

## II

*(Preparatory Acts)*

## COMMISSION

**Amended proposal for a Council Directive on the legal protection of computer programs***COM(90) 509 final. — SYN 183**(Submitted by the Commission pursuant to Article 149 (3) of the EEC Treaty on 18 October 1990)*

(90/C 320/11)

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

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 THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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 THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Unchanged

Having regard to the proposal from the Commission,

Unchanged

In cooperation with the European Parliament,

Unchanged

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

Unchanged

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;

Unchanged

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;

Unchanged

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;

Unchanged

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;

Unchanged

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;

Unchanged

## ORIGINAL PROPOSAL

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:

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.

## AMENDED PROPOSAL

Unchanged

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;

Unchanged

Unchanged

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;

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

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

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;

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 50 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;

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;

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

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 insofar as they satisfy the conditions laid down in 4 (a) above.

*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.

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 I

*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.

Deleted

*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.

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

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.

Unchanged

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

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.

Deleted

*Article 3**Article 3***Beneficiaries of protection****Beneficiaries of protection**

1. Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works.

Unchanged

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.

Unchanged

*Article 4**Article 4***Restricted acts****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:

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. 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;

(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 adaptation of a computer program;

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

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

(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.

Unchanged

*Article 5**Article 5***Exceptions to the restricted acts****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, in so far 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.

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.

3. The making of a back-up copy by a person having a right to use the program may not be prevented by contract in so far as it is necessary for that use.

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.

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.

ORIGINAL PROPOSAL

AMENDED PROPOSAL

*Article 5a***Amendment to the form of the code**

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 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 point (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

## AMENDED PROPOSAL

*Article 6**Article 6***Secondary infringement****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.

Unchanged

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.

Unchanged

*Article 7**Article 7***Term of protection****Term of protection**

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

Protection shall be granted for the life of the author and for 50 years after his death; where the computer program is an anonymous or pseudonymous work, the term of protection shall be 50 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.

## CHAPTER II

## CHAPTER II

*Article 8**Article 8***Continued application of other legal provisions****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.

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 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 without prejudice to any acts concluded and rights acquired before that date.

ORIGINAL PROPOSAL	AMENDED PROPOSAL
CHAPTER III	CHAPTER III
<i>Article 9</i>	<i>Article 9</i>
<b>Final provisions</b>	<b>Final provisions</b>
1. Member States shall bring into force the laws, regulations or administrative provisions needed in order to transpose this Directive by 1 January 1993.	Unchanged
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.	2. Member States shall communicate to the Commission the provisions of national law which they adopt in order to transpose this Directive.
<i>Article 10</i>	<i>Article 10</i>
This Directive is addressed to the Member States.	Unchanged

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