International Chamber of Commerce
The world business organization

26 AUGUST 2003

PROPOSAL FOR A DIRECTIVE ON THE PATENTABILITY OF COMPUTER-IMPLEMENTED INVENTIONS

JOINT STATEMENT BY INDUSTRY ON THE REPORT OF THE EUROPEAN PARLIAMENT'S LEGAL AFFAIRS COMMITTEE

Dear Member of the European Parliament,

A very broad platform of trade associations and industry groups, including UNICE, ICC (International Chamber of Commerce), EICTA, ICRT, BDI, the Confederation of Swedish Enterprise, BITKOM, INTELLECT, SEDISI and AGORIA welcomes the support which the Committee of Legal Affairs and the Internal Market, has expressed for a directive on patent protection for computer-implemented inventions. Most of the amendments proposed in its report will help to clarify the legal situation and promote innovation in Europe.

However, we have great concern with Amendment 20 which would seriously undermine the benefits of the directive and result in damaging consequences for holders of patents in Europe.

The undersigned organisations have previously called upon the Parliament to support a directive which reflects the following principles:

1. The Directive should confirm the current scope of patentability and ensure that the European practice which has served Europe well is not disrupted. Legal certainty in patent protection is a precondition for the industry to invest in software development. Such certainty needs to build on the existing interpretations of the legal framework. By integrating the long-standing approach of the European Patent Office, the directive should codify existing rules and preclude the patentability of "pure" business methods (i.e., business methods which make no technical contribution). The use of the precise definitions and conditions developed by the jurisprudence is the only way to prevent an evolution towards an overly liberal treatment, which has led to problems in certain countries outside of Europe. The EPO's rigorous examination practices will be maintained by this directive and should prevent many of the problems seen in other parts of the world with so-called "trivial" patents.

With the notable exception of Amendment 20, the most amendments proposed in the Legal Affairs Committee Report would embrace existing EPO practice. Amendment 20, however, would create major new exceptions in European patent law and bring into question the enforceability of existing and future patents. Moreover, Amendment 20 is contrary to the EU's and member states' obligations under Articles 27(1) and 30 of the WTO TRIPs Agreement.

2. The Directive should safeguard the possibility for software developers to develop interoperable systems. Amendments 13 and 19 of the Report correctly maintain the existing possibilities of software developers to engage in studying and reverse engineering of computer programs by clarifying that acts falling within the relevant exceptions to the copyright protection of programs are not affected by patent protection. We firmly support these interoperability provisions.

Amendment 20, however, goes far beyond existing provisions in EU Directive 91/250/EEC to promote interoperability. It creates new and unnecessary EU patent law, addressing potential problems of interoperability and abuse of dominant positions which are already addressed through EU competition law.

3. The Directive should provide for a mechanism that ensures that open source software development will not be negatively affected. Amendment 21 empowers the European Commission to monