

# Letter of MEPs to Barroso

<http://swpat.ffii.org/letters/cec0503/index.en.html>

Members

english version 2005/03/02 by Members\*

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The undersigned ask Barroso to restart the directive and to transfer responsibility for the dossier to another Directorate, such as DG Information Society.

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Dear Mr. President

Following the votes of the JURI Committee on February 2, the Conference of Presidents on February 17, and Parliament in plenary session on February 24, the President of the European Parliament asked the Commission to review the process of producing a directive on software patents. The following day you responded simply that the Commission did not intend to offer a new proposal. We take note of the speed of the Commissions response, its failure to acknowledge the depth of the Parliaments interest in the subject, and its failure to offer any explanation for its refusal of the Parliaments request.

We are concerned that the Commissions terse response is further evidence of fundamental problems in how this directive was conceived and developed. The roots of the directive as presented in the 1997 Green Paper and the 1999 Communication to the Parliament reflect a strong predisposition toward following the U.S. model — as does the choice of title, “Computer-Implemented Inventions”.

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\*<http://lists.ffii.org/mailman/listinfo/traduk>

In little more than a page in either document, DG MARKT approached this problem from the perspective of a patent law constituency who naturally preferred not to have the scope of their practice constrained in any significant way. DG MARKT appears to have failed to grasp the enormity of the stakes in a timely manner. Important economic aspects, such as transaction costs, licensing practices, opportunistic behavior, liability, and insurance cost, were either summarily dismissed or simply not discussed.

In this case, there have been a number of incidents that have at least stirred concerns about the appearance of impropriety. These include:

- Citation in the Directive of undocumented assertions on the U.S. software industry from an internally commissioned study
- Premature circulation of a directive draft with metadata indicating inappropriate access and authorship by a trade association
- A study on how patent offices should promote the patent system – awarded to a company that holds a uniquely large patent portfolio and a reputation for being an especially ardent proponent of software patents

Having committed to the position of the directive, it is understandable that DG MARKT would be reluctant to rethink the issues and thereby acknowledge the deficiencies of the earlier process. Indeed, we not believe that DG MARKT, having brought us to the present confrontation, can participate objectively in any decision to restart the process. There are at least five other DGs with a commensurate interest in the far-reaching implications of software patents and with expertise to contribute that was not evident in the Commissions directive. They and their respective commissioners should be given a proper opportunity to consider a restart in consultation with the Parliament and with each other without the burden of special pleading from DG MARKT. DG MARKT's views should be heard but publicly rather than behind closed doors. Its familiarity with patent law and the patent community's interests should be taken into account but as clearly identified input into a policy decision that, as public debate has demonstrated, is too important to be left to the lawyers.

We also cannot avoid stating that commissioner McCreevy himself is believed to have a stake in the issue insofar as he helped the Irish Presidency engineer the Council's political agreement of May 18, 2004. This naturally raises questions about his ability to consider and effectuate a restart in a completely open-minded manner. Given the sensitivity of this issue among software developers and adjacent areas of the economy, it is impossible to overlook Ireland's unique stake in this issue. By offering lower tax rates than the rest of Europe, Ireland has attracted the distribution operations of major U.S. vendors and become the gateway through which software is imported into Europe, successfully making up in tax volume what it loses from a lower tax rate. Microsoft's strong presence in Ireland, evident in its official sponsorship of the Irish Presidency, does not lend confidence to a belief that Ireland's Commissioner can handle this delicate matter with the impartiality and perspective it requires.

Accordingly, we ask you to reconsider your intentions in due regard for the Parliaments request, a request which has not been made lightly. We expect more than a statement of negative intent in return. Of the three bodies, only the Commission has the resources to investigate and analyze an issue of this magnitude with the care and diligence it deserves.

The debate over software patents is not just an issue of a single industry or profession. Software provides the essential infrastructure and tools for generating, managing, communicating and using knowledge in all sectors of the economy. The ground rules for innovation and competition for software deserve more attention and perspective than the Commission has provided to date. The consensus for copyright is heartening, but it shows up the great danger in the deep divisions over patents and the possible consequences of getting the law wrong. The cost may be measured not only in hundreds of billions of Euros over time but in Europes role in the worlds market for ideas and influence. The impatience of one side of the debate to resolve the issue in their favor should not be an excuse for the Commission to abdicate its responsibility to develop sound policy with due time, attention, and resources.

In the interests of a full and proper restart on this important directive and to ensure maximum public trust in the transparency and accountability of European institutions, we respectfully ask that you remove DG MARKT from the internal leadership in reconsidering the restart decision and any further action in this matter.