IRISH FREE SOFTWARE ORGANISATION
Promoting and Defending Free Software in Ireland

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European Patent Directive (2002/0047 COM (COD))

Dear Mr Brian Crowley, MEP

We are writing to you on behalf of the Irish Free Software Organisation regarding Directive COM 2002/0047 (COD) "On the Patentability of Computer-Implemented Inventions". On February 2nd, JURI will vote on restarting this directive and returning it to a first reading. We request that you support this restart on the grounds that the Council's text no longer enjoys a qualified majority, and that external factors have changed significantly. At issue is that the Council's text permits software ideas to be patented. This outcome is particularly concerning since it contradicts the stated aim of most Council members.

The aim of this directive was to harmonise and unify the criteria for patentability across Europe. Regrettably, the Commission produced an unclear text. For instance, the text repeatedly relies on the undefined terms "technical", "industrial", and even "invention". These terms were defined in the Parliament's text, but the definitions were removed by the Council. Such ambiguity would lead to software idea patents being granted.

A second common problem with the text are the clauses of the form: "[A] is not patentable, unless [condition B] is met." Where, upon scrutiny, condition B is always met."

On September 24th, 2003, after 19 months of discussion, the European Parliament voted on this directive. The numerous ambiguities were resolved and appropriate measures were added to ensure that software ideas could not be patented. Other useful provisions of this draft assured the right to develop interoperable software packages and stipulated that data processing is not a "field of technology".

On May 18th, 2004, the Competitiveness Council and removed almost all of the Parliament's amendments. Definitions of terms were removed, and unclear or confusing clauses introduced. The result was much like the Commission's version of the directive. The new draft claims to exclude software from patentability, but it relies on meaningless distinctions, like that between "software as such" and "software which has a technical effect".

Although this draft has been described as a "political compromise" it no longer enjoys even a qualified majority following:

- Poland's clarification of its lack of support for software patents (16 November)
- The Dutch Parliament's resolution requiring their representative to withdraw support for the draft (1 July)
- A joint motion of all groups of the German Parliament (30 November)
- A readjustment of EU voting weights that further reduces support for the draft (1 November)

Restarting the legislative process offers the Council a way for the EU to avoid adopting this deeply flawed directive without any loss of face for the Council and supports democracy in the EU.

The legal basis on which this restart can be requested is rule 55.1 of the Parliament's Rules of Procedure which allow the Parliament to request a renewed referral of the Commission's proposal under certain circumstances - for instance, under a change of relevant circumstances, or when new elections have been held. This action must be taken now before the Council moves this text to the second reading, thus pressuring members of JURI to stay quiet.

IFSO believes that the circumstances not only permit but demand a restart of the process so that the the European Parliament can fix this directive once again. The council will also be given a new first reading as part of this process. Due to the changed circumstances around this issue, we also believe that the current unclear draft would not reach a qualified majority under the present council.

Some specific circumstances that support the restart include:

- It is clearer that software patents cause clear harm to SMEs in competitive bids. To cite but two: the city of administration Munich attempt to to migrate to GNU/Linux identified software patents as a specific danger and advocated special clauses in the contracts for such bidders. The UK School Authority use of Bromcom equipment resulted in the advice not to consider taking equipment from other manufacturers because of a patent held by Bromcom.
- Increased recognition of the unmanageable risks associated with software patents, and the corresponding need for patent insurance, as documented in CJA report for DG MARKT.
- Advice from important commercial entities, most notably Deutsche Bank, PriceWaterhouseCooper and the Kiel Institute, all of whom have identified many harmful aspects to the current proposals and have urged the EU to change direction.
- Microsoft has begun asking for licencing fees for Software Patents, and has announced their "outbound licensing" program, clearly indicating their intent.

- The changed voting circumstances in the EU: Poland, The Netherlands, and Germany no longer support the directive. A circumstance which, along with the changed Voting weights in the EU, means that the current proposal no longer enjoys a qualified majority.
- The USA Federal Trade Commissions wholly negative report on the USA's experience in allowing software ideas to be patented .

The directive would have drastic consequences for Europe's indigenous software industry and its software writers, and we believe it is unacceptable that such a controversial proposal should be put forward for adoption without discussion.

Yours sincerely,

Malcolm Tyrrell
(on behalf of the committee)