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****II**

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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A Series: Reports - B Series: Motions for Resolutions, Oral Questions - C Series: Documents received from other Institutions (e.g. Consultations)

* = Consultation procedure requiring a single reading

****II** = Cooperation procedure (second reading) which requires the votes of a majority of the current Members of Parliament for rejection or amendment

****I** = Cooperation procedure (first reading)

******* = Parliamentary assent which requires the votes of a majority of the current Members of Parliament

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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)), Reymann, 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

² OJ No. C 320, 20.12.1990, pp. 22-30

(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;

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 acts necessary to maintain the program, may not be prohibited by contract; whereas, notwithstanding contractual provision to the contrary, 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, nevertheless, circumstances may exist when acts listed in Article 4(a) and (b) are indispensable to obtain the necessary information to the creation or operation of interoperable programs and whereas such programs may be connected to or enter into competition with a protected program;

(Amendment No. 5)

Recital No. 22

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;

(Amendment No. 6)

Article 5 paragraph 1

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.

(Amendment No. 7)

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.

1. The authorization of the rightholder shall not be required for the acts listed in Article 4(a) and (b) when such acts are indispensable to obtain the necessary information to the creation or operation of interoperable programs or hardware devices, 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.

(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.

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 a computer program or hardware device;

(b) to be given to others, except when necessary for the interoperability of a computer program; or hardware device; 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 or conflicts with a normal exploitation of the computer program.

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 and 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.