a study on the question of collective management in order better to identify the issues.

1.7. The Commission proposes to take a comprehensive approach to the problems of copyright and neighbouring rights. The approach would be "comprehensive" in three ways.

Within the Community, first of all, the Commission must not confine itself to a few salient points but must try to tackle all the main aspects which might have implications for the creation of the single market in cultural goods and services. Indeed in its communication Books and Reading: a Cultural Challenge for Europe (2) the Commission emphasized that alongside the matters looked at in the Green Paper there were other questions of copyright which needed to be considered at Community level. Similarly, in its communication on audiovisual policy (3), the Commission emphasized the need for action on copyright in the field of broadcasting.

Next, a response to the challenges of new technology which is limited to the Member States of the Community will deal with only part of the problem. If protection is inadequate outside the borders of the Community creative work produced in the Community can be plagiarized in non-member countries, and productive activity displaced to countries in which the level of protection of intellectual property is lower. As we move towards an intensification of world trade the Community would find itself having to deal with growing imports of work produced in breach of copyright in those countries.

Neither can we underestimate the fact that the rule of national treatment laid down in the international copyright conventions means that any improved protection available in the Member States of the Community has to be granted to natural or legal persons from non-member countries, even though in those countries natural or legal persons from the Community may receive a lower level of protection. The existing imbalances would be aggravated.

(2) COM(89) 288 final, 3 August 1989.

(3) COM(90) 78 final, 21 February 1990.
The same thing holds for neighbouring rights, with one qualification. Under the Rome Convention national treatment is granted only to the nationals of other contracting states which are party to the Convention.

1.8. The Commission and the Community have accordingly been making an active contribution to the work on trade-related aspects of intellectual property rights ("TRIPs") in the framework of the GATT Uruguay Round, in order to arrive at a minimum level of substantive and effective protection at world level. While taking account of the legitimate interests of the developing countries and of the need to secure as broad a consensus as possible, the Commission feels that the level of protection provided should be high. It feels that in the medium term this would profit all countries, developed and developing.

1.9. The Commission would also like to repeat its full backing for the sustained efforts undertaken by the World Intellectual Property Organization (WIPO) to ensure adequate protection of copyright and neighbouring rights. The Commission supports the initiatives worked out, and particularly the preparation of standard provisions intended to serve as a model for national copyright legislation in the countries party to the Berne Convention and the setting up of a committee of experts to consider whether a protocol to the Berne Convention should be drawn up and if so what its content should be.

1.10. Finally it is necessary to have a basic level of harmonisation common to all Member States upon which it is possible to build more easily as means of a complementary harmonisation of these rights in specific areas.

1.11. Proposed Community action

1.11.1. The Commission feels that to parallel and complement the steps taken in the multilateral framework the protection of copyright and neighbouring rights should be consolidated inside the Community. This is why it intends to take its first initiative in the form of a joint approach.

1.11.2. As well as, and without prejudice to the other measures referred to in this paper, it is vital that all the Member States of the Community should accede to the multilateral conventions administered by WIPO - alone or in conjunction with other international organizations - in the field of copyright and neighbouring rights.
1.11.3. This would supply a common foundation in all the Member States, on the basis of which specific aspects could be harmonized in the Community, and steps taken in the multilateral framework, in order to improve the level of protection. Such a common foundation would facilitate the practical exercise of the powers conferred by the Treaty of Rome, which already permit Community action on certain specific aspects of copyright and neighbouring rights.

1.11.4. As things stand at present the majority of Member States are already party to the Berne Convention on the protection of literary and artistic works, as revised by the Paris Act of 1971, and to the 1961 Rome Convention on the protection of performers, producers of phonograms and broadcasting organizations. In most of the Member States which have not yet acceded to these Conventions legislation allowing ratification or accession to the Rome Convention has already been passed or is currently before the national Parliaments.

1.11.5. In order to eliminate the distortions which exist and to clear the way for the large single market, therefore, the Commission is presenting to the Council a proposal for a decision which would require all Member States to have acceded to and comply with the provisions of the Berne Convention, as revised by the Paris Act, and to the Rome Convention, by 31 December 1992, the date on which the Internal market is to be completed.

1.11.6. Such an initiation, which seeks to lay down a minimum level of protection, does not mean that on more specific matters the Commission will not purpose a more complete harmonisation.

1.11.7. This proposal forms the subject of a separate document.
CHAPTER 2 : PIRACY

2.1. Conclusions of the Green Paper

2.1.1. In Chapter 2 of its Green Paper on Copyright and the Challenge of Technology the Commission concluded that the repression of piracy of sound and audiovisual recordings in the Community requires the existence of clear substantive legal provisions in favour of authors, producers, performers and broadcasting organizations in respect of their right to authorize the reproduction for commercial purposes of their recordings and broadcasts.

2.1.2. In the view of the Commission, such substantive legal protection must be accompanied by appropriate procedures facilitating legal action and proof against acts of piracy, in particular provisions on search and seizure. Furthermore, efficient remedies must be at the disposal of right holders in infringement cases and deterrent criminal sanctions must be available. There must be an organized framework permitting an effective cooperation between right holders and public authorities, in particular, law enforcement authorities. Specific measures, such as the control of commercial tape duplication equipment, should be adopted where appropriate.

2.1.3. To achieve these goals, the Commission indicated its intention to submit to the Council as a matter of priority a proposal for a binding legal instrument:

- requiring all Member States to provide, through one legal technique or another, for rights for producers of cinematographic works, videograms and sound recordings to authorize the reproduction for commercial purposes of those works and their commercial distribution;

- requiring all Member States to provide rights for performing artists to authorize the reproduction for commercial purposes of their fixed performances and their commercial distribution;

- requiring all Member States to provide rights for organizations engaged in broadcasting to authorize the fixation and reproduction for commercial purposes of their broadcasts, as well as the commercial distribution of such fixed broadcasts, and the introduction of similar rights in respect of signals transmitted by cable in favour of cable television operators;
- requiring the introduction in all Member States of regimes making the possession of digital audio tape commercial duplicating equipment dependent upon a licence to be delivered by a public authority and the maintenance of a register or registers in respect of licensed equipment.

2.1.4. In addition, the Commission indicated an intention to submit to the Council in due course a proposal for a regulation:

- extending Council Regulation (EEC) no. 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods to cover equally goods under copyright;

- extending the mutual assistance regime to include first counterfeit and then copyright infringements.

2.1.5. Furthermore, the Commission stated the desirability of:

- recommending to Member States the provision of rights for authors, producers of phonograms and videograms and performers to request public prosecution in respect of acts of piracy;

- recommending to Member States the introduction of minimum requirements as regards search and seizure procedures in cases of suspected piracy of copyright goods;

- recommending to Member States the introduction of minimum requirements as to criminal sanctions and civil remedies;

- creating at the appropriate Community or International level a register or registers, financed by right holders, of rights in sound recordings, video recordings and feature films, possibly linked to the C.D. project(1);

- setting up an agreement at the international level on the seizure of counterfeit goods, applicable not only to counterfeit of trade marks but also to Intellectual property rights including copyright and related rights.

(1) CD project: A computerised data storage system containing information on a range of materials protected by intellectual property rights.
2.2. Hearing

The conclusions suggested by the Commission for the harmonization of certain neighbouring rights (see 2.1.3. above) were also dealt with in the hearing the Commission held for interested circles on 18 and 19 September 1989 in Brussels.

There was general support for the Commission to submit a proposal on those items mentioned above (under 2.1.3) which would in effect harmonize the protection for performing artists, producers of phonograms and videograms and broadcasting organizations on the line of the Rome Convention of 1961.

Furthermore, participants unanimously held that the term of protection for all neighbouring right holders protected by the Rome Convention of 1961 should be harmonized and fixed to 50 years from production, performance or publication for all rightholders.

2.3. Proposed Community action

2.3.1. A proposal for a directive on the harmonization of certain neighbouring rights has been prepared. This proposal is intended to follow the suggestions in the Green Paper to fight piracy (above 2.1.3). Based on these suggestions, on the results of the hearing and the written and oral comments received, the proposal includes the following elements:

- Introduction of exclusive rights of reproduction and distribution for performing artists, phonogram producers, videogram producers and broadcasting organizations;
- Introduction of an exclusive right of fixation for performing artists and broadcasting organizations.

2.3.2. Thus, the proposal would follow the line of the Rome Convention of 1961, to which a majority of Member States have adhered, and go beyond it in some respects. This proposal on the harmonization of neighbouring rights may be linked, for practical purposes, to the proposal for a directive on rental/lending right.

2.3.3. On duration of these rights, the Commission accepts the suggestion that their duration shall be 50 years after the fixation or the performance was made or took place or was published. For practical purposes this point will be included in a separate proposal which will deal with the problem of duration in general.
2.3.4. In addition, most of the other items mentioned in Chapter 2 of the Green Paper (above 2.1.4 and 5) are at present dealt with on a multilateral basis in the context of the Uruguay Round of the GATT (TRIPs) which is intended to improve the protection and enforcement of trade related intellectual property rights.

2.3.5. The proposal concerning the reinforcement of neighbouring rights is presented in a separate document (see point 2.3.2.).
CHAPTER 3: HOME COPYING OF SOUND AND AUDIOVISUAL RECORDINGS

3.1 Introduction

3.1.1 The question of home copying of audio-visual recordings, which was discussed in Chapter 3 of the Green Paper, evoked considerable interest in relevant circles. The problem is a particularly important and complex one.

Home recording of sound and audio-visual works by private individuals for personal and non-commercial use, whether from other recordings or from broadcasts, has become a widespread practice both in the European Community and elsewhere. It can be expected to grow even further, as a result particularly of technological progress.

3.1.2 To take account of the new situation, copyright legislation in a number of countries, both within and outside the Community, has been amended to ensure the protection of right holders and to introduce a right to remuneration. The Commission also raised the question in the Green Paper. On that basis it engaged in a wide-ranging process of consultation with all interested parties.

3.1.3 On the basis of what was said in the Green Paper and in the course of the subsequent consultation, the Commission considers that measures must be taken to deal with the problem at the Community level.

3.2 Conclusions of the Green Paper

3.2.1 After thoroughly studying the legal, practical and technical aspects of the problem the Commission sought the views of interested parties.

3.2.2 As regards digital audio recordings the Commission asked for comments on the following propositions:

(a) Digital audio tape (DAT) recorders should be required to conform to technical specifications which prevent their use for unlimited acts of audio reproduction;

(b) The manufacture, importation or sale of machines which do not conform to the specifications should be prohibited;

(c) The measures outlined in (a) and (b) should apply to all DAT machines for recording audio;

(d) The manufacture, importation or sale of devices intended to circumvent or render inoperable the measures outlined in (a) and (b) should be prohibited;
(e) possession of machines intended for professional or specialist use and not conforming to the specifications for home use outlined in (a) should be made dependent upon a licence to be delivered by a public authority and the maintenance of a register or registers in respect of licensed equipment.

3.2.3 The Commission also asked for views on the question whether it was acceptable that systems of remuneration for private copying should remain in those Member States which have introduced them, and could be introduced if Member States so wish in those countries which have not yet introduced them, no Community action being required for their introduction or harmonization.

3.3 Hearing and submissions

3.3.1 Since the Green Paper was published a great many opinions have been expressed, and some positions have shifted as a result of developments in the field.

3.3.2 The general comment was put forward that it was unwise to focus attention exclusively on digital recording, since analogue recording would continue to be the major form for years to come.

It was also said that there was no need to differentiate between the copying of audiovisual works and of works in sound only because from the point of view of copyright all reproduction is treated in the same way. Also, the progressive integration of technical means of reproduction tends to render such a distinction increasingly meaningless. Finally, a large majority opposed any prohibition on home copying.

3.3.3 On the question of systems of remuneration for home copying the opinions expressed differed. Right holders — authors, performers and the producers of phonograms and videograms — all insisted that this system must be generalized in all the Member States in order to safeguard their rights. Other groups, including consumers and the manufacturers of magnetic tape, were opposed to any system of levies.

3.3.4 Finally, as regards technical protection systems, there was a broad consensus in favour of a system to regulate DAT recording, which was supported by right holders, equipment and carrier manufacturers, and consumers. This system, the Serial Copy Management System (SCMS), permits copies to be made from the original work but not from other copies. The holders of rights in protected works would accept this system only if a right of remuneration was also ensured.
3.4 Proposed Community action

3.4.1 Given the need to complete the internal market the Commission intends initially to take two measures regarding the private copying of sound and audio-visual works.

3.4.2 Firstly, the Commission intends to lay before the Council a proposal for a directive on home copying.

3.4.3 Secondly, the Commission is favourably disposed to the general use of the SCMS system for digital audio tape (DAT) recording equipment. New technology is to be encouraged, but not where it would damage the interests of right holders and consumers. The SCMS system satisfies these requirements, by allowing copies to be made while at the same time limiting the practice; the user thus has the full benefit of technological progress. It also allows right holders to keep at least partial control of the exploitation of their works by preventing the making of the unlimited series of copies permitted by DAT technology. There will also have to be consideration of the scope for extending such a system or an equivalent system to other forms of digital reproduction.

3.4.4 The Commission intends to include the drafting of a proposal for a directive in its work programme for 1991.
CHAPTER 4: DISTRIBUTION RIGHT, EXHAUSTION AND RENTAL RIGHT

4.1. Conclusions of the Green Paper

4.1.1. Upon review of the legal situation in the Member States and evaluation of the economic background, the Green Paper on Copyright and the Challenge of Technology in chapter 4 concluded that there is a need to harmonize a rental right for certain areas of copyright and for certain recording media.

4.1.2. Thus, the Commission in the Green Paper (4.11.1.) suggested the introduction in all Member States of a right for the author, the performer and the phonogram producer to authorize the commercial rental of sound recordings. This suggestion is mainly based on the consideration that the increasing penetration of compact discs, which do not deteriorate upon repeated use, entails the risk that the author, the performer and the phonogram producer may suffer economic damage by the unauthorized commercial rental of sound recordings.

4.1.3. Furthermore, the Commission (Green Paper 4.11.2.) suggested the introduction or generalization in all Member States of a right for the producers of cinematographic works to authorize the commercial rental of their videograms. In the view of the Commission the economic interests of such producers of videograms make it necessary to guarantee them the right to choose the time and place to exploit their works by performance in movie theatres and by commercial rental.

4.1.4. However, the Commission in the Green Paper (4.11.3.) saw no obvious need for the introduction of a general right for authors to control other elements in the commercial distribution of their works or to harmonize exhaustion provisions. Neither did the Commission consider it necessary at that time to extend the scope of a rental right to non-commercial lending.

4.1.5. The harmonization of a right for the commercial rental of sound and audiovisual recordings was intended to be initiated by a proposal for a directive, to be submitted to the Council by the Commission based on Article 100A EEC (Green Paper 4.12.1.).

4.2. Hearing

4.2.1. The conclusions of the above mentioned proposals in Chapter 4 of the Green Paper were discussed at a hearing which the Commission held for interested circles on 18 and 19 September 1989 in Brussels.
4.2.2. Most participants in this hearing agreed to the need for a harmonization of rental rights. An overwhelming majority held that a harmonization should concern both rental right and non-commercial lending right and thus should go beyond the suggestions made in the Green Paper. There was unanimity that not only sound recordings and videograms should be covered by such a rental/lending right, but also all categories of works under Article 2 of the Berne Convention. In the view of many participants the determination of the beneficiaries of a rental/lending right should not be decided at the Community level but should be left to the legislation of Member States.

4.2.3. Most participants were in favour of an exclusive right (to authorize or prohibit) for commercial rental. For lending right, most participants considered that a right to remuneration would suffice, which could preferably be exercised by collecting societies or other similar bodies.

4.3. Proposed Community action

4.3.1. A proposal for a directive on the harmonization of rental and lending right has been prepared.

4.3.2. On the basis of the Green Paper, the results of the hearing and the numerous written and oral comments submitted to the Commission on these issues, the proposal is intended to include the following elements:

- An exclusive right (to authorize or prohibit) the commercial rental of protected copyright works, phonograms and videograms.

- The beneficiaries of such a rental right will be the authors, performing artists and producers.

- An exclusive lending right, which may be subject to derogations, on the part of Member States, for cultural or other reasons.

- The duration of the rental/lending right will follow the minimum term of the Berne Convention (at least 50 years after the death of the author) and Rome Convention (at least 20 years) until such time that a Community harmonization of the duration of these rights has taken effect.

4.3.3. This proposal is the subject of a separate document.
CHAPTER 5 : THE LEGAL PROTECTION OF COMPUTER PROGRAMS

5.1. Conclusions of the Green Paper

5.1.1. Chapter 5 of the Green paper proposed the submission of a proposal for a Council Directive on the legal protection of computer programs, and indicated the possible contents of such a directive in broad terms (5.7.1)

5.1.2. In October 1988 the Commission held a hearing of interested circles to discuss the conclusions set out in the Green Paper. Participants from major organizations representing producers and users of computer programs were invited to contribute oral and written statements.

