

COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 18 October 1990

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 a 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 licensee 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 licensee 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.

Original Proposal

Amended Proposal

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Original Proposal

Amended Proposal

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 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;

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

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

unchanged

Original Proposal

Amended Proposal

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; 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;

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

unchanged

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;

unchanged

Original Proposal

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

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, 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;

Original Proposal

Amended Proposal

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

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;

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

ORIGINAL PROPOSAL

AMENDED PROPOSAL

CHAPTER 1

CHAPTER 1

Article 1

Article 1

Object of protection

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.

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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.

Deleted

ORIGINAL PROPOSAL

AMENDED PROPOSAL

Article 2

Article 2

Authorship of programs

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.

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 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

ORIGINAL PROPOSAL

AMENDED PROPOSAL

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

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

AMENDED PROPOSAL

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 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.

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 acquiror 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.

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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.

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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 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 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

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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 fifty years from the date of creation.

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

AMENDED PROPOSAL

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 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)

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.

ORIGINAL PROPOSAL

AMENDED PROPOSAL

CHAPTER III

CHAPTER III

Article 9

Article 9

Final provisions

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.

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.

Article 10

Article 10

This Directive is addressed to the Member States.

Unchanged

Done at Brussels For the Council

The President

COM(90) 509 final

DOCUMENTS

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