



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.1.2008
COM(2008) 23 final

2008/0019 (COD)

Proposal for a

**DIRECTIVE .../.../EC OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL**

on the legal protection of computer programs

(Codified version)

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. In the context of a people's Europe, the Commission attaches great importance to simplifying and clarifying Community law so as to make it clearer and more accessible to the ordinary citizen, thus giving him new opportunities and the chance to make use of the specific rights it gives him.

This aim cannot be achieved so long as numerous provisions that have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original instrument and partly in later amending ones. Considerable research work, comparing many different instruments, is thus needed to identify the current rules.

For this reason a codification of rules that have frequently been amended is also essential if Community law is to be clear and transparent.

2. On 1 April 1987 the Commission therefore decided¹ to instruct its staff that all legislative acts should be codified after no more than ten amendments, stressing that this is a minimum requirement and that departments should endeavour to codify at even shorter intervals the texts for which they are responsible, to ensure that the Community rules are clear and readily understandable.

3. The Conclusions of the Presidency of the Edinburgh European Council (December 1992) confirmed this², stressing the importance of codification as it offers certainty as to the law applicable to a given matter at a given time.

Codification must be undertaken in full compliance with the normal Community legislative procedure.

Given that no changes of substance may be made to the instruments affected by codification, the European Parliament, the Council and the Commission have agreed, by an interinstitutional agreement dated 20 December 1994, that an accelerated procedure may be used for the fast-track adoption of codification instruments.

4. The purpose of this proposal is to undertake a codification of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs³. The new Directive will supersede the various acts incorporated in it⁴; this proposal fully preserves the content of the acts being codified and hence does no more than bring them together with only such formal amendments as are required by the codification exercise itself.

¹ COM(87) 868 PV.

² See Annex 3 to Part A of the Conclusions.

³ Carried out pursuant to the Communication from the Commission to the European Parliament and the Council – Codification of the Acquis communautaire, COM(2001) 645 final.

⁴ See Annex I, Part A of this proposal.

5. The codification proposal was drawn up on the basis of a preliminary consolidation, in all official languages, of Directive 91/250/EEC and the instrument amending it, carried out by the Office for Official Publications of the European Communities, by means of a data-processing system. Where the Articles have been given new numbers, the correlation between the old and the new numbers is shown in a table contained in Annex II to the codified Directive.

Proposal for a

**DIRECTIVE .../.../EC OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL**

of [...]

on the legal protection of computer programs

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article  95  thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty²,

Whereas:



- (1) Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs³ has been substantially amended⁴. In the interests of clarity and rationality the said Directive should be codified.

↓ 91/250/EEC Recital 2

- (2) 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.

¹ OJ C [...], [...], p. [...].

² OJ C [...], [...], p. [...].

³ OJ L 122, 17.5.1991, p. 42. Directive as amended by Directive 93/98/EEC (OJ L 290, 24.11.1993, p. 9).

⁴ See Annex I, Part A.

↓ 91/250/EEC Recital 3

- (3) 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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↓ 91/250/EEC Recital 4 (adapted)

- (4) 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 ☒ internal ☒ market as regards computer programs .
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↓ 91/250/EEC Recital 5 (adapted)

- (5) Existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the ☒ internal ☒ market to a substantial degree need not be removed or prevented from arising.
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↓ 91/250/EEC Recital 6

- (6) 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 authorise or prohibit certain acts and for how long the protection should apply.
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↓ 91/250/EEC Recital 7

- (7) For the purpose of this Directive, the term “computer program” shall include programs in any form, including those which are incorporated into hardware. 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.
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↓ 91/250/EEC Recital 8

- (8) 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.
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↓ 91/250/EEC Recital 9

- (9) The Community is fully committed to the promotion of international standardisation.

↓ 91/250/EEC Recitals 10, 11 and 12

- (10) 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. The parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as “interfaces”. This functional interconnection and interaction is generally known as “interoperability”; such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged.

↓ 91/250/EEC Recitals 13, 14 and 15

- (11) 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. 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. 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.

↓ 91/250/EEC Recital 16

- (12) 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.

↓ 91/250/EEC Recitals 17 and 18 (adapted)
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- (13) The exclusive rights of the author to prevent the unauthorised reproduction of his work ☒ should ☐ 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. 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. 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.