5.2. Hearing

5.2.1. The hearing of October 1988 confirmed the support of Industry for the broad terms of paragraph 5.8.2 (i.e., the contents of any Directive which might be proposed) of the Green Paper with the following reservations:

Point c) It was generally felt that access protocols and interfaces should not be treated differently from other parts of programs.

Point d) It was generally felt that the normal restricted acts provided for by the Berne Convention should apply, and that these should be listed as separate acts.

Point j) There was no support for this point.

5.2.2. The conclusions of the hearing were:

a) a directive should be prepared without further delay;

b) it should be based on copyright: neighbouring right or sui generis protection were rejected;

c) it should correspond to the majority view expressed in the hearing, and depart as little as possible from the legislation already enacted in the Member States.

5.3. Proposed Community Action.

5.3.1. The text of a proposed directive was adopted by the Commission in December 1988 and published in the Official Journal.
5.3.2. The opinion of the Economic and Social Committee was received in October 1989. It was generally favourable to the Commission's proposal.

5.3.3. Considerable controversy was generated in industry circles by the proposed directive on two specific points: the scope of protection (whether protection covered interfaces or not) and reverse engineering (the changing of the object code form in which the program is supplied to the source code form in which it was first written in order to study aspects of the program design). The controversy on these issues delayed the Parliamentary opinion by several months.

5.3.4. The opinion of the Parliament was delivered in July 1990.

5.3.5. The Commission amended its proposal on 17 October 1990(1) by incorporating those amendments of the European Parliament which it considered to be acceptable.

5.3.6. A common position of the Council is expected by the end of 1990.

(1) COM(90) 509 final SYN 183.
CHAPTER 6: DATABASES

6.1. Conclusions of the Green Paper

6.1.1. The Commission solicited views as to whether databases should be protected by copyright or a sui generis system, and whether protection should be granted by virtue of the selection and arrangement of the compilation.

6.1.2. The conclusions of this chapter of the Green Paper were left relatively open ended, with no firm indication being given of specific action by the Commission in view of the rapid development of this new sector. Comments received on Chapter 6 indicated a strong desire in many quarters to see measures introduced within the Community to clarify and harmonize protection of databases, where such protection exists at present, and to introduce protection explicitly in those Member States where existing legislation is unclear or deficient as regards databases.

6.2. Hearing

6.2.1. A hearing of interested circles was held on April 26/27 1990. The hearing confirmed that there was overwhelming support from right holders for protection of databases by means of copyright. No support was expressed for a 'sui generis' approach.

6.2.2. The conclusions of this hearing were as follows:

(1) As regards the first question on the questionnaire, a large majority spoke against making any distinction between "database" and "data bank". Both terms are used equally at present. However, there is a growing tendency to use the general term "database".

(2) As regards a definition of "database", several participants proposed a broad definition which includes the following elements:

a) collection, organization and storage of data;

b) information in a digital form in which it can be processed by means of a computer.

In the course of the discussion it became clear that the fact that the information is stored digitally means that the definition of "database" can include all media, e.g. text, image, sound, whether protected as such by copyright or not.

(3) All speakers indicated that databases are in their view protected by copyright. This view was shared by the representative of WIPO.
Copyright should apply to databases without prejudice to the application of other forms of legal protection such as patents, unfair competition, criminal law, contract, etc.

As to the applicability of an alternative form of protection instead of copyright (neighbouring right or sui generis right) a large majority of participants rejected this approach.

As to the categorization of databases, speakers did not indicate a desire to limit this to "compilations" given that some databases are "literary works" in their own right.

As far as the protection of personal data is concerned, this problem was considered to be outside the scope of the hearing.

As to the distinction which could be made between real time and static databases, the majority of speakers believed no distinction should be made. Copyright could apply to and resolve legal problems arising in respect of all databases regardless of the technique used to create them.

Regarding the ownership of rights in the database itself, all participants felt that the author, in the sense of the person creating the database, should be the first rightholder.

As regards databases created by joint authors or under a contract of employment, in the absence of contractual provisions to the contrary, the Berne Convention would provide the appropriate legal framework.

The question of the inclusion in a database of protected works was raised. A large majority believed that normal copyright rules should apply. All participants agreed that indexing (inclusion of bibliographical information) of protected works without authorization of the rightholder should not be an infringement of copyright. The same rule could apply to abstracts of protected works provided that they did not substitute for the original protected works themselves. Normal copyright rules should apply in this instance.

As regards the term of protection, Article 7 of the Berne Convention was referred to on a number of occasions. The term of protection should be compatible with the provisions of the Berne Convention. The possibility of increasing the term of protection to 70 years met with no particular resistance. Some participants however reserved their position on this issue.
As to the originality issue, most participants expressed a desire to see a criterion of originality compatible with the requirements of the Berne Convention and which would impose no special requirements on the authors of databases.

As regards the restricted acts, there was general agreement that classic copyright principles as laid down in the Berne Convention should apply. These restricted acts should cover: displaying, inputting, loading, transmission, storage, downloading.

The need to provide for the collective administration of rights in works input into databases was indicated by some participants.

Several speakers advocated that no distinction should be drawn between databases on CD Rom and on-line databases. It was felt that the physical medium on which the database was stored was irrelevant to this issue.

It was said that the use of the same software to create different databases did not affect their protectability: sufficient choices were available to make different databases using the same software.

As regards technical measures to protect databases, several speakers indicated that in their view rightholders should use all available means to control access to and use of their works.

6.3. Proposed Community Action

6.3.1. The above conclusions suggest that a uniform and stable legal environment for the creation of databases within the Community should be established without further delay, given the economic importance of the sector and the risk of distortions arising within the Single Market.

6.3.2. Given that there was general support for a directive harmonizing copyright protection for databases, it has therefore been announced that a proposal for a Directive to this end should be prepared for adoption as soon as possible.

6.3.3. The Commission will include this initiative in its working program for 1991.
CHAPTER 7: THE ROLE OF THE COMMUNITY IN MULTILATERAL AND BILATERAL EXTERNAL RELATIONS

7.1. Conclusions of the Green Paper

7.1.1. In Chapter 7 of its Green Paper on Copyright and the Challenge of Technology, the Commission dealt with the international aspects of copyright protection, including the negotiations currently taking place in the framework of the GATT.

7.1.2. The Commission concluded that copyright also is placed in a multi-faceted, plurilateral world. The success or failure of multilateral efforts, and the ongoing negotiations in the new GATT round in particular, cannot fail to have an effect on the Community's bilateral efforts. These, in turn, will affect and are affected by the use which interested parties may make of the autonomous new commercial policy instrument.

7.1.3. Rather than submitting specific proposals for initiatives, the Commission has in the Green Paper submitted for discussion the following matters:

- the priorities to be given to the different aspects of reinforcement of intellectual property protection in the international context;

- the development by the GATT of new disciplines as regards the effective reinforcement of intellectual property laws, in particular, copyright, as well as the adoption, as appropriate, of improved substantive standards;

- the more systematic use of bilateral relations, to ensure better protection in non-Member States of the intellectual and industrial property of Community right holders, particularly in the copyright field.

7.2. Negotiations on "TRIPs" in the Uruguay Round of the GATT

7.2.1. Numerous written and oral submissions to the Commission have encouraged the active role the Community, as represented by the Commission, plays in the negotiations on "TRIPs" (Trade related Intellectual Property Rights) in the ongoing Uruguay Round of the GATT.

7.2.2. The mandate for the TRIPs-negotiations is included in the Ministerial Declaration of Punta del Este. It was further specified and clarified in the course of the Mid-term Review (Montreal/Geneva) which struck a balance between the items industrialized countries are seeking and points of importance for developing
countries. According to this mandate, the negotiations aim at establishing a multilateral agreement on the improved protection of intellectual property rights, governed by the GATT.

7.2.3. The issues to be included in the TRIPs agreement are substantive standards (copyright, neighbouring rights, patents, trademarks, industrial design, chips/semiconductor layouts, trade secrets and geographical indications); enforcement (internal enforcement including provisional measures, border enforcement and the acquisition of IPR's) and basic principles (national treatment, MFN/non-discrimination, transparency, dispute settlement, relationship between organizations, developing countries, transitional periods).

7.2.4. On all of these three issues, the Community submitted in 1989 comprehensive and detailed written proposals (Doc. W26 on substantive standards, Doc. W31 on enforcement and Doc. W49 on basic principles). Among the other participants in the group, nearly all industrialized countries, but also some developing countries, have also submitted written proposals. The Community proposals have succeeded in forming the main basis for discussion.

7.2.5. Finally, the Community was the first participant in the negotiating group to submit, in March 1990, its own complete legal draft of an agreement on "TRIPs" (Doc. W68). On this draft the Commission has received on the whole very positive reactions, including from among developing countries. Thus the Community has become a leading force in its commitment to the highest possible level of intellectual property protection, particularly in the field of copyright and neighbouring rights.

7.2.6. The Commission strongly believes that the agreement on TRIPs should become an integral part of the GATT. This would strengthen the role and function of the GATT. Furthermore, it is the declared interest of the Community to enable as many developing countries as possible to join such a TRIPs agreement, while not compromising on the level of protection.

7.2.7. Ministerial meetings on the Uruguay Round have confirmed that adequate protection for intellectual property rights is an issue of increasing importance for international trade in the global economy. Some issues in the negotiations, such as the level of intellectual property protection, the relationship between GATT and WIPO and the balance between the in part diverging interests of developing and industrialized countries, were identified as still pending reasonable definition.
7.3. Work in WIPO

7.3.1. The World Intellectual Property Organization (WIPO) has worked constantly to render the protection of intellectual property, including copyright and neighbouring rights, more effective throughout the world. WIPO administers the relevant international conventions, including the Berne and Rome Conventions, alone or in conjunction with other international organizations. The Commission has hitherto taken part in WIPO’s work in these fields in an observer capacity.

7.3.2. Since the 1971 Paris revision of the Berne Convention there have been several fresh developments with implications for the creation, dissemination and use of literary and artistic works, mainly as a result of the appearance of new technology. A number of meetings held under WIPO’s auspices have analysed copyright-related questions raised by these developments.

In the course of WIPO’s 1982-83 and 1984-85 biennia meetings of governmental experts were held to discuss such new uses as home copying, hiring and lending, storage and recovery of data processing systems, cable television and satellite broadcasting.

During the 1986-87 biennium and the first part of 1988, guidelines with commentaries covering nine categories of literary and artistic works were discussed at meetings of governmental experts called jointly by WIPO and UNESCO. These guidelines and their commentaries were revised and supplemented in Geneva in June and July 1988 by a committee of governmental experts given the task of evaluating and drawing together the principles relating to the different categories of work.

7.3.3. In accordance with the WIPO Programme for the 1988-89 biennium a committee of governmental experts has examined the question of model provisions for legislation in the field of copyright, on the basis of documents drawn up by the International Bureau.(1)

(1) Document CD/MPC/1/2-1 to III; document CE/MPC/11/2; Addendum to Chapter IX, "Obligations concerning Equipment used for Acts Covered by Protection", of document CE/MPC/1/2; and document CE/MPC/111/2.
These model provisions are intended to serve as examples for the drafting of aspects of national copyright legislation in the Berne Union countries which are indispensable to the strict and proper interpretation of the Convention, and to provide satisfactory answers to traditional copyright questions and to the new questions linked to the development of technology.

The committee completed its work at its third session in Geneva on 2 to 13 July 1990. In the light of the opinions received the model provisions are now to be drawn up and published by the International Bureau.

7.3.4. The Programme for the 1990-91 biennium which the Governing Bodies of WIPO approved at their twentieth series of meetings(2) includes item PRG 02.7 entitled "setting of norms for the protection and enforcement of intellectual property rights," which calls for the following initiatives:

"(a) in the field of norm setting by treaties

(iii) preparations for

- the conclusion of a protocol to supplement the Berne Convention ("Protocol to the Berne Convention"),

- the conclusion of a treaty on the settlement of disputes between States in the field of intellectual property ("Treaty on the Settlement of Intellectual Property Disputes between States"), (3)

7.3.5. Under Item PRG.03, "Exploration of intellectual property questions in possible need of norm setting," the Programme for the 1990-91 biennium refers to "Intellectual Property Disputes between Private Parties."


(3) "WIPO will invite GATT to cooperate, if GATT so desires, with WIPO in this undertaking. The treaty would cover possible disputes arising in all fields of intellectual property, particularly concerning any disputes that may arise in connection with the interpretation or application of the Paris Convention, the Berne Convention, other treaties or other international obligations." Document AB/XX/2 already referred to, Annex A, page 17.
The International Bureau is to study the possibilities of establishing a mechanism to provide services for the resolution of disputes between private parties over intellectual property rights. Recourse to such a mechanism would be open to private parties (not governments) on a completely voluntary basis.

The mechanism would situate the settlement of disputes in WIPO's specialized and clearly neutral environment, and, in most cases, would make the non-judicial procedures much faster and cheaper than today.

7.3.6. These initiatives, which by no means account for the whole of WIPO's extensive activities in the field of copyright, are of particular interest to the Community. The Commission intends to take part, and to make its own contribution within the limits of its powers.

7.3.7. In the Green Paper (point 7.2.3.) the Commission concluded that "the further evolution of the Community's role within WIPO in general is a matter of considerable importance given the likelihood of further Community legislation on copyright and related rights and, indeed, on other forms of intellectual property."

7.3.8. Before 31 December 1992 the Commission will reconsider the need for a change in the status of the Community within WIPO in respect of copyright and neighbouring rights.

7.4. The Community and other European States and institutions

The pursuit of effective and appropriate protection for intellectual property rights at the world level, which in the nature of things must seek a balance between the interests of the industrialized countries and those of the developing countries, must not be allowed to obscure the need for more extensive protection in Europe. Such an approach is fully in line with the letter and spirit of the Berne Convention (Article 20) and the Rome Convention (Article 22), and with the cultural traditions of the European countries. Discussion must continue with the other European States and institutions, particularly those of the European Free Trade Association (EFTA), the countries of central and eastern Europe, and the Council of Europe.
7.5. **Negotiations on the European Economic Area**

7.5.1. *With a view to the establishment of a European Economic Area* the Council has given the Commission a brief to negotiate an agreement between the Community and EFTA and Liechtenstein. The agreement is to allow free movement of goods, services, capital and persons within the European Economic Area by 31 December 1992. The basis of the agreement would be the relevant *acquis communautaire*, i.e. the general principles of the Community Treaties and secondary legislation as interpreted by the Court of Justice. The *acquis communautaire* would be integrated into the agreement.

7.5.2. Community secondary legislation in the Intellectual property field is so far very limited, but the Court of Justice has developed a number of principles regarding the implications for copyright and neighbouring rights of the free movement of goods and the freedom to provide services. These principles therefore form an integral part of the *acquis communautaire*.

7.5.3. The various proposals in the field of copyright and neighbouring rights which the Commission intends to submit to the Council and Parliament should also be considered to form part of the *acquis communautaire* as soon as they are adopted.

This would emphasise once again the importance which the Commission attaches to the maintenance and reinforcement of a high level of protection for intellectual property rights, and more particularly copyright and neighbouring rights, not only in the Community but also in the wider context of the European Economic Area.

7.6. **The Community and the countries of central and eastern Europe**

7.6.1. In the trade and cooperation agreements concluded in 1989 and 1990 between the Community and most of the countries of central and eastern Europe the question of intellectual, industrial and commercial property was given particular attention, particularly because of its implications for direct investment in those countries by Community businesses and for the transfer of technology.

In the present state of Community law, intellectual, industrial and commercial property rights are to a great extent within the jurisdiction of the Member States. Apart from the Directives on semiconductors and trade marks, the Council has not yet approved the proposals submitted by the Commission, on computer programs and biotechnology for example.
7.6.2. Despite this there is an article in the agreements concluded recently under which, within the limits of their respective powers, the Contracting Parties undertake to:

- ensure adequate protection and enforcement of industrial, commercial and intellectual property rights,
- ensure that their international commitments in the field of industrial, commercial and intellectual property rights are honoured,
- encourage appropriate arrangements between undertakings and institutions within the Community and the other party with a view to due protection of industrial, commercial and intellectual property rights,
- encourage cooperation and exchanges of views between organizations and institutions responsible for industrial, commercial and intellectual property.

It has also been agreed that Community right holders will have access to the relevant courts and administrative bodies of the countries of central and eastern Europe.

7.6.3. While aware of the limits to action on its part the Commission intends to make full use of the scope provided by these agreements to ensure effective and appropriate protection of the rights in question.

In this spirit the Commission held an information conference on intellectual property with the countries of central and eastern Europe in Brussels on 23 May 1990. Its aim was to improve mutual awareness of the present situation and future developments in the Community and in those countries. Such contact should go on, in a bilateral or multilateral framework.

7.6.4. The trade and cooperation agreements are the first step towards closer relations between the Community and the countries of central and eastern Europe. The protection of intellectual property, and more especially copyright and neighbouring rights, have so far played only a limited role in this connection.
At the European Council meeting in Dublin on 28 April 1990 the Commission envisaged the conclusion of association agreements with certain countries of central and eastern Europe under Article 238 of the EEC Treaty. These agreements will represent a major qualitative advance on the first step. They will establish a lasting and structured relationship with associate countries and will substantially shape tomorrow's Europe. They will include chapters on the following subjects: political dialogue, free trade and free movement, economic cooperation, financial cooperation, cultural cooperation and institutional aspects.

7.6.5. Questions regarding the protection of copyright and neighbouring rights are to be seen against this more general background.

A communication from the Commission was submitted in August 1990(4), to the Council and was discussed on 17 September 1990. The outcome of the discussion was favourable and, on the basis of the communication, the Commission made explanatory contacts with Poland, Hungary and Czechoslovakia. The Commission informed the Council about these contacts and submitted proposals for negotiation guidelines with the countries in question. These were discussed in the Council in 4 December 1990.

7.6.6. Regarding intellectual property rights, the proposals for negotiating guidelines envisage that measures guaranteeing effective and adequate protection of intellectual, industrial and commercial property, at a comparable level to that which exists in the Community, will be taken by Poland, Hungary and Czechoslovakia. These countries would have undertake to join to those multilateral agreements in this field to which they are not yet party.

7.7. The Council of Europe

7.7.1. In line with the exchange of letters between the Council of Europe and the European Community concerning the consolidation and intensification of cooperation, of 16 June 1987(5) the Commission intends to continue working together with the Council of Europe on matters of common concern in the copyright field, as it said in the Green Paper.(6)

7.7.2. The Council of Europe has already adopted recommendations in this field, such as those on sound and audiovisual private copying, piracy, and reprography.(7)

Work is going on on a legal instrument dealing with questions of copyright in broadcasting, either in the form of a separate instrument to the European Convention on Transfrontier Television, which was opened for signature on 5 May 1989, or an additional protocol to the Convention. A final decision on this could be taken around the beginning of 1991.

7.7.3. The Council of Europe and the Commission are already working together. The Commission would repeat its desire to pursue this process, in the interests of both sides, in order to consolidate the protection of copyright and neighbouring rights at European level.

7.8. The role of the Community in bilateral relations

7.8.1. The Green Paper pointed out that the existing international conventions had not yet achieved the objective of providing effective copyright protection on a large enough international scale. In addition to the work in the multilateral context, therefore, problems existing with regard to individual countries or groups of countries need to be tackled bilaterally.

(5) OJ No L 273, 26 September 1987, pages 35 to 39.
(7) Recommendation No R(88)1 of the Committee of Ministers to Member States on Sound and Audiovisual Private Copying and Recommendation No R(88)2 of the Committee of Ministers to Member States on Measures to combat Piracy in the field of Copyright and Neighbouring Rights, adopted on 18 January 1988.
Recommendation No R(90)11 of the Committee of Ministers to Member States on Principles relating to Copyright Law Questions in the field of Reprography, adopted in April 1990.
7.8.2. Community industry encounters difficulties of three kinds in non-member countries:

- the absence of adequate substantive standards protecting intellectual property,
- the lack of effective enforcement where such standards exist,
- failure to accord national treatment to Community right holders.

7.8.3. It will be clear that an agreement on the aspects of intellectual property rights affecting trade, which the Commission hopes can be concluded in the GATT framework (see point 7.2) and to which all the Community trading partners could agree, would place bilateral relations between the Community and non-member countries on an entirely new footing, and would make an important if gradual contribution to alleviating the current difficulties.

7.8.4. In order to prepare for an intensification of bilateral relations following the conclusion of the GATT multilateral trade negotiations, and particularly if the negotiations in the field of intellectual property do not produce the desired outcome, the Commission will need information on the legal and practical situation regarding all aspects of the protection of intellectual property in non-member countries. The Commission's information must be sound if it is to make the best possible assessment of priorities, to concentrate the action taken by the Community, and to select the most suitable forms of action, in the field of copyright and neighbouring rights as elsewhere.

7.8.5. The Commission accordingly proposes to draw up an inventory covering the situation with regard to intellectual property in the majority of non-member countries and the difficulties encountered by Community industry there. This would include a summary of legislation and regulations in force regarding copyright, neighbouring rights, designs and models, patents, trade marks, appellations of origin, etc.

7.8.6. Such an exercise will be of little use if it is not supplemented by an assessment of the factual situation in the relevant countries, since in some cases the legal position and the practical position are quite different. There will therefore have to be a study of the real difficulties encountered by Community industry. The Commission is in the process of consulting Community business, through UNICE, regarding the difficulties encountered in the field of intellectual property in all non-member countries.
7.8.7. The replies received will supplement the information already in the Commission's possession. Existing studies by international organizations will also be used.

7.8.8. The inventory will be published in 1991; it will of course have to be updated regularly. In time, therefore, it will allow a complete picture of the changing situation to be built up, and will put the Community in a strong position to defend its interests.
CHAPTER 8 : OTHER COMMUNITY INITIATIVES IN THE FIELD OF
COPYRIGHT AND NEIGHBOURING RIGHTS

8.1. Introduction

In this Chapter the Commission outlines some areas for action in respect of copyright and neighbouring rights which were not discussed in the Green Paper. This is without prejudice to the other initiatives referred to in the communication Books and Reading(1) or the communication on audio-visual policy.(2)

This is not an exhaustive account, and it may be that matters not referred to here will have to be tackled if the development of technology or legislation and national practice should make it advisable to take measures at Community level.

8.2. The duration of protection

The international conventions on copyright and neighbouring rights lay down minimum periods of protection; the states which are party to these conventions are free to apply longer periods. Some Member States have made use of this possibility, to different extents.

The result is that at present the duration of protection varies within the Community, in some cases according to the nature of the work. The disparities can create obstacles to the free movement of cultural goods and services and lead to distortion of competition, since the same work may at the same time be protected in one Member State and have fallen into the public domain in another.

8.2.2. In the Patricia case(3) the Court of Justice had to rule on the interpretation of Articles 30 and 36 of the EEC Treaty with regard to different periods of protection in force in two Member States. Legislation in one Member State allowed a manufacturer of sound recordings to invoke exclusive rights which it held over the reproduction and sale of certain musical works in order to prohibit the sale in that country of recordings incorporating some of those works which had

(1) COM(89) 258 final, 3 August 1989.
(2) COM(90) 78 final, 21 February 1990.
(3) Case 341/87 EMI Electrola v Patricia and Others; Judgment delivered on 24 January 1989, not yet reported.
been imported from another Member State where they had been lawfully marketed, without the consent of the right holder or his licensee, a period of protection previously enjoyed by the manufacturer there having since expired.

8.2.3. The Court found that in the present state of Community law, which was characterized by a lack of harmonization or approximation of laws relating to the protection of literary and artistic property, it was for the national legislatures to determine the conditions and rules for such protection. In so far as disparities between national laws might lead to restrictions on intra-Community trade in sound recordings, those restrictions were justified under Article 36 of the Treaty as long as they were due to the disparity between the rules concerning the period of protection and this was inseparably linked to the existence of the exclusive rights.

8.2.4. This state of affairs is clearly not in keeping with the spirit and the reality of a Community area without internal frontiers in which the free movement of cultural goods and services is ensured in the same way as it is within a domestic market. The Commission therefore has a duty to take steps towards the harmonization of the duration of copyright and neighbouring right protection.

8.2.5. The Commission intends to draw up a proposal for a directive on this subject; it will be guided by four main principles:

(a) The harmonization achieved should be total, that is to say that it should lay down fixed periods of protection, beginning and ending at the same time in all Member States of the Community, for each type of work and for each neighbouring right covered.

(b) The duration laid down should provide a high level of protection for authors and other holders of neighbouring rights. This will mean that the periods of protection will be longer than the minimum period laid down in the international conventions.

(c) The harmonization of periods of protection must not in any way prejudice rights acquired under existing national legislation. Transitional measures will be proposed in order to avoid any reduction in periods of protection already running which may be longer than those laid down under the directive.
(d) Lastly, the Commission's proposal will seek to preserve the delicate balance between copyright and neighbouring rights, while at the same time avoiding excessive complexity.

8.2.6. The Commission will include the presentation of such a proposal for a directive in its 1991 work programme.

8.3. Authors' moral rights

8.3.1. Copyright includes entitlements of an economic nature and entitlements of a moral nature. Economic rights are bound up with the author's right to benefit from the economic use of his work. Moral rights spring from the fact that the work is a reflection of the personality of the author. This approach is in fact enshrined in the Universal Declaration of Human Rights, and specifically Article 27(2).

8.3.2. Article 6bis of the Berne Convention on the protection of literary and artistic works lays down minimum rules on the scope and duration of moral rights, while leaving it to legislation in the country where protection is claimed to define the means of redress available to the author and other holders after his death.

As a result of different legal approaches and traditions, there are differences between the Member States of the Community, as well as between the States party to the Berne Convention, with regard for example to the extent and duration of moral rights.

8.3.3. In recent years cases have come before the courts of some countries in which moral rights, and more especially the right of the author to object to any distortion, mutilation or other modification of his work which would be prejudicial to his honour or reputation, were invoked against the way in which cinematographic works were being treated (the colourization of black and white films, commercial breaks in films broadcast on television, etc). Thus moral right entitlements can generate restrictions on the use of works already made public.

8.3.4. The Commission has not so far decided to propose any general harmonization of moral rights in the Member

(4) "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."
States. However, the Commission does not rule out the possibility that it might have to take action in respect of one or other defined area of moral rights if that should prove advisable in connection with any of the measures referred to in this communication. The duration of moral rights, for example, might have to be harmonized.

8.3.5. The Commission proposes to make a more thorough study of all problems raised by the differences existing between Member States' legislation on moral rights, beginning in 1991. It will then decide what initiatives may be called for on the question of moral rights in the Community.

8.4. Reprography

8.4.1. Reprography of printed works, that is to say their reproduction by photocopying or by similar mechanical reproduction processes, has grown considerably in the last few years. This is due primarily to improvements in the machines used. These have become smaller while nevertheless giving a better quality product more rapidly and at a lower cost. The appearance on the market of colour photocopying machines has opened up new scope for the reproduction of protected works, as has the possibility of combining reprography with the recovery of works stored on computer.

8.4.2. Article 9(1) of the Berne Convention allows authors of literary and artistic works the exclusive right of "authorizing the reproduction of these works, in any manner or form." It is generally accepted that reprography is a form of reproduction covered by this exclusive right.

Limitations on this right are provided for in paragraph 2 of the same article, under which it is to be a matter "for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."
8.4.3. In the light of this article and of the report of the Stockholm diplomatic conference, it must therefore be asked whether technological developments in reprography do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

8.4.4. In 1990 the Commission undertook a study of the problems raised by reprography and of possible solutions, as it had promised to do in its communication Books and Reading.

8.4.5. After it has consulted interested parties the Commission envisages taking a Community Initiative in this area in 1991.

8.5. Resale rights

8.5.1. In accordance with Article 14ter of the Berne Convention for the protection of literary and artistic works, the laws of certain Member States give authors a resale right, which is an inalienable right enjoyed by the author, or after his death the persons or institutions authorized by the national legislation, to an interest in any sale of original works of art and original manuscripts of writers and composers subsequent to the first transfer by the author of the work.

8.5.2. This article of the Berne Convention is an optional provision, and by way of exception from the general principle of national treatment its application may be made subject to a reciprocity condition.

8.5.3. The Commission proposes to examine this aspect, before 31 December 1992, looking particularly at the practice in the States which do confer a resale right, and the arguments for and against the introduction of such a right. The Commission will then take a decision on the advisability of a Community Initiative on this question.

(5) The revision of the Berne Convention which was drawn up in Stockholm on 14 July 1967 has not entered into force as far as the substantive provisions are concerned. The same provisions were however taken over without change in the Paris Act of 24 July 1971, which is the most recent version of the Convention and to which most of the states of the Berne Union are party.
CHAPTER 9: BROADCASTING AND COPYRIGHT

9.1. On the subject of broadcasting and copyright, in its communication on audiovisual policy, the Commission announced its intention to propose a directive on the harmonisation of copyright rules applicable to satellite broadcasting and cable retransmission. In order to facilitate the consultation of interested parties, the Commission has prepared a discussion paper on the problems raised by copyright in the field of satellite broadcasting and cable retransmission. The measures envisaged for satellite broadcasting are based on three principles.

9.2. Any satellite broadcast originating in a Community Member State, must be regarded as an act of broadcasting for copyright purposes, regardless of the technology used, once it constitutes communication to the public. As far as copyright is concerned, therefore there is no longer any point in making a distinction between direct broadcasting satellites and other satellites.

9.3. The right to broadcast protected works by satellite has to be acquired only in the country of establishment of the broadcaster. For the purpose of acquiring the rights, the parties may take into consideration the actual or potential audience within the footprint of the satellite.

9.4. An adequate level of protection for authors' rights and of the neighbouring rights of performers, producers of phonograms and broadcasters has to be secured by a minimum level of harmonisation of Member States' laws on the subject. In this respect, the possibility of a legal licence for satellite broadcasts must be ruled out. Thus, the interests of right holders will be safeguarded no matter in which Member State the broadcaster may be established.

9.5. The Commission's proposals in respect of simultaneous, unaltered and unabridged cable retransmission of broadcasts can be summed up in four principles.

9.6. The cable retransmission of a programme coming from another Member State is a form of exploitation subject to copyright. It follows that the cable operator must obtain authorisation from the owners of all rights in any part of the programme.

9.7. These authorisations must be obtained by contractual means.
9.8. It should be possible for such rights to be managed on an exclusively collective basis to the extent that this is made necessary by the specific features of cable retransmission. There should be a Community measure to ensure that the smooth operation of collective agreements is not brought to a halt by the opposition of the owners of individual rights in sections of the programme to be retransmitted.

9.9. On the other hand, negotiations between cable operators and right holders, these being represented by collecting societies, should be made eased by supplementary measures such as a voluntary conciliation mechanism and a mechanism designed to prevent abuse of negotiating positions.

9.10. The discussion paper forms a separate document which has been available since the end of November 1990.
ANNEX

ACTIONS PROPOSED IN THE FIELD OF COPYRIGHT AND NEIGHBOURING RIGHTS

I. Legislative action to be taken by 31 December 1991

(i) Proposal for a decision that the Member States will, by 31 December 1992, ratify or adhere to and comply with the 1971 Paris Act of the Berne Convention and the Rome Convention of 26 October 1961.

(ii) Proposal for a directive on rental right, lending and certain neighbouring rights.

(iii) Proposal for a directive on home copying of sound and audiovisual recordings.

(iv) Proposal for a directive on the harmonisation of the legal protection of databases.

(v) Proposal for a directive on the harmonisation of the term of protection for copyright and certain neighbouring rights.

(vi) Proposal for a directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite and cable broadcasting.

II. Studies to be carried out by 31 December 1992 at the latest.

(i) Moral rights,

(ii) Reprography,

(iii) Resale right,

(iv) Collective management of copyright and neighbouring rights and collecting societies.

III. Other actions planned by 31 December 1992

(i) Consolidation of the role of the Community in the field of bilateral and multilateral external relations;

(ii) Establishment of an inventory of the intellectual property situation in certain non-member countries.
EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 25 January 1991 (28.01)
4334/91.

RESTREINT
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TRANSLATION OF LETTER

from: Commission of the European Communities, signed by Mr Martin BANGEMANN, Vice-President
dated: 22 January 1991
to: Mr Jacques POOS, President of the Council of the European Communities

Subject: Communication from the Commission to the European Parliament containing the Commission statement on the common position of the Council on the proposal for a Directive on the legal protection of computer programs

Sir,

I enclose, for the Council's information, a communication from the Commission to the European Parliament containing the Commission statement on the common position of the Council on the proposal for a Directive on the legal protection of computer programs.

(Complimentary close).

(s.) Martin BANGEMANN
Vice-President

Encl.: SEC(91) 87 final - SYN 183
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT

pursuant to Article 149.2(b) of the EEC Treaty

Common position of the Council
on the proposal for a Directive on the
Legal Protection of Computer Programs
Communication from the Commission to Parliament
in accordance with Article 149 (2) of the Treaty

Re: Common position of the Council on the proposal for a
Directive on the Legal Protection of Computer Programs

1. Introduction

On December 13, 1990 the Council acting unanimously in
accordance with Article 149 (2) of the Treaty, adopted
a Common Position on the Commission proposal referred
to above.

2. Legal basis

The proposal, based on Article 100A of the Treaty was
transmitted to the Council on 5 January 1989(1). The
Economic and Social Committee delivered an opinion on
the proposal on 18 October 1989(2). The European
Parliament, consulted under the co-operation procedure
delivered its opinion on 11 July 1990(3).

The Commission adopted an amended text to take into
account those amendments agreed by the European
Parliament and accepted by the Commission on
October 17, 1990(4).

3. Purpose of the Commission's proposal

The purpose of the Directive as already explained in
the Explanatory Memorandum, remains to ensure an
adequate level of protection for computer programs in
the laws of all Member States, to strengthen and make
uniform existing protection and to eliminate any
differences in protection which would affect the
functioning of the Common Market.

Such a legal environment is essential if research and
investment in computer technology are to continue at a
sufficient level to allow the Community to keep pace
with other industrialized countries. In particular, as
regards small and medium sized enterprises, it is
important that their ability to create and market
innovative software is not significantly reduced by
unauthorized reproductions of their products.

(1) O.J. n° C 91 of 12.4.89, p. 4
(2) 18.10.89 - O.J. n° C 329 du 30.12.89, p. 4
(3) non yet published
(4) COM(90)509 final - O.J. n° C 320 of 20.12.90
4.0. Comments

4.1. As explained in the Explanatory Memorandum to the amended proposal, in its opinion, Parliament proposed various amendments, most of which were accepted in their spirit and substance by the Commission. The annexed proposal presented to the Council on 17 October 1990 reflects only the changes resulting from the Opinion of the Parliament. No other changes were made to the original proposal.

4.2. The common position clearly reflects the principal amendments proposed by Parliament and incorporated by the Commission in its amended proposal.

In particular,

a) the original proposal has been abridged and simplified as proposed by the European Parliament to make clear the basic doctrine of copyright law which the Directive seeks to apply. That doctrine, widely applied in the jurisprudence of the Member States even if not always articulated explicitly in each national legislation, is that copyright protection only applies to the expression of an idea or principle, and not the idea or principle itself.

b) As regards the exclusive rights of the author to prevent the performance of certain acts in relation to a copy of his work, the amended proposal clarifies the position of the lawful acquirer of a copy of a computer program.

It further ensures that the licensee may perform at least the otherwise infringing act of reproducing the program in order to load it and run it in a computer for the purpose of its intended use.

Other acts not strictly necessary for use remain subject to control by the rightholder. Similarly, the act of making a back-up copy of the program is to be allowed if it is necessary for the use of the program. Where a copy of a program has been sold, or where the licence does not contain specific contractual provisions, the addition of the words "the correction of errors" makes explicit that in particular the correction of errors by the lawful acquirer in order to maintain his normal use of the program is no longer to be made subject to the authorization of the rightholder, in response to concern expressed in the European Parliament as regards the maintenance of the program.
c) In response to concerns expressed by the European Parliament and by part of the industry, a further exception to the author's exclusive rights for the purpose of creating an interoperable program has been accepted.

4.3. In general, the common position does not deviate from the objectives set by the Commission proposal but adjusts or refines certain technical features and makes some drafting adjustments.

In conformity with the opinion of the European Parliament, Article 1.1. now contains a reference to the provisions of the Berne Convention for the Protection of Literary and Artistic Works in order to make clear that protection of computer programs by copyright as literary works brings programs clearly within the scope of this international convention.

The text of Article 1.2 re-states in a simplified form, the general principle of copyright law on which the scope of protection of this proposal is based. That principle is the following: copyright protects the way in which an idea is expressed, but does not give a monopoly in the idea itself. A second author may take up an idea which he has found in an existing work and re-formulate it, using a different expression, and acquiring his own copyright in that new expression.

The Council agrees with the Parliament in substance that to qualify for protection as a literary work the only requirement to be met should be that the program is the author's own intellectual creation. A computer program should not have to meet any additional requirements, as to, for example, its aesthetic or qualitative merits.

4.4. In Article 3, the Council considered it unacceptable to maintain paragraph (2). The Commission has agreed to its deletion since the essential rule is already contained in Article 2 (2).

4.5. In Article 4 (c), the Council has accepted the substance of the Commission's original text, unchanged by the Parliament and in the amended text, on the rental of computer programs. The text has been re-phrased to make the elements more clear in their presentation. The Commission can agree to these drafting improvements.

4.6. In Article 5, the Council has simplified the wording proposed by the Commission in its amended text but has retained the substance unchanged. Accordingly, the correction of errors will remain covered by the derogation contained in Article 5, as proposed by the Commission following the concern expressed by the European Parliament relating to maintenance.
4.7. Article 6, included in the Commission’s amended text following the opinion of Parliament, is intended to provide a safety mechanism by which an independently created program can be made to be interoperable with other programs, even when the creator of the existing program has chosen not to reveal to third parties the specifications of the interfaces which provide for such interoperability.

The text of the Common Position adopted by the Council takes into account almost every element of the amendments proposed on this subject by the Parliament. However, it differs, as does the Commission’s amended proposal, on the scope of the derogation for interoperable programs to be created, and the maintenance of programs. The Commission agrees with the Council that a derogation to the normal rules of copyright may in some circumstances be justified if acts are performed without authorization of the right holder, provided that the derogation comes into play when non-infringing means are not available.

Decompilation is permitted by Article 6 to the extent necessary to ensure the interoperability of an independently created computer program. Such a program may connect to the program subject to decompilation. Alternatively it may compete with the decompiled program and in such cases will not normally connect to it. Article 6 does not however permit decompilation beyond what is necessary to achieve the interoperability of the independently created program. It cannot therefore be used to create a program reproducing parts of a decompiled program having no relevance to the interoperability of the independently created program.

5.0. The Commission finds that the common position reflects to a very large extent the wishes expressed by Parliament and incorporated in the Commission’s amended text. The improvements to the drafting which the Council has made in arriving at its Common Position do not represent any significant change in substance on any point.

6.0. The Commission has agreed to a declaration indicating a willingness on the part of the Commission to present a report on the effect of the Directive to Council, European Parliament and Social and Economic Committee.

7.0. Conclusion

Consequently the Commission is able to accept this common position unanimously adopted by the Council.
Objet : Procédure de coopération

- Demande du Parlement européen de prolongation du délai prévu par l’article 149 alinéa 2


2. Par lettre en date du 13 mars 1991, le Président du Parlement européen a indiqué que :

- le délai prévu à l’article 149 du Traité CEE commencera donc à courir à partir du 21 janvier 1991 ;

- le Parlement européen demande l’accord du Conseil pour prolonger d’un mois ce délai pour cette position commune ;

- cette demande de prolongation est motivée du fait du nombre élevé d’amendements introduits à la position comme ainsi qu’à la complexité du dossier.

3. Si le Comité des Représentants Permanents convenait de suggérer au Conseil de répondre favorablement à cette demande, il pourrait lui soumettre, en conséquence, le texte du projet de lettre donné en Annexe.
PROJET DE LETTRE

à adresser à Monsieur Enrique BARON CRESPO
Président du Parlement européen

Objet : Demande du Parlement européen de prolonger le délai prévu par l'article 149, paragraphe 2, alinéa g) du Traité CEE

Monsieur le Président,

Le Conseil a bien reçu votre lettre du 13 mars 1991 par laquelle vous demandez que, conformément à l'article 149, paragraphe 2, alinéa g) du Traité CEE, soit prolongé d'un mois le délai imparti au Parlement européen pour se prononcer sur la position commune du Conseil concernant la protection juridique des programmes d'ordinateurs (cf. doc. 10652/1/90).

Le Conseil a décidé d'y répondre favorablement.

Veuillez agréer, Monsieur le Président, l'assurance de ma haute considération.

Pour le Secrétaire Général

Francisco FERNANDEZ-FABREGAS
Directeur Général
Subject: Co-operation procedure
  Request from the European Parliament for an extension of the period provided for in Article 149(2)

1. On 21 January 1991 the Council submitted to the European Parliament its common position on the legal protection of computer programs (see 10652/1/90 + ADD 1).

2. In a letter dated 13 March 1991 the President of the European Parliament intimated that:

   - the period provided for in Article 149 of the EEC Treaty would therefore begin on 21 January 1991;
   - the European Parliament was asking the Council to agree to a month's extension of this period with respect to the common position;
   - this request for an extension was based on the significant number of amendments introduced into the common position and on the complexity of the dossier.

3. Should the Permanent Representatives Committee agree to suggest that the Council reply favourably to this request, it might then submit to it the text of draft letter No 1 set out in the Annex.

4. If, on the other hand, the Permanent Representatives Committee agreed to suggest that the Council reply negatively to this request, it might submit to it the text of draft letter No 2.
DRAFT LETTER No 1

to Mr Enrique BARON CRESPO
President of the European Parliament

Subject: Request from the European Parliament for an extension of the period laid down in Article 149(2)(g) of the EEC Treaty

Sir,

The Council has received your letter of 13 March 1991 requesting, pursuant to Article 149(2)(g) of the EEC Treaty, an extension by one month of the period allowed to the European Parliament for reaching a decision on the Council's common position on the legal protection of computer programs (see 10652/1/90).

The Council has decided to agree to your request.

Please accept, Sir, the assurance of my highest consideration.

For the Secretary-General

Francisco FERNANDEZ-FABREGAS
Director-General
DRAFT LETTER No 2

to Mr Enrique BARON CRESPO
President of the European Parliament

Subject: Request from the European Parliament for an extension of the period laid down in Article 149(2)(g) of the EEC Treaty

Sir,

The Council has received your letter of 13 March 1991 requesting, pursuant to Article 149(2)(g) of the EEC Treaty, an extension by one month of the period allowed to the European Parliament for reaching a decision on the Council's common position on the legal protection of computer programs (see 10652/1/90).

The Council notes that the reason for your request is the complexity of the dossier and the significant number of amendments introduced. While agreeing that the matter is a complex one, the Council takes the view that it is no more complex than many other proposals that have been the subject of the co-operation procedure and that the European Parliament had every opportunity to familiarize itself with the matter during the first reading, which lasted more than a year.
Moreover, in view of the small number of substantive questions on which the Council's common position differs from Opinion of the European Parliament, the Council considers that the normal period of three months should suffice to enable the European Parliament to reach a decision on the common position.

The Council has therefore decided not to agree to an extension of the period laid down in Article 149(2)(b) of the EEC Treaty.

Please accept .....
Subject: Co-operation procedure

- Request from the European Parliament for an extension of the period laid down in Article 149(2)(g) of the EEC Treaty

1. On 21 January 1991 the Council submitted its common position on the legal protection of computer programs to the European Parliament (see 10652/1/90 + ADD 1).

2. In a letter dated 13 March 1991, the President of the European Parliament stated that:

- the period laid down in Article 149 of the EEC Treaty had started to run on 21 January 1991;
- the European Parliament requested the Council's agreement to extend the period for a decision on this common position by one month;
- the reason for requesting the extension was the large number of amendments made to the common position and the complexity of the dossier.

3. At its meeting on 20 March 1991 the Permanent Representatives Committee agreed to suggest that the Council grant this request. (The text of the draft letter is annexed hereto).
DRAFT LETTER

to Mr Enrique BARON CRESPO
President of the European Parliament

Subject: Request from the European Parliament for an extension of the period provided for in Article 149(2)(g) of the EEC Treaty

Sir,

The Council is in receipt of your letter of 13 March 1991 containing your request, pursuant to Article 149(2)(g) of the EEC Treaty, for a one-month extension of the period allotted for the European parliament to reach a decision on the Council's common position on the legal protection of computer programs (see 10652/1/90 + ADD 1).

Regardless of the reasons for the European Parliament's request, the Council has decided to grant it.

Please accept, Sir, the assurance of my highest consideration.

For the Secretary-General

Francisco FERNANDEZ-FABREGAS
Director-General
RECOMMENDATION

of the Committee on Legal Affairs and Citizens' Rights

on the COMMON POSITION established by the Council with a view to the adoption of a directive on the legal protection of computer programs

(C3-0018/91 - SYN 183)

Rapporteur : Mrs Margarida SALEMA
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At its sitting of 11 July 1990 the European Parliament delivered its opinion at first reading (A3-0173/90) on the Commission proposal for a Council directive on the legal protection of computer programs.

At the sitting of 24 January 1991 the President of Parliament announced that the common position had been received and referred to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Energy, Research and Technology for their opinions.

At its meetings of 29/30 January, 26/27 February, 18/19 and 20 March, and 2 and 3 April 1991 the Committee on Legal Affairs and Citizens' Rights considered the common position and the draft recommendation.

At the last meeting it adopted the following recommendation.

The following were present for the votes: Stauffenberg, chairman; Vayssade, vice-chairman; Rothley, vice-chairman; Salema, rapporteur; Alber (pursuant to Rule 124(4)), Bontempi, Bru Purón, Cooney, De Gucht, Dury (for Oddy), Falconer, Fontaine, García Amigo, Herman (for Casini), Hoon, Inglewood, Klepsch (for Anastassopoulos), Janssen van Raay, Lucas Pires (pursuant to Rule 124(4)), Malangré, Mazzone, Merz (for Cabanillas Gallas), Price (pursuant to Rule 124(4)), Reyman, Schlechter (for Marinho), Simpson, and Zavvos (pursuant to Rule 124(4)).

The recommendation was tabled on 4 April 1991.

The deadline for tabling amendments to the common position or proposals to reject it will appear on the draft agenda for the part-session at which the recommendation is to be considered.
A RECOMMENDATION

(Cooperation procedure: second reading)

on the common position established by the Council with a view to the adoption of a directive on the legal protection of computer programs (COM(88) 816 final¹ and COM(90) 509 final²).

The Committee on Legal Affairs and Citizens' Rights,

- having regard to the common position of the Council (C3-0018/91 - SYN 183)

Recommends that the European Parliament amend the common position as follows:

Council common position

Amendments

(Amendment No. 1)

Recital No. 13

Whereas, for the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive;

Whereas, for the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas, principles, procedures, processes, systems, methods of operation and concepts which underlie any element of a program, including its interfaces, are not protected by copyright under this Directive; whereas, these unprotectable items include, for example, protocols for communication, rules for exchanging or mutually using information that has been exchanged, formats for data, and the syntax and semantics of a programming language;

¹ OJ No. C 91, 12.4.1989, pp. 4-16
(Amendment No. 2)
Recital 15 bis (new)

After the fifteenth recital insert a new recital to read:

Whereas, in some circumstances only one implementation of an interface is possible; whereas in such cases similarities will exist in the code which implements these ideas and principles to assure interoperability; whereas in such cases, no copyright infringement occurs because in these circumstances it is regarded that idea and expression have merged;

(Amendment No. 3)
Recital No. 18

Whereas this means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired and the act of correction of its errors, may not be prohibited by contract; whereas, in the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy;

(Amendment No. 4)
Recital No. 21

Whereas, nevertheless, circumstances may exist when such a reproduction of the code and translation of its form within the meaning of Article 4(a) and (b) are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs;
Whereas it has therefore to be considered that in these limited circumstances only, performance of the acts of reproduction and translation by, or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorization of the rightholder;

Whereas it has therefore to be considered that in these limited circumstances only, performance of the acts listed in Article 4(a) and (b) by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorization of the rightholder;

1. In the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) shall not require authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

1. Notwithstanding contractual provisions to the contrary, the acts referred to in Article 4(a) and (b) shall not require authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for maintenance of the program.
Article 6 paragraph 1

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4(a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, 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 readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.

(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 readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.
(Amendment No. 8)
Article 6 paragraph 2

2. The provisions of paragraph 1 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 computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

(Amendment No. 9)
Article 6 paragraph 3

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, conflicts with a normal exploitation of the computer program.
EXPLANATORY STATEMENT

On 13 December 1990, the Council unanimously adopted a common position on the proposal for a directive on the legal protection of computer programs.

This document makes a number of changes to the original Commission proposal (COM(88) 816 - SYN 183) and to the opinion delivered by Parliament on 11 July 1990. The changes broadly follow the direction indicated by Parliament's amendments and seek either to make the suggestions contained in the original Commission proposal more specific (i.e. clearer or more explicit) or to introduce new provisions allowing for a broader conception of interoperability as well as the possibility of decompilation. However, some of Parliament's amendments have not been incorporated either in the amended proposal (COM(90) 509, subsequently adopted by the Commission) or in the Council's common position.

The Committee on Legal Affairs and Citizens' Rights feels that Parliament, at second reading, should resubmit the main amendments it endorses at first reading, with a view to maintaining its basic position, which received broad support. After the vote at first reading it emerged that Parliament's proposals enjoyed broad acceptance and they were in the end incorporated by the Council in its common position as part of a new Article 6. In our view, the main amendments to Articles 5 and 6 that were not accepted or included have to be resubmitted in order to demonstrate the consistency of our institution's position and conclude the process initiated at first reading.

As regards Article 5: Parliament's amendments have been only partly incorporated by the Commission and the Council. The Council has deleted the provision (by Parliament and the Commission) which would allow computer programs to be lent by public libraries, on the grounds that this is a matter best left to national legislation. In particular, the Council has added the reference to error correction, thereby to some extent limiting the scope for maintenance of programs and failing to legislate for today's realities, and at the same time, almost certainly because of the way its text is formulated, it has omitted to introduce the clarification proposed by Parliament concerning the elements of a computer program which may be analysed under Article 5(3).

As regards Article 6 (previously Article 5a): this article lies at the heart of the disagreement which still separates Parliament's position at first reading from that of the Commission and the Council. It deals with derogations to the exclusive rights of the author and it was this article which enabled Parliament to assert the principle of interoperability.

In fact, paragraph 4.7 of the Communication from the Commission to the European Parliament (SEC/91/87) clarifies that the decompilation exception established by Article 6 is applicable when necessary to ensure the interoperability of a program that will either connect to or compete with the decompiled program. We endorse the Commission's statement on this point. The proposed amendments simply try to re-establish the position adopted by Parliament on first reading by clarifying that the exception in Article 6 is available to ensure the operation as well as creation of interoperable products and by providing that the exception extends to all the acts covered...
by Article 4(a) and (b), not just 'reproduction of the code and translation of its form.'

The Committee on Legal Affairs and Citizens' Rights also considers that the goal of interoperability must be pursued even more vigorously and is therefore proposing that the scope of Article 6 be extended to cover hardware devices.
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. 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. The European Parliament has not yet given its opinion.

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 entreprises 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 therefor 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.
COMMUNAUTES EUROPEENNES
LE CONSEIL

Bruxelles, le 11 mars 1993

5980/91

RESTREINT

CRS/CRP 17

COMITE DES REPRESENTANTS PERMANENTS

PROJET

de

COMPTRENDUSOMMAIRE

de la 1473ème réunion
tenue à Bruxelles, le jeudi 2 mai 1991
QUESTIONS TRAITEES

1. Approbation de l’ordre du jour provisoire

2. Question écrite n° 420/91 posée au Conseil par Mme EWING, membre du Parlement européen — Amendements à la proposition de directive relative au traitement des eaux urbaines résiduaires

3. Affaire portée devant le Tribunal de Première Instance

4. Comité consultatif de la CECA : remplacement de M.KRIWET, membre démissionnaire

5. Proposition de directive du Conseil concernant la protection juridique des programmes d’ordinateur


7. Proposition de directive du Conseil modifiant la directive 72/461/CEE relative à des problèmes de police sanitaire en matière d’échanges intracommunautaires de viandes fraîches et la directive 72/462/CEE concernant des problèmes sanitaires et de police sanitaire lors de l’importation d’animaux des espèces bovine, porcine, ovine et caprine, de viandes fraîches ou de produits à base de viande en provenance des pays tiers

8. Établissement d’une position commune en vue de l’adoption d’une décision du Conseil relative à un programme spécifique de RDT dans le domaine des énergies non nucléaires

10. Etablissement d'une position commune en vue de l'adoption d'une décision du Conseil relative à un programme spécifique de RDT dans le domaine de l'agriculture et de l'agro-industrie (1990-1994) 5

11. Adoption dans les langues des Communautés du règlement du Conseil modifiant le règlement (CEE) n° 3975/87 déterminant les modalités d'application des règles de concurrence applicables aux entreprises de transports aériens 6

12. Projet d'ordre du jour provisoire de la prochaine période de session du Parlement européen (Strasbourg, 13-17 mai 1991) 6

13. Procédure de coopération 6

14. Proposition de décision du Conseil instaurant la deuxième phase du programme TEDIS (Trade Electronic Data Interchange System) 6

15. Procédure préalable à la ratification de la Convention de l'OIT sur la sécurité dans l'utilisation des substances chimiques au travail 7

16. Proposition de règlement du Conseil modifiant le Statut des fonctionnaires et le régime applicable aux autres agents des Communautés en ce qui concerne les modalités d'application des rémunérations 7

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18. Proposition de règlement et de décision modifiant - les règlements 2340/90 et 3155/90 (CEE) - les décisions 90/414/CECA et 91/125/CECA empêchant les échanges de la Communauté à l'égard de l'Irak et du Koweït (modifications suite notamment à la résolution 687 du Conseil de Sécurité des Nations-Unies) 8

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24. Relations avec les PTOM

25. AELE : Négociations EEE


28. Relations avec les Etats ACP

29. Divers
   a) Ratification du protocole permettant l’adhésion de la CEE à la Convention de la Pharmacopée européenne
   b) Experts nationaux
   c) Lutte contre la fraude
1. Approbation de l'ordre du jour provisoire
docs 5940/91 OJ/CRP 16 (1ère partie) et
5941/91 OJ/CRP 16 (2ème partie)

Approuvé, sous réserve de l'inscription des points
28 et 29 (Divers) de la liste des questions traitées.

2. Question écrite n° 420/91 posée au Conseil par Mme EWING,
membre du Parlement européen – Amendements à la proposition
de directive relative au traitement des eaux urbaines
résiduaires doc. 5342/91 PE-QE 70

Le Comité convient de suggérer au Conseil d'approuver
sous point "A" de son ordre du jour provisoire le projet de
réponse susvisé.

3. Affaire portée devant le Tribunal de Première Instance
- Affaire T-22/91 (Inès RAIOLA-DENTI e.a. c/Conseil des
communautés européennes)
= Information pour le Comité des Représentants Permanents
doc. 5852/91 JUR 40 STAT 10

Le Comité convient de suggérer au Conseil
d'approuver sous points "A" de son ordre du jour
provisoire le point susvisé.

4. Comité consultatif de la CECA : remplacement de M.KRIWET,
membre démissionnaire doc. 5832/91 SOC 73 SID 19 CHAR 11

Le Comité suggère au Conseil d'adopter sous points "A"
dans les langues des Communautés, la décision figurant en
annexe au document 5832/91 SOC 73 SID 19 CHAR 11.
5. Proposition de directive du Conseil concernant la protection juridique des programmes d'ordinateur
   - Adoption définitive
doc. 5873/91 PI 27

   Le Comité convient de suggérer au Conseil d'approuver sous points "A" de sa prochaine session, le point susvisé.

   - Istituto nazionale di credito per il lavoro italiano all'estero
docs 5698/91 SID 18 et 5903/91 SID 20

   Le Comité marque son accord sur la demande et convient de recommander au Conseil de donner l'avis conforme demandé par la Commission.

7. Proposition de directive du Conseil modifiant la directive 72/461/CEE relative à des problèmes de police sanitaire en matière d'échanges intracommunautaires de viandes fraîches et la directive 72/462/CEE concernant des problèmes sanitaires et de police sanitaire lors de l'importation d'animaux des espèces bovine, porcine, ovine et caprine, de viandes fraîches ou de produits à base de viande en provenance des pays tiers
docs 7213/90 AGRILEG 220, 5699/91 AGRILEG 73 et 5930/91 AGRILEG 83

   Le Comité convient de suggérer au Conseil d'approuver, sous points "A" de l'ordre du jour provisoire de l'une de ses prochaines sessions, le point susvisé.
8. ÉTABLISSEMENT D'UNE POSITION COMMUNE EN VUE DE L'ADOPTION
D'UNE DECISION DU CONSEIL RELATIVE A UN PROGRAMME SPECIFIQUE
DE RDT DANS LE DOMAINE DES ENERGIES NON NUCLEAIRES
(1990-1994)
(docs 5733/1/91 RECH 66 PRO-COOP 42 REV 1
5917/91 RECH 79 PRO-COOP 51)

Les conclusions du Comité sur ce point figurent dans le
document 6027/91 RECH 84 PRO-COOP 54.

9. ÉTABLISSEMENT D'UNE POSITION COMMUNE EN VUE DE L'ADOPTION
D'UNE DECISION DU CONSEIL RELATIVE A UN PROGRAMME SPECIFIQUE
DE RDT DANS LE DOMAINE DES TECHNOLOGIES INDUSTRIELLES ET DES
MATERIAUX (1990-1994)
(docs 5734/1/91 RECH 67 PRO-COOP 43 REV 1
5918/91 RECH 80 PRO-COOP 52)

Les conclusions du Comité sur ce point figurent dans le
document 6028/91 RECH 85 PRO-COOP 55.

10. ÉTABLISSEMENT D'UNE POSITION COMMUNE EN VUE DE L'ADOPTION
D'UNE DECISION DU CONSEIL RELATIVE A UN PROGRAMME SPECIFIQUE
DE RDT DANS LE DOMAINE DE L'AGRICULTURE ET DE
L'AGRO-INDUSTRIE (1990-1994)
(docs 5805/1/91 RECH 75 AGRI 32 PRO-COOP 47 REV 1
5919/91 RECH 81 AGRI 36 PRO-COOP 53)

Les conclusions du Comité sur ce point figurent dans le
document 6029/91 RECH 86 AGRI 38 PRO-COOP 56.
11. Adoption dans les langues des Communautés du règlement du Conseil modifiant le règlement (CEE) n° 3975/87 déterminant les modalités d’application des règles de concurrence applicables aux entreprises de transports aériens
docs 5633/1/91 AER 25 REV 1 et 5924/91 AER 29

Le Comité convient de maintenir ce projet de règlement à l’ordre du jour provisoire du Conseil du 14 mai 1991, pour adoption sous point "A".

12. Projet d’ordre du jour provisoire de la prochaine période de session du Parlement européen (Strasbourg, 13-17 mai 1991)
doc. 5936/91 PE 11

Le Comité convient de prendre acte de ce projet d’ordre du jour provisoire.

13. Procédure de coopération
- Demande du Parlement européen de prolonger le délai prévu par l’article 149, paragraphe 2, alinéa g) du Traité CEE
docs 5868/91 ENT 38 ENV 125 PRO-COOP 49 et 5869/91 ENT 39 ENV 126 PRO-COOP 50

Le Comité convient de reporter l’examen de ce point à sa prochain réunion, étant entendu que la Présidence mettra à profit ce délai pour prendre les contacts appropriés avec le Parlement et la Commission.

14. Proposition de décision du Conseil instaurant la deuxième phase du programme TEDIS (Trade Electronic Data Interchange System) docs 10311/90 ECO 210, 5684/91 ECO 47

Le résultat des délibérations du Comité sur ce point est repris dans le document 6018/91 ECO 59.
15. **Procédure préalable à la ratification de la Convention de l'OIT sur la sécurité dans l'utilisation des substances chimiques au travail**

Le Comité délibère sur le projet de lettre à envoyer par les Etats membres au Directeur Général du B.I.T. et convient de revenir sur ce point lors d'une prochaine réunion.

16. **Proposition de règlement du Conseil modifiant le Statut des fonctionnaires et le régime applicable aux autres agents des Communautés en ce qui concerne les modalités d'application des rémunérations**

docs 9295/90 STAT 43 FIN 343 + ADD 1 et 5926/91 STAT 11 FIN 124

Le Comité procède à un échange de vues à la lumière des orientations qui se sont dégagées au sein du groupe "statut" (doc. 5926/91 STAT 11 FIN 124).

Le Président, après avoir constaté que ces orientations ne lui permettaient pas d'envisager la recherche d'une solution acceptable pour toutes les parties en cause, fait part de son intention :
- de soumettre le dossier au Conseil des Affaires Générales des 13/14 mai 1991, afin de faire définir les objectifs à poursuivre dans le cadre de l'examen de la proposition de la Commission,
- de présenter, à un moment opportun, des éléments de réflexion qui puissent conduire à des solutions acceptables pour tous.

17. **Etat des procédures écrites**

18. Proposition de règlement et de décision modifiant
   - les règlements 2340/90 et 3155/90 (CEE)
   - les décisions 90/414/CECA et 91/125/CECA empêchant les échanges de la Communauté à l’égard de l’Irak et du Koweït (modifications suite notamment à la résolution 687 du Conseil de Sécurité des Nations-Unies)

   docs 5853/91 IRAQ 16, 5840/91 IRAQ 13 et 5836/91 IRAQ 12

   Le Comité marque son accord sur le résultat des travaux du Groupe [doc. 5853/91] et convient de recommander au Conseil (aux Représentants des Gouvernements des Etats membres réunis au sein du Conseil, en ce qui concerne la décision CECA), agissant par procédure écrite d’urgence :

   - d’adopter le règlement et la décision susmentionnés, après mise au point par les Juristes-linguistes (docs 5836/91 IRAQ 12 et 5840/91 IRAQ 13) ;

   - d’inscrire au procès-verbal du Conseil les déclarations y relatives ;

   - de décider la publication de la décision CECA au Journal Officiel.

19. Textiles
   - Conclusion de l’accord avec l’URSS

   docs 5622/91 TEXT 13 et 5854/91 TEXT 15

   Le Comité marque son accord sur le document 5854/91 TEXT 15.
20. Relations avec les Etats ACP
- Préparation de la 16ème session du Conseil des Ministres ACP-CEE (Bruxelles, 6/7 mai 1991)
  doc. 5722/91 ACP 43 FIN 109 ADD 1

  Le Comité convient de suggérer au Conseil d'approuver, sous points "A" de l'ordre du jour provisoire de l'une de ses prochaines sessions, le point susvisé.

21. Adoption dans les langues des Communautés d'une décision du Conseil concernant un échange de lettres modifiant l'accord de coopération Euratom/Canada (Tritium)
  docs 5878/91 ATO 24 RECH 78 et 5675/91 ATO 23 RECH 65

  Le Comité convient de recommander au Conseil

  - l'adoption sous point "A" de son ordre du jour, lors de l'une de ses prochaines sessions, de la décision citée en objet dont le projet figure, après mise au point sur un plan juridique et linguistique, au document portant la cote 5675/91 ATO 23 RECH 65 ;

  - l'inscription au procès-verbal de cette session de la déclaration dont le texte est repris en Annexe à la note 5878/91 ATO 24 RECH 78.

22. Interventions de la Banque Européenne d'Investissement à l'extérieur de la Communauté
  doc. 5672/91 RELEX 14 FIN 105

23. Famine en Afrique
- Proposition d’un programme spécial d’aide alimentaire pour l’Afrique
  doc. 5883/91 ALIM 12 FIN 119

Le Comité convient de se réunir en cadre restreint.

- Révision des perspectives financières
docs 5880/91 FIN 117 et 5881/91 FIN 118

S’agissant du programme spécial "Famine en Afrique", le COREPER a atteint un accord sur la base d’un compromis que lui a présenté le Président :

- Le montant à fixer pour ce programme spécial s’élève à 140 MECUS (ceci implique une économie de 20 MECUS sur les frais de transport).

- Les 140 MECUS impliquent un étalement différent des crédits de paiement prévus pour l’URSS en 1991 (125 MECUS au lieu de 150 MECUS).

A la demande du COREPER, le représentant de la Commission s’est engagé à proposer à son Institution d’inscrire globalement le montant de cette aide sur le poste ("réserve exceptionnelle : aide alimentaire"), et de ne pas proposer de virements à partir de cette ligne pour renforcer d’autres lignes.

Le représentant de la Commission a fait savoir qu’après le trilogue de ce soir (2 mai 1991), il recommanderait à son Institution de procéder à un préfinancement afin de répondre à l’urgence de cette action.
En ce qui concerne les "ajustements" et les "dotations budgétaires soutenant la réserve", le COREPER a fait siennes les suggestions du comité budgétaire reprises au doc. 5881/91 (points B.II.i et B.II.ii).

L'ensemble des éléments concernés par la position du COREPER (Conseil) est repris dans le tableau ci-dessous :

<table>
<thead>
<tr>
<th>Article 12</th>
<th>URSS</th>
<th>400</th>
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<td>Famine en Afrique</td>
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<td>Article 4</td>
<td>Kurdes</td>
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24. Relations avec les PTOM

- Régime futur d'association doc. 5961/91 PTOM 28

Le Comité

- confirme l'accord intervenu au sein des Groupes ACP et ACP/FIN sur les modifications à apporter au texte proposé par la Commission (cf. doc. 4882/91) telles que reprises au doc. 5961/91 ADD 1, la délégation néerlandaise maintenant toutefois une réserve d'ensemble à ce sujet ;

- examine les propositions présentées par la délégation néerlandaise, sur la base du rapport des Groupes ACP et ACP/FIN (doc. 5961/91),

- prend acte de la déclaration portugaise

Le Portugal rappelle la situation existant à Timor oriental. A cet égard, seul le fait qu'il soit illégalement privé de l'exercice effectif de l'administration de ce territoire empêche toute évidence le Portugal de proposer, comme il l'aurait déjà fait depuis son adhésion aux Communautés, l'inclusion de Timor oriental dans la liste des PTOM figurant à l'annexe IV du traité.

- convient de soumettre ce dossier au Conseil, lors de sa session du 13 mai 1991, en vue d'un débat d'orientation,

- charge le Groupe ACP de poursuivre l'examen des questions techniques soulevées par les propositions précitées de la délégation néerlandaise.
25. **AELE : Négociations EEE**

a) **Préparation de la 2ème rencontre ministérielle prévue avec l'AELE le 13 mai 1991**

À la suite d'un exposé de la Commission faisant le point des négociations et donnant des indications pour la procédure ultérieure, le Comité est convenu de procéder, lors de sa prochaine réunion, à une discussion approfondie dans l'optique de la préparation à la fois des délibérations du Conseil ainsi que de la session ministérielle avec l'AELE.

b) **Aspects institutionnels : mécanisme juridictionnel, procédure de surveillance et règlement des différends**

Sur base du doc. 5981/91 AELE 40, le Comité a poursuivi les travaux en vue de l'élaboration d'un projet d'articles à présenter à l'AELE. Il a chargé le Groupe de mettre au point le texte de ce projet à la lumière du débat.


Le Comité convient de retirer ce point de l'ordre du jour de la réunion.

27. **Préparation de la session du Conseil (Affaires Générales) des 13/14 mai 1991**

Le Comité prend acte des points susceptibles de figurer à l'ordre du jour de la session susvisée.
28. Relations avec les Etats ACP

= Rapport oral du Président du Groupe


29. Divers

a) Ratification du protocole permettant l'adhésion de la CEE à la Convention de la Pharmacopée européenne

La Commission présente au Comité l'aide-mémoire repris ci-après destiné à attirer l'attention du Conseil sur la nécessité pour les Etats membres qui n'ont pas encore ratifié le protocole permettant l'adhésion de la CEE à la Convention de la Pharmacopée européenne, de le faire sans tarder.

1) La Convention relative à l'élaboration d'une Pharmacopée européenne, signée le 4 septembre 1964 est entrée en vigueur en 1974. Elle regroupe actuellement 20 pays européens:
- les douze États membres de la Communauté européenne ;
- les six pays membres de l'Association Européenne de Libre Echange (AELE) ;
- Chypre et la Yougoslavie.

L'URSS, la Pologne et la Hongrie ont récemment marqué leur intérêt pour cette convention dont l'objectif est d'harmoniser les spécifications de qualité et les méthodes d'analyse concernant les principales substances à usage pharmaceutique commercialisées en Europe.

2) Les directives 75/318/CEE (1) et 81/852/CEE (2) avaient confirmé le caractère opposable des monographies de la Pharmacopée européenne pour la réalisation des essais des médicaments à usage humain et vétérinaire. Par décision du 26 mai 1987, le Conseil a autorisé la Commission à mener, dans le cadre du Conseil de l'Europe, des négociations en vue de permettre l'adhésion de la CEE, à côté de ses États membres, à la Convention relative à l'élaboration d'une Pharmacopée européenne.

3) La Convention, n'étant pas ouverte, dans sa rédaction actuelle, qu'aux seuls États, les négociations ont conduit à l'élaboration d'un protocole additionnel permettant l'adhésion de la CEE, dont le texte a été approuvé par le Conseil des Communautés européennes le 7 mars 1988. Le protocole a ensuite été signé par toutes les Parties Contractantes et ratifié par onze pays, à savoir : Belgique, Danemark, Finlande, France, Allemagne, Irlande, Islande, Norvège, Suède, Suisse et Royaume-Uni.

4) La ratification de ce protocole par toutes les Parties Contractantes doit être achevée avant que le Conseil des Communautés européennes ne puisse, sur proposition de la Commission, décider formellement de l'adhésion de la CEE. La Commission attire en conséquence l'attention du Conseil sur la nécessité pour les États membres retardataires de ratifier dans les meilleurs délais le protocole additionnel qu'ils ont déjà signé.

(1) J.O. n° L 147 du 9.06.1975, p. 1
(2) J.O. n° L 317 du 6.11.1981, p. 27
b) Experts nationaux

La délégation britannique, appuyée par les délégations française et espagnole, ont fait part de leur souhait de voir évoquer la situation des experts nationaux.

La Présidence a précisé que les implications financières de ce dossier seraient examinées par le comité budgétaire.

c) Lutte contre la fraude

La délégation britannique a fait part de son souhait de voir le rapport sur les travaux et progrès réalisés en 1990 en matière de lutte contre la fraude inscrit à l'ordre du jour d'un prochain Conseil ECOFIN.

La Présidence a pris note de la suggestion britannique et a indiqué que les dispositions seraient prises pour charger le comité budgétaire de l'examen de ce dossier.
EUROPEAN COMMUNITIES

THE COUNCIL

Brussels, 8 May 1991

6033/91
ADD 1
RESTREINT
PTS A 21

ADDENDUM 1 TO LIST OF "A" ITEMS

for: 1487th meeting of the COUNCIL OF THE EUROPEAN COMMUNITIES
Brussels, Monday 13 and Tuesday 14 May 1991

5. Written Question No 420/91 put to the Council by Mrs EWING, Member of the European Parliament - Changes to proposed waste water Directive

5342/91 PE-QE 70
approved by COREPER, Part 1, on 2.5.1991

6. Oral Questions, with debate, put to the Council by Members of the European Parliament
No 0-10/91 by Mr CASSIDY - Rules governing travellers' allowances derogations granted to Denmark and Ireland
No 0-22/91 by Mr HOWELL - Welfare of farm animals

4653/91 PE-QO 29
approved by COREPER, Part 1, on 8.5.1991

7. Economic and Social Committee: replacement of Mr H.-A. HÖRSKEN, member, who has resigned

5934/91 CES 16
5480/91 CES 8
approved by COREPER, Part 1, on 9.4.1991

8. ECSC Consultative Committee: replacement of Mr KRIWET, member, who has resigned

5832/91 SOC 73 SID 19 CHAR 11
approved by COREPER, Part 1, on 2.5.1991

9. Request for Council assent, in accordance with Article 54, second paragraph, of the ECSC Treaty, for the granting of a global loan to the ICLE S.p.A. - Istituto nazionale di credito per il lavoro italiano all'estero

5698/91 SID 18
5903/91 SID 20
approved by COREPER, Part 1, on 2.5.1991
10. Co-operation procedure
   - Request from the European Parliament to extend the deadline laid down by Article 149(2)(g) of the EEC Treaty
     5868/91 ENT 38 ENV 125 PRO-COOP 49
     5869/91 ENT 39 ENV 126 PRO-COOP 50
     approved by COREPER, Part 1, on 8.5.1991

11. Commission communication to the Council concerning Community participation in the negotiations on the framework Convention on the protection of the Alps
     5754/91 ENV 118
     5388/91 ENV 100
     approved by COREPER, Part 1, on 25.4.1991

12. Adoption in the official languages of the Communities of a Council Regulation amending Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector
     5924/91 AER 29
     5633/1/91 AER 25 REV 1
     approved by COREPER, Part 1, on 2.5.1991

13. Adoption in the official languages of the Communities of a Council Directive relating to the legal protection of computer programs
     5873/91 PI 27
     10652/1/90 PI 82 PRO-COOP 148 REV 1
     + COR 1 (i)
     approved by COREPER, Part 1, on 2.5.1991

     5878/91 ATO 24 RECH 78
     5675/91 ATO 23 RECH 65
     approved by COREPER, Part 2, on 2.5.1991

15. Adoption in the official languages of the Communities of the Council Regulation on the conclusion of the Protocol establishing, for the period from 1 June 1990 to 31 May 1993, the fishing rights and financial compensation provided for in the Agreement between the European Economic Community and the Government of the Democratic Republic of Sao Tome and Principe on fishing off Sao Tome and Principe
     9086/90 PECHE 333
     approved by COREPER, Part 1, on 22.10.1990
16. Adoption in the official languages of the Communities of a Council Decision extending to Czechoslovakia, Bulgaria and Romania Decision 90/62/EEC granting a Community guarantee to the European Investment Bank against losses under loans for projects in Hungary and Poland
   5990/91 ECOFIN 39 EST 53
   5979/91 ECOFIN 38 EST 52
   approved by COREPER, Part 2, on 8.5.1991

17. Textiles: maintaining the MFA in force
   5956/91 TEXT 18
   5887/91 TEXT 17
   approved by COREPER, Part 2, on 8.5.1991

18. Anti-dumping
   Adoption in the official languages of the Communities of a Council Regulation extending the provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the People's Republic of China
   5968/91 COMER 45
   5804/91 COMER 43
   approved by COREPER, Part 2, on 8.5.1991
COUNCIL DIRECTIVE

of 14 May 1991

on the legal protection of computer programs

(91/250/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

Whereas the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently;

Whereas computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community's industrial development;

Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;

Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;

Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts and for how long the protection should apply;

Whereas, for the purpose of this Directive, the term 'computer program' shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;

Whereas, in respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied;

Whereas the Community is fully committed to the promotion of international standardization;

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, 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;

Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as 'interfaces';

Whereas this functional interconnection and interaction is generally known as 'interoperability'; whereas such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged;

Whereas, for the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive;

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;

Whereas, in accordance with the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright;

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; whereas this term does not include public lending, which, accordingly, remains outside the scope of this Directive;

Whereas the exclusive rights of the author to prevent the unauthorized reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by the lawful acquirer;

Whereas this means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of correction of its errors, may not be prohibited by contract; whereas, in the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy;

Whereas a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program, provided that these acts do not infringe the copyright in the program;

Whereas the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author;

Whereas, nevertheless, circumstances may exist when such a reproduction of the code and translation of its form within the meaning of Article 4 (a) and (b) are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs;

Whereas it has therefore to be considered that in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorization of the rightholder;

Whereas an objective of this exception is to make it possible to connect all components of a computer system, including those of different manufacturers, so that they can work together;

Whereas such an exception to the author's exclusive rights may not be used in a way which prejudices the legitimate interests of the rightholder or which conflicts with a normal exploitation of the program;

Whereas, in order to remain in accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the term of protection should be the life of the author and fifty years from the first of January of the year following the year of his death or, in the case of an anonymous or pseudonymous work, 50 years from the first of January of the year following the year in which the work is first published;

Whereas protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection; whereas, however, any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) should be null and void;

Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive;
Whereas the provisions of this Directive should be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunications sector or Council Decisions relating to standardization in the field of information technology and telecommunication;

Whereas this Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive,

HAS ADOPTED THIS DIRECTIVE:

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 program' shall include their preparatory design material.

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 computer 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.

2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

Article 3

Beneficiaries of protection

Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works.

Article 4

Restricted Acts

Subject to the provisions of Articles 5 and 6, 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. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts 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;

(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.

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 authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.
3. The person having a right to use a copy of a computer 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 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 6

Decompilation

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4 (a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, 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 readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.

2. The provisions of paragraph 1 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 computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

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 right holder's legitimate interests or conflicts with a normal exploitation of the computer program.

Article 7

Special measures of protection

1. Without prejudice to the provisions of Articles 4, 5 and 6, 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 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 the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer 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 8

Term of protection

1. 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 abovementioned events.

2. Member States which already have a term of protection longer than that provided for in paragraph 1 are allowed to maintain their present term until such time as the term of protection for copyright works is harmonized by Community law in a more general way.

Article 9

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. Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void.

2. The provisions of this Directive shall apply also to programs created before 1 January 1993 without prejudice to any acts concluded and rights acquired before that date.
**Article 10**

**Final provisions**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993.

When Member States adopt these measures, the latter shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field governed by this Directive.

**Article 11**

This Directive is addressed to the Member States.

Done at Brussels, 14 May 1991.

*For the Council*

*The President*

J. F. POOS
DRAFT
MINUTES

of the 1487th Council meeting

held in Brussels on Monday 13 and Tuesday 14 May 1991
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1. Adoption of the agenda  
6032/91 OJ/CONS 19

The Council adopted the abovementioned agenda.

2. Approval of the list of "A" items  
6033/91 PTS A 21 + ADD 1

The Council approved the "A" items listed in 6033/91 PTS A 21 + ADD 1.

3. Other business
   - International Fund for Ireland

The Irish delegation, supported by the United Kingdom delegation, appealed for renewed Community support for the abovementioned Fund for a further period of three years starting on 1 January 1992.

The Commission representative said that the Commission had initiated the procedures necessary to fulfil the wishes of the Irish and United Kingdom delegations.
4. Relations with the EFTA countries

- Preparation for the ministerial meeting on 13 May 1991

The Council finalized the Community position in preparation for the EEC-EFTA ministerial meeting held the same day; at the close of that meeting the Ministers adopted the Joint Declaration recorded in 6219/91 AELE 44.

5. Resolutions adopted by the European Parliament at its April part-session

(Strasbourg, 15-19 April 1991)

5844/91 PE-RE 29

The President drew the Council's attention to the following Resolutions:

No 5: on the implementation of the general budget of the European Communities for the financial year 1989;

No 15: on the guidelines for budgetary policy in 1992;

No 16: on draft supplementary and amending budget No 1 of the European Communities for the financial year 1991;

No 28: on famine in Africa;

No 38: on the enhancement of democratic legitimacy in the context of the Intergovernmental Conference on Political Union;

No 39: on the nature of Community acts,

No 42: on a general outline for association agreements with the countries of Central and Eastern Europe;

No 48: the Commission proposal for a Council Regulation amending the Staff Regulations of officials of the European Communities and the conditions of employment of other servants of those Communities in respect of detailed rules for adjusting the remuneration.

The Council agreed to take note of these Resolutions on the understanding that they had been or would be taken into consideration when the problems to which they referred were examined.
6. Relations with Israel

- 9th meeting of the Co-operation Council at ministerial level:
determination of the Community position
6168/91 ISR 7, 6052/91 ISR 3

The Council approved the position to be adopted by the Community at the 9th meeting of the EEC-Israel Co-operation Council, as recorded in 6052/91 ISR 3.

7. Relations with Turkey (in restricted session)

The Council discussed relations with Turkey, and then instructed the Permanent Representatives Committee to continue its examination of the Commission's communication of June 1990 and to report back to it in time for its July meeting.

The Council noted that the Greek delegation did not support these conclusions; reiterated its basic position and said that the examination by the Permanent Representatives Committee was entirely without prejudice to the outcome of that examination.

8. Relations with the OCT

- Future association arrangements
  = Policy debate
  6160/91 PTOM 30 FIN 143

The Council agreed to postpone examining the above item until its meeting in July 1991.
9. Commission report on European Investment Bank operations outside the Community  
- Policy debate  
6068/91 RELEX 22 ECOFIN 139

The Council was largely in favour of a limited extension of the EIB's external activities to countries or regions to be defined which do not yet benefit from it and which are linked to the Community by co-operation agreements, on the basis of case-by-case authorization of specific projects.

The various elements, in particular the guarantee, enabling this approach to be put into practice, remain to be specified on the basis of the technical data contained in the EIB's letter.

This approach will be submitted to the ECOFIN Council for appraisal at its next meeting.

10. European Energy Charter  
(consensus)

In the light of the results of the Troika's preliminary talks with third countries (6170/91 EST 56 ENER 24), the Council held a detailed discussion on the issue of participation in the Conference on the European Energy Charter.

It will return to this question at its next meeting on 17 and 18 June.

The preparatory work for the Conference will continue in the meantime.
11. Proposal for a Council Regulation amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the Communities in respect of detailed rules for adjusting remunerations

The Council held an informal discussion on this proposal for a Regulation.

At the close of the discussion, the Presidency informed the Council that it would contact all the parties concerned, including the Commission, and would act in due course.

12. Other business

- Aid to Bangladesh

The Member States, meeting within the Council, decided, on the basis of a proposal from the Commission and within the framework of a Community action, to grant Bangladesh special aid of ECU 60 million.

The amount will be apportioned among the Member States according to the GNP scale.

The aid will be incorporated in the Community's general action for Bangladesh.

The aid will be supplied either directly by the Member States or via an account administered by the Commission.

The Commission will see to overall co-ordination of the special aid of ECU 60 million.
REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE

on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs
REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE

on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs

EXECUTIVE SUMMARY

On the occasion of the adoption of a common position on Council Directive 91/250/EEC (13 December 1990) the Commission made a political commitment to produce a report on the implementation and effects of the Directive. As this was the first Directive in the field of copyright and related rights the provision of a review clause in the Directive itself had not yet become standard practice.

The present report is substantially based on a study carried out by external consultants and finalised in 1997, together with the Commission’s own findings, including comments from interested circles.

The overall results show that the objectives of the Directive have been achieved and the effects on the software industry are satisfactory (demonstrated for example by industry growth and decrease in software piracy). On the basis of these results there appears to be no need to amend the Directive.

As far as implementation by Member States is concerned, some flaws have become apparent. While not all of these merit attention by the Commission, others may need to be investigated further with a view to possible infringement proceedings.

Some specific issues raised by industry (the distribution right and communication to the public, back-up copies, remedies, and technical devices) are also addressed. While the Commission concludes that no amendment of the Directive in these respects is appropriate at present, this is not to rule out the possibility of adjustment at a later stage in the light of other developments.

Finally reference is made to related Community initiatives, specifically the patentability of computer software (which would complement the existing copyright protection) and the Green Paper on combating counterfeiting and piracy in the single market, which would be the appropriate context for further action on software piracy. Member States’ attention is drawn in particular to the importance of government policies on the use of legal software.
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I. THE MANDATE FOR THE REPORT

On the occasion of the adoption of the common position on Council Directive 91/250/EEC on the legal protection of computer programs on 13 December 1990 the Commission made the following statement:

"The Commission agrees to make a report to the Council, the European Parliament and the Economic and Social Committee on how the Directive is working by the end of 1996."

The present communication is intended to honour this political commitment. It is somewhat delayed because only three of the Member States met the implementation deadline of the Directive of 1 January 1993.

This document is in part based on an independent study commissioned in 1997 for the purpose of collecting all the available facts on Member States' implementing legislation under Directive 91/250/EEC and on the practical application thereof. In addition, conclusions have been drawn from the views expressed by interested circles, in particular on the operation of the Directive and its impact on the computer programs industry as well as other interests at stake, and the Commission's own views and analysis.

Furthermore, the present communication also takes account of ongoing separate Commission initiatives concerning the legal protection of computer programs.

II. THE BACKGROUND FOR THE DIRECTIVE

The computer programs Directive was first announced in the Commission White Paper entitled "Completing the Internal Market"1 and its substance has been influenced inter alia by the results of a comprehensive consultation exercise undertaken in the context of the June 1988 " Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action"2.

Following this exercise the proposal for a Directive of April 1989 was intended to provide harmonisation of Member States' legal provisions in the field concerned by defining a minimum level of protection, and was formulated as a balance between the interests of rightholders, of their competitors and of users of computer programs. At the time, the disparity amongst Member States on the matter of protection of computer programs was quite significant. In fact, since the issue was then a rather recent development, there were no provisions expressly protecting computer programs in the copyright legislation in seven out of the then 12 Member States.

In its explanatory memorandum accompanying the proposal for a Directive the Commission indicated that such differences in the level of protection could no longer be maintained, since this might not only adversely affect the operation of the Common Market by perpetuating or creating barriers to intra-Community trade in computer programs but would also negatively impact on the creation of software companies in the Community and result in distortions of competition.

1 COM (85) 310 final, point 149
2 COM(88) 172 final, 10.11.1988
As set out in this document the aim of the Directive was to establish legal protection of computer programs in those Member States where it did not yet exist and to ensure that the protection in all Member States is based on common principles.

These principles can be summarised as follows:

– computer programs are protected as literary works by exclusive rights under copyright;
– the person entitled to the right is specified;
– restricted acts requiring authorisation of the rightholder and acts which do not constitute an infringement are determined and
– conditions for protection of the program are defined.

Whilst all such objectives were finally achieved, the Directive did not provide for total harmonisation but left some room for Member States to use their discretionary powers in the light of subsidiarity where such national measures do not affect the proper functioning of the Internal Market.

III. THE CONTENT OF THE DIRECTIVE

Council Directive 91/250/EEC gives copyright protection to computer programs as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). The question of authorship is widely left to the EU Member States. Employers are entitled to exercise the economic rights in programs created by their employees. Moral rights are excluded from the scope of the Directive.

The striking feature of the Directive is that the level of originality (eligibility criterion for copyright protection) has for the first time been harmonised at the Community level for a specific category of copyrightable work. The program must be the "own intellectual creation of its author". No other criteria are allowed. This uniform level has required 12 Member States to lower the threshold for granting protection and the remaining three to “lift the bar”. It should also be noted that protection under the Directive is strong and that in particular no home copying exception may apply.

The rightholder has a number of exclusive rights: the right to do or authorise reproduction, translation, adaptation, arrangement, and any form of distribution to the public, including rental.

However, some exceptions to these exclusive rights are listed. Normal activities by 'lawful acquirers' of the program are free.

Certain reverse engineering techniques are also specifically allowed. The person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rightholder, to observe, study or test the functioning of the program in order to determine the 'ideas and principles' underlying any element of the program, so long as this does not result in an infringing copy.

Moreover, the Directive provides that such 'rights of the rightful possessor' cannot be overridden by contract.
The most important exception is the possibility of decompiling a program to make it interoperable with other programs. This point was the subject of intense debate and resulted in a pragmatic compromise which has the effect in practice that the information required for establishing interoperability is made available.

A number of conditions aim at limiting decompilation to the minimum which is necessary in order to achieve interoperability without prejudicing the rightholder’s legitimate interest by developing, for example, a program which has not been independently created or a program infringing its copyright. Such restrictions involve inter alia that the decompilation exception can only be invoked by a licensed user or by someone else acting on his behalf, that the required information is not already readily available, that those parts of the program that are not necessary to achieve interoperability must not be decompiled, that the information obtained must not be used to develop, produce or market a program which infringes copyright in the decompiled program, that the rightholder's legitimate interests are not unreasonably prejudiced and that the use does not conflict with a normal exploitation of the computer program.

The Directive also provides that any contractual provisions contrary to the decompilation exception are null and void.

With respect to law enforcement, rules on seizure of infringing copies and on means to circumvent encryption / copy protection systems are prescribed.

IV. STATE OF IMPLEMENTATION OF THE DIRECTIVE

Whilst only three Member States met the implementation deadline (1 January 1993) all of them have to date adopted the required domestic laws, regulations and administrative provisions.

A table of such implementation measures is set out below.

<table>
<thead>
<tr>
<th>Member State</th>
<th>Entry into force</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>19 December 1992</td>
<td>Lov No 1010</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1 January 1993</td>
<td>Statutory Instrument 1992 No 3233</td>
</tr>
<tr>
<td>Austria</td>
<td>1 March 1993</td>
<td>Urheberrechtsgesetz – Novelle 1993, BGBI. No 93/1993, p. 1166</td>
</tr>
<tr>
<td>Greece</td>
<td>4 March 1993</td>
<td>Law No 2121/93</td>
</tr>
</tbody>
</table>
V. REVIEW OF IMPLEMENTATION BY MEMBER STATES

1. Object of protection (Article 1)

Article 1 of the Directive sets out to define the scope of copyright protection granted for computer programs. Six of the Member States (Belgium, Germany, Greece, Ireland, Italy and Spain) have complied with the requirements of this Article, although all but two have seen fit not to implement the portion of "No other criteria shall be applied to determine (the computer program's) eligibility for protection". The latter clarification is foreseen under Article 1 (3) and relates to the definition of originality as a prerequisite for copyright protection.

Germany has expressly incorporated Article 1 (3)\(^3\) and has thus abandoned the "Inkassoprogramm" case law of its Supreme Court\(^4\) which previously required the existence of a (high) level of creativity ("Schöpfungshöhe"). This changed level of originality has since

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\(^3\) sec. 69a (3) of the German Copyright Act.

\(^4\) BGHZ 94, 276
then been confirmed by constant case law\(^5\) and the German eligibility criterion has thus been brought in line with the Directive's terms.

\[(a) \quad \text{Protection of computer programs as literary works}\]

Computer programs are to be protected as literary works within the meaning of Article 2 of the Berne Convention. Article 4 of the WIPO Copyright Treaty (WCT) uses the same formulation as the Directive. Such provisions are also on a par with Article 10 (1) of the TRIPs Agreement.

All Member States appear to have implemented this requirement.

\[(b) \quad \text{Inclusion of preparatory design material}\]

Further to Article 1 (1) (2) the term “computer programs” shall include their preparatory design material. The vast majority of the Member States have implemented this provision without providing for a definition of computer programs. Apparently, only France and Germany have such a definition on their statute book. It should be noted however that the Directive itself did not define the notion of computer program. Nevertheless, some guidance is provided by recital 7 and the explanatory memorandum to the initial Commission proposal of April 1989.

Denmark and Finland have not implemented the preparatory design material requirement at all. The UK has included preparatory design material within literary works rather than computer programs. It would appear that the UK provision, whilst going further than the Directive which is limited to computer programs, is compliant and that in Denmark and Finland no difficulties linked to this issue have arisen in practice.

\[(c) \quad \text{Expression in any form}\]

According to Article 1 (2) protection shall apply to the expression in any form of a computer program. Ten of the Member States have implemented this requirement, whereas Denmark, Finland, France, Luxembourg and the Netherlands have not done so explicitly. At present it is not clear what effect this has on the protection of computer programs in the Member States concerned.

\[(d) \quad \text{Ideas and principles}\]

Ideas and principles which underlie any element of a computer program are not protected by copyright. This traditional exclusion from copyright is reiterated by virtue of Article 1 (2) (2) and recitals 13 and 14 of the Directive. Eight Member States (Austria, Finland, France, Luxembourg, Netherlands, Portugal, Sweden and the UK) have not implemented these provisions. It would appear, however, that it is standing practice of such Member States to apply the idea / expression dichotomy as a general principle of copyright law.

\[(e) \quad \text{The author's own intellectual creation}\]

As mentioned above Article 1 (3) defines the level of originality required for the grant of copyright protection. The Community criterion refers to "the author's own intellectual creation". Six Member States have not explicitly implemented this requirement. Of these

Denmark, Finland, Luxembourg, the Netherlands and Sweden apparently consider that it is an implied requirement of their legislation to take account of the wording of the Directive. This principle does not appear so far to have been called into question by interested parties.

However, the Commission had to take issue with the UK implementation because this latter Member State traditionally only requires skill and labour and permits copyright to protect computer generated works. The Commission has noted that as a result of the adoption of Directive 96/9/EC on the legal protection of databases\textsuperscript{6} the UK now provides for a legal definition of originality for the purposes of a literary work consisting of a database\textsuperscript{7}. A similar clause for computer programs is still lacking. It remains to be seen whether this will lead to an over-extensive protection of computer programs in the UK.

(f) No other criteria

Only Belgium and Germany have transposed this feature of the Directive. It would appear, however, that it is not strictly necessary to implement this safeguard \textit{expressis verbis} since the Directive clearly indicates that the "author's own intellectual creation" suffices. Furthermore, recital 8 provides for a reminder that in respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied. In practice, it is assumed that the tribunals of the Member States will have recourse to such provisions for guidance when they construe the Directive's Articles.

2. Authorship of computer programs (Article 2)

Article 2 contains three mandatory requirements: namely on individual authorship, on joint authorship and on employees’ works. Furthermore there is one, on collective works, which is left to the Member States' discretion. France, Italy, Spain and Portugal have made use of this option.

All Member States have included in their legislation rules implementing the mandatory provisions of Article 2.

3. Beneficiaries of protection (Article 3)

Since this Article refers for the purpose of determining beneficiaries of protection to national copyright legislation concerning literary works it is largely confirmatory. Notwithstanding this nature of the provision it would appear that all Member States have explicitly brought computer programs under copyright protection as a literary work, which will imply that normal rules on authorship apply.

4. Restricted acts (Article 4)

Seven Member States (Belgium, France, Germany, Ireland, Italy, Luxembourg and Spain) have implemented all of the requirements of Article 4.

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\textsuperscript{6} OJ L 77, 27.3.1996, p. 20
\textsuperscript{7} Sec. 3 A (2) CDPA 1988 as amended by the Copyright and Rights in databases Regulations 1997, S.I. 1997/3032 of 18.12.1997
(a) **Reproduction (Article 4 (a))**

Under the Directive's terms permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole, is a restricted act. In some Member States, however, there appears to be no specific implementation of "permanent or temporary reproduction" (Austria, Denmark, Finland, the Netherlands and Sweden). In the light of comments from industry, this discrepancy may need further investigation.

Similarly some of these Member States (Denmark, Finland, Greece, Sweden and the UK) have not implemented the "in part or in whole" requirement. Finally a number of Member States (Austria, Denmark, Finland, Portugal and Sweden) have omitted to include "loading, displaying, running, transmission or storage of the computer program" within the scope of the reproduction right. This omission appears to be inconsistent with the Agreed Statement concerning Article 1 (4) of the WCT according to which it is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

(b) **translation, adaptation, arrangement or any other alteration of a program (Article 4 (b))**

A number of Member States (Austria, Denmark, the Netherlands, Sweden and the UK) have apparently omitted to implement expressly the "any other alteration" phrase. In those Member States the scope of the right may be narrower than foreseen in the Directive.

(c) **any form of distribution to the public, including rental (Article 4 (c) (1))**

All the Member States provide for restricted acts covering the distribution of the original or a copy of a computer program. A rental right is likewise afforded.

(d) **Community exhaustion (Article 4 (c) (2))**

As set out in Commissioner Monti's response of 11 July 1995 to Oral Question H-0436/95 by Arthur Newens, MEP\(^8\), the Commission has constantly taken the view that Directive 91/250/EEC prevents Member States from applying a concept of international exhaustion in relation to the distribution of computer programs. Article 4 (c) establishes an exclusive distribution right which is subject to Community exhaustion where the sale of the program was made in the Community. Since no provision is made for that exclusive right to be exhausted within the Community by a first sale outside the Community, Member States are not free to provide for such exhaustion in respect of computer programs.

The implicit restriction of parallel imports of computer programs into the Community has not been expressly implemented by Denmark, Finland, the Netherlands and Portugal. Furthermore, it would appear from the wording of the statute that the exhaustion concept retained by Luxembourg does not only apply to the distribution right. Interested circles have expressed concerns in relation to these issues.

It is to be noted, however, that as a consequence of case law construing the Dutch copyright statute in the light of the Directive Community exhaustion is now likewise applied in the

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\(^8\) Debates of the European Parliament (EN ed.) No. 466, p. 174.
Netherlands. According to the President of the district court of The Hague in the Novell case, the Dutch copyright statute which does not provide any rules on exhaustion, must be construed as far as possible in accordance with the provisions of the Directive. Under these circumstances he arrived at the conclusion that as of 1 September 1994 a copyright regime has to be applied for computer programs in the Netherlands which provides for Community exhaustion only.

5. Exceptions to the restricted acts (Article 5)

Nine Member States have implemented all of these mandatory provisions, either verbatim or very closely (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Spain and Sweden). Details on each provision are given below.

(a) Normal use by the lawful acquirer and error correction (Article 5 (1))

This provision stipulates that in the absence of specific contractual provisions, the restricted acts, with the exception of distribution and rental, shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including error correction.

Most Member States have made it clear that contracting out is permitted in relation to the scope of Article 5 (1). Divergences of views subsist however as to the meaning of "lawful acquirer". Several Member States have transposed this notion by using the term "lawful user" i.e. a person having a right to use the program.

The Commission shares the view of some commentators that ‘lawful acquirer” did in fact mean a purchaser, licensee, renter or a person authorised to use the program on behalf of one of the above. This argument also draws from Articles 6 and 8 of the database Directive (Directive 96/9/EC) which use the term “lawful user” and which were modelled along the lines of Article 5 (1) of the computer programs Directive.

In the view of the Commission, what was intended by Article 5 (1) and recital 18 was that it should not be possible to prevent by contract a "lawful acquirer" of a program doing any of the restricted acts that were required for the use of the program in accordance with its intended purpose or for correcting errors. It is, however, possible for a contract to include specific provisions that "control" the restricted acts which may be carried out by the user of the computer program.

In the implementations by Austria, Finland and the UK there is no reference to "in the absence of specific contractual provisions”. In the case of the UK it would appear that this is to do with the fact that this Member State applies a comprehensive concept of freedom of contract which goes far beyond the area of copyright exceptions affecting the protection of computer programs. The Austrian and Finnish statutes appear to be inconsistent with Community requirements by providing broader exceptions than permitted under the Directive.

Furthermore, the Portuguese and UK implementations omit "in accordance with its intended purpose". The Commission is not aware that any practical difficulties have arisen as a result of this shortcoming.

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9 District Court of The Hague, summary judgement of 7 July 1995 in case KG 95/591 (Novell, Inc. vs. America Direct B.V.), computerrecht 1995/96, p.281 et seq.
10 Explanatory memorandum, COM (92) 24 final, 13.5.1992, item 8.4.
(b) making of back-up copies (Article 5 (2))

Article 5 (2) provides that the making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.

The provision has been implemented by all Member States.\(^{11}\)

(c) observing, studying or testing the functioning of a program (Article 5 (3))

Under Article 5 (3) the person having a right to use a copy of a computer program shall be entitled, without the authorisation 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 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.

All Member States have complied with these terms except Finland and the UK which both have omitted the phrase "which he is entitled to do". This omission is significant in that the phrase “which he is entitled to do” ensures appropriate limitation of the permitted acts which can be performed by the legitimate user to observe, study or test the functioning of the program.

(d) Private copying

The Directive in Article 5 (1) provides specific exceptions allowing use under certain circumstances. Private copying of computer programs was excluded by the Community legislator from the scope of permissible exceptions from the restricted acts. However, some Member States have not expressly repealed their private copying exceptions. Rightholders consider that this is an important issue and steps should be taken to bring these Member States into alignment with those countries that have repealed their private copying exceptions for computer programs.