↓ 91/250/EEC Recital 19

- (14) 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.
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↓ 91/250/EEC Recitals 20, 21, 22, 23 and 24 (adapted)

- (15) 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. Nevertheless, circumstances may exist when such a reproduction of the code and translation of its form are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs. 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 authorisation of the rightholder. 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. Such an exception to the author's exclusive rights may not be used in a way which prejudices the legitimate interests of the right holder or which conflicts with a normal exploitation of the program.
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↓ 91/250/EEC Recital 25
(adapted)

- (16) In accordance with the provisions of ☒ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights⁵ ☒, the term of protection should be the life of the author and ☒ seventy ☒ 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, ☒ seventy ☒ years from the first of January of the year following the year in which the work is ☒ lawfully made available to the public ☒.
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↓ 91/250/EEC Recital 26
(adapted)

- (17) 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 ☒ the provisions of this Directive laid down in respect of decompilation ☒ or to the exceptions provided for ☒ by this Directive with regard to the making of a back-up copy or to observation, study or testing of the functioning of a program ☒ should be null and void.

⁵ OJ L 372, 27.12.2006, p. 12.

↓ 91/250/EEC Recital 27
(adapted)

- (18) The provisions of this Directive are without prejudice to the application of the competition rules under Articles 81 and 82 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive.

↓ 91/250/EEC Recital 28

- (19) 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 standardisation in the field of information technology and telecommunication.

↓ 91/250/EEC Recital 29

- (20) This Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive.

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- (21) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B,

↓ 91/250/EEC

HAVE 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.

↓ 91/250/EEC (adapted)

⊗ 4. 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. ⊗

↓ 91/250/EEC

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 recognised 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

1. 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 authorise:

- (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 authorisation 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.

2. 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(1)(a) and (b) 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 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 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.

Article 6

Decompilation

1. The authorisation of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4(1)(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 authorised to do so;
 - (b) the information necessary to achieve interoperability has not previously been readily 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.

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

↓ 91/250/EEC (adapted)

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 ☒ following ☒ acts :

↓ 91/250/EEC

- (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 unauthorised 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

Continued application of other legal provisions

↓ 91/250/EEC (adapted)

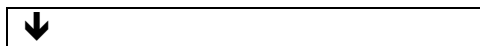
The provisions of this Directive shall be without prejudice to any other legal provisions such as those concerning patent rights, trade-marks, unfair competition, trade secrets, protection of semi-conductor products or the law of contract.

Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) shall be null and void.

Article 9

⊠ Communication ⊠

Member States shall communicate to the Commission the provisions of national law ⊠ adopted ⊠ in the field governed by this Directive.



Article 10

Repeal

Directive 91/250/EEC, as amended by the Directive indicated in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 11

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

↓ 91/250/EEC (adapted)

Article 12

⊠ Addressees ⊠

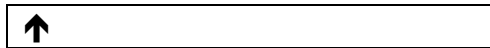
↓ 91/250/EEC

This Directive is addressed to the Member States.

Done at Brussels, [...]

For the European Parliament
The President
[...]

For the Council
The President
[...]



ANNEX I

Part A

Repealed Directive with its amendment (referred to in Article 10)

Council Directive 91/250/EEC
(OJ L 122, 17.5.1991, p. 42)

Council Directive 93/98/EEC
(OJ L 290, 24.11.1993, p. 9)

Article 11(1) only

Part B

List of time-limits for transposition into national law (referred to in Article 10)

Directive	Time-limit for transposition
91/250/EEC	31 December 1992
93/98/EEC	30 June 1995

ANNEX II

CORRELATION TABLE

Directive 91/250/EEC	This Directive
Article 1(1), (2) and (3)	Article 1(1), (2) and (3)
Article 2(1), first sentence	Article 2(1), first subparagraph
Article 2(1), second sentence	Article 2(1), second subparagraph
Article 2(2) and (3)	Article 2(2) and (3)
Article 3	Article 3
Article 4, introductory words	Article 4(1), introductory words
Article 4(a)	Article 4(1)(a)
Article 4(b)	Article 4(1)(b)
Article 4(c), first sentence	Article 4(1)(c)
Article 4(c), second sentence	Article 4(2)
Articles 5, 6 and 7	Articles 5, 6 and 7
Article 9(1), first sentence	Article 8, first paragraph
Article 9(1), second sentence	Article 8, second paragraph
Article 9(2)	Article 1(4)
Article 10(1)	-
Article 10(2)	Article 9
-	Article 10
-	Article 11
Article 11	Article 12
-	Annex I
-	Annex II