So far there is no evidence of major problems in practice in this area and no formal complaints have been received. However the situation does appear to demonstrate some legal uncertainty and may need further investigation.

6. Decompilation (Article 6)

Generally speaking this is the Article implemented to the fullest extent by the Member States. Most implementations are verbatim or near verbatim. However, Article 6 (3) concerning the limitation of the decompilation exception has been omitted in six Member States (Austria, Denmark, Finland, Netherlands, Sweden and UK). This limitation is important because it stems from the Berne Convention's "three steps test" (originating in Article 9(2) Berne Convention). Under the Directive, this limitation ensures that the decompilation exception shall not be used in a manner which unreasonably prejudices the rightholder’s legitimate interests or conflicts with a normal exploitation of the computer program. The omission of any such explicit limitation could lead to unreasonable detriment to the rightholder.

In respect of other matters covered by Article 6, the implementations by Portugal, Sweden and the UK are the only ones which do not seem to be wholly consistent with the Directive.

\(^{11}\) Some industry concerns are reflected in § VII.2.
As to the Portuguese implementation it appears that firstly there is no equivalent to Article 6 (1) (c). This omission is serious because in an infringement case a party may need to be able to show that access to parts of a program not required for interoperability was an unauthorised act and therefore infringing. Secondly Article 6 (2) (a) has not been implemented. Contrary to the Directive it is therefore not ruled out that decompiling acts may be used for goals other than to achieve the interoperability of an independently created computer program. Finally, the implementation of the three steps test requirement is by no means fully compliant with the wording of Article 6 (3).

The Swedish implementation is only defective in that the phrase "independently created program" is missing from the transposition of Article 6 (1). It would appear, however, that this omission has a significant effect. The missing element was provided in the Directive to ensure that any decompilation of a target program does not occur before the independently created program exists (even if only in preparatory design material form).

The UK implementation may also be non-conforming in that firstly "lawful user" is used which appears not to include "a person authorised on behalf of the licensee or person having a right to use a copy of the program". Secondly "reproduction of the code and translation, of its form" has been implemented as "expressed in a low level language to convert it into a higher level language", thirdly there is no restriction to "parts" of the decompiled program, the restriction is "to such acts as are necessary to achieve the permitted objective" and finally there is no express implementation of the three steps test under Article 6 (3).

7. Special measures of protection (Article 7)

Article 7 (1) specifies a number of acts against which Member States have to provide "appropriate remedies in accordance with their national legislation". Such acts involve (a) putting into circulation of infringing copies, (b) possession for commercial purposes of infringing copies and (c) putting into circulation, or possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorised removal of technical protection devices.

Article 7 (2) deals with seizure of infringing copies and Article 7 (3) with seizure of means permitting facilitating the unauthorised removal or circumvention of technical protection devices.

A number of Member States (Germany, Greece, Italy, and Portugal) have not transposed every detail of Article 7 although only Greece has not implemented the discretionary provision of Article 7 (3). It would appear that generally speaking this lack of precision has only resulted in minor practical difficulties in the context of law enforcement.

In relation to Article 7 a number of important court decisions have been noted. In a German landmark decision it was ruled that the altering of the programming of a computer program protected with a hardware lock (dongle) in order to remove the program protection constitutes an act of copyright infringement.\(^\text{12}\).

\(^{12}\) Karlsruhe Court of Appeals, [1996] WRP 587; confirmed by Federal Supreme Court (BGH) [1996] CR 737
8. **Term of protection (Article 8)**

Article 8 was repealed by virtue of Article 11 (1) of Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights\(^\text{13}\). Further to Article 1 (1) of the term Directive authors of a literary or artistic work within the meaning of Article 2 of the Berne Convention now benefit from a harmonised copyright term of 70 years post mortem auctoris. This provision also applies in the case of authors of computer programs.

All Member States have complied with the terms of the Directive.

9. **Continued application of other legal provisions (Article 9)**

Article 9 (1) contains a without prejudice clause in relation to other legal provisions affecting computer programs such as legislation on patents, trademarks, unfair competition, trade secrets, semi-conductor products or contracts. Furthermore, it stipulates that any contractual provisions contrary to Article 6 (decompilation) or to the exceptions provided for in Article 5 (2) and (3) shall be null and void.

The failure of the Netherlands and Spain to specifically implement these latter requirements may however be mitigated by these Member States’ concepts in relation to public policy considerations, which are likely to attain the Directive's goal.

A significant number of Member States (Austria, Belgium, Denmark, Finland, France, Italy, Luxembourg, the Netherlands, Sweden and the UK) have refrained from implementing expressis verbis the “without prejudice to other provisions” clause. It is understood, however, that the other legal provisions concerned will continue to apply in such Member States by virtue of the principle of lex specialis. This omission is therefore unlikely to have any negative effect that might be inconsistent with Community requirements.

International software producers have recognised the decompilation requirements of the Directive in their Licensing Agreements. However, there are licence agreements from some US and European sources that are not consistent with Articles 5, 6 and 9 of the Directive. Given the mandatory nature of certain exceptions and 'users rights' set out in the provisions concerned, such contracts may be invalid.

VI. **OVERVIEW OF THE EFFECTS OF IMPLEMENTATION**

1. **Overall satisfaction among interested circles with the basic features of the current regime**

Apart from a number of new developments in the aftermath of the presentation of the Commission proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society\(^\text{14}\), which are discussed below, there is no pressure from interested circles to change the Directive in any substantial way. Without exception the interests interviewed in the context of the 1997 study were of the opinion that the Directive had had a significant harmonising effect by setting standards for the protection of computer programs by copyright as literary works.

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\(^\text{13}\) OJ L 290, 24.11.1993, p. 9  
2. The impact on the computer programs industry

The adoption of the Directive has promoted the computer programs industry in relation to four important points:-

A reduction in piracy (decline throughout Western Europe from an average rate of 78% in 1990 to 36% in 1998)\(^\text{15}\)

An increase in employment (European software industry grew from 19 billion ECU in 1992 to 31 billion in 1997)\(^\text{16}\)

A move towards open systems (see results of the work undertaken by the EU working group on Open Software at http://eu.conecta.it), and

Harmonisation for employee-created computer programs.

3. The impact on third country legislation

The Directive has been used as a model in a significant number of Central and Eastern European States as well as in Hong Kong, the Philippines and Australia.

The Directive appears to provide a similar scope of protection to that provided in the legislation of the Community's major trading partners.

It has been claimed that one specific issue on the scope of copyright protection for computer programs creates some international discrepancies. In the context of the 1997 study it has indeed been noted that the Japanese Copyright Act defines exclusions for "any programming language, rule or algorithm used for making such" computer programs.

The Commission shares the view that there is no reason for extending the exceptions to the scope of protection under the Directive to include programming languages. Under Article 1 (2) of the Directive it is however debatable as to whether rules and algorithms may be included within "principles", particularly if principles covers "procedures, methods of operation or mathematical concepts as such".

Finally, it would appear that there is no pertinent case law under Article 47 (2) of the Japanese Copyright Law which puts Japan in any different position to that of the European Union or the United States.

4. Consequences resulting from other discrepancies in Member States' implementation

Although interested parties were of the opinion that the majority of differences of implementation do not create significant problems for the Single Market, it can be noted that the Member States deviating most from the text of the Directive are those which have joined the European Union after the adoption of the Directive. It would appear that this is a consequence of the lack of involvement of such new Member States in the process that led to the adoption of the Directive.

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\(^{16}\) Price Waterhouse Report
VII. POSSIBLE NEED FOR FURTHER COMMUNITY ACTION

Since the completion of the study in August 1997 the Commission has received various communications from interested circles concerning issues arising both from the implementation of Directive 91/250/EEC and also from further developments since it came into force. Some of these submissions suggest that there is a need for clarifying certain aspects of the Directive. The issues concerned are set out hereafter.

1. The distribution right and communication to the public

The new WIPO Copyright Treaty (WCT) of December 1996 provides for authors of literary and artistic works including computer programs the exclusive right of authorising any communication to the public by wire or wireless means, including making available (Article 4 in conjunction with Article 8 WCT).

On the basis of such new international rules it has been suggested that an express communication to the public right (including a right of making available) be added to the bundle of restricted acts under Article 4 of the Directive. In this context it has also been proposed by parts of the computer programs industry to clarify the scope of the exhaustion principle.

As to the exhaustion of copyright it must be borne in mind that under the Directive Community exhaustion only applies to the sale of copies i.e. goods, whereas supply through on-line services does not entail exhaustion.\(^{17}\)

Furthermore, the Commission notes that by contrast with the other Community acquis concerning the distribution right Article 4 (c) of the Directive refers to "any form" of distribution "to the public" of a copyright computer program. This could be interpreted as meaning that the distribution right under Directive 91/250/EEC is not limited to the distribution of tangible copies of a computer program on floppy disks.

Whilst Article 4 (c) is capable of such a wide interpretation, the author's exclusive right of authorising any making available to the public of the work in such a way that members of the public may access it from a place and at a time individually chosen by them (cf. Article 8 WCT) is currently not provided for. Under these circumstances the need for the Community to ensure compliance with WCT requirements by providing for complementary rules on making available of computer programs is being taken into account in the proposal for a Directive on copyright and related rights in the Information Society.

2. Back-up copies

Industry has expressed concern that the back-up copy provisions (Article 5 (2) of the Directive) are being illegally exploited in that so-called "back-up" copies have been made and sold on the open market. Apparently even videograms, compilations on a CD-ROM and certain other "multimedia applications" integrating some features of "software" have been subject to unauthorised acts of reproduction by individuals claiming that they were entitled to do so.

\(^{17}\) Answer by Commissioner Monti to Oral Question H-0436/95 by Arthur Newens, MEP (11.7.1995), Debates of the EP (EN ed.) No. 466, p. 174
In this context the use of the phrase "means the sole intended purpose of which is to facilitate unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program" under Article 7 (1) (c) has created problems for computer games manufacturers in that action has not been taken against the providers of protection defeating devices and programs because the sole intended purpose of these devices / programs has been disguised in the advertising literature as for use for back-up purposes.

In the first place it should be noted, however, that under Directive 91/250/EEC the notion "back-up" is intended to mean "for security reasons". Furthermore, the Commission is of the opinion that it results from the wording and the objective of Article 5 (2) that only "a" (= one) copy is permitted and that the purpose may not be other than as a "back-up". The back-up copy exception shall merely ensure that normal use of the program can continue in the event of loss or defect of the original. It must indeed be "necessary" for the use of the computer program. Where there is no or no longer a right to use a computer program the exception does not apply. The making of private copies for unauthorised use is not permitted but constitutes an act of software piracy.

Despite a certain level of confusion in a number of Member States on the exact scope of the back-up copy exception, in general national jurisprudence has proved able to deal effectively with such illegal activity. In addition, rightholders may rely upon other pertinent provisions of Community law such as Directive 96/9/EC on the legal protection of databases in order to combat acts of multimedia piracy. Finally, a further strengthening of the framework for the enforcement of intellectual property rights may be anticipated as a result of the consultation process launched with the Commission’s Green Paper "Combating Counterfeiting and Piracy in the Single Market".

3. Remedies

On the issue of remedies, the Directive recognises the importance of copyright remedies but is only general in its requirements. Various interests that had been consulted believe that there is a need for a broad-based set of minimum standards and procedures for copyright remedies to be based on the TRIPs Agreement. They consider this to be particularly important in that such a set of standards and procedures would, they believe, be as influential as the Directive has been.

Issues of overall harmonisation of copyright remedies and combating copyright piracy are being addressed in the context of the pending proposal for a Directive on copyright and related rights in the Information Society and the follow-up to the Green Paper "Combating Counterfeiting and Piracy in the Internal Market".

4. Technical devices

It has been claimed by a number of interested circles that Article 7 of the Directive dealing with remedies must be brought in line with the new WIPO Copyright Treaty. According to this view there may also be some divergence between the coverage of Article 7(c) of Directive 91/250/EEC and Article 6 of the proposal for a Directive on certain aspects of copyright and related rights in the Information Society that suggests provisions on obligations as to technological measures that go into somewhat greater detail.

18 OJ L 77, 27.3.1996, p. 20
19 COM (98) 569 final
Under Article 11 WCT Contracting Parties of this instrument shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under the WCT or the Berne Convention and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.

Article 7 (1) (a), (b) and (c), (2) and (3) of the computer programs Directive provide for 'special measures of protection' that require Community Member States to prescribe appropriate remedies against certain types of acts.

It should be borne in mind that the WCT has not yet entered into force and will only bind its signatories from expiration of three months from the date on which 30 instruments of ratification or accession have been deposited. Finally, the legislative process concerning the proposal for a Directive on copyright and related rights in the Information Society is still ongoing. It is therefore premature to consider amending Directive 91/250/EEC until the final form of Article 6 of the Information Society Directive has been established. Whether there will be any need to adapt Article 7 of the computer programs Directive will have to be assessed at a later stage.

VIII. RELATED COMMUNITY INITIATIVES

1. Patent protection for software-related inventions

The Commission has noted that there is a misconception among certain circles that copyright is the only available regime for protecting computer programs. It would therefore recall Article 9 (1) (1) of the Directive according to which other legal provisions such as rules concerning patent rights and other intellectual property rights remain unaffected.

The necessity to create transparency and legal certainty with respect to patent protection of software-related inventions is being actively discussed in the follow-up to the Green Paper on Innovation and the Green Paper on the Community Patent:

"The European Parliament supported the patentability of computer programs, on condition that the product in question meets the conditions of novelty and industrial application of a technical invention, as is the case with our economic partners at international level, in particular the United States and Japan. The Commission shares this analysis and suggests action on two fronts.

On the one hand, to fully ensure the achievement and operation of the internal market in this field, the Commission will present, as soon as possible, a draft Directive based on Article 95 (ex Article 100A) of the EC Treaty aimed at harmonising Member States’ legislation on the patentability of computer programs. This Directive should ensure uniform application and interpretation of the new rules on the patentability of computer programs throughout the whole Community. In this context, the parallel application of copyright and patent rights in the area of computer programs does not pose any particular difficulties, owing to the specific material covered by the two types of rights. The draft Directive will have to closely examine the question of possible exceptions to the general system covering the patentability of computer programs.

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20 COM (1999) 42 final
In parallel with this legal action, the contracting states to the Munich Convention will need to take steps to modify Article 52(2) (c) of the European Patent Convention, in particular to withdraw computer programs from the list of non-patentable inventions. This is necessary to ensure harmony between the work carried out at Community level and that undertaken in the framework of the Munich Convention.

In addition, all patent offices should improve the dissemination of information aimed at enterprises engaged in the software sector, and in particular SMEs, in order to make them aware of the economic advantages which can be derived from appropriate use of the patent system.”

One aim of patent protection would be to cover the underlying ideas and principles of a computer program, which according to recital 14 of Directive 91/250/EEC can never be covered by copyright. The means of ensuring that copyright in computer programs remains nevertheless unaffected will be a matter for any future patent legislation.

2. Government use of computer programs

While the implementation of the Directive has clearly entailed a decrease in software piracy rates, industry figures suggest that piracy is still significant and indeed may even take place in publicly funded organisations, which in some cases are among the largest users of commercial software. A number of possible actions to combat piracy within the EU have been proposed in the Commission’s Green Paper “Combating Counterfeiting and Piracy in the Internal Market”. Moreover it has already been agreed under the TEP Action Plan that the EU and U.S. will examine ways and possibly adopt measures to ensure that government agencies make use only of authorised software. In this connection it is noted that some Member States have issued policy statements on the use of authorised software in government establishments, as has the U.S.21 Others may wish to consider publicising the measures they are taking in this regard, and the Commission services would be interested to hear of such activities, with a view to possible follow-up at Community level in the context of the Green Paper on Counterfeiting and Piracy.

IX. FINAL CONCLUSIONS

Member States' implementation is overall satisfactory but not always as good as expected. In a number of specific cases it may be necessary for the Commission to open ex officio infringement proceedings under Article 226 of the Treaty (ex Article 169 ECT).

However the effects of implementation actually achieved are beneficial.

Areas of non-harmonisation such as the absence of a binding definition of 'computer programs' present only minor difficulties and do not justify action at Community level.

In common with interested circles who in 1998 issued a joint statement in this regard, the Commission considers that experience to date does not lead to the view that the substantive copyright provisions of the Directive should be revisited at this time. The Directive and in particular the decompilation provisions were the result of intensive debate among all interested circles and the balance found then appears to be still valid today; indeed the

21 Executive order of 1.10.1998 “Computer Software Piracy”
Community institutions have been urged "not to re-open the floodgate of debate on this Directive".

Under these circumstances and in the light of the favourable results of the review, the Commission does not see fit to undertake any new initiatives with a view to proposing any amendments to Directive 91/250/EEC at this stage. However, this is not to rule out the possibility of re-examining certain questions at a later stage depending on the progress of other ongoing initiatives, in particular those concerning WIPO Copyright Treaty implementation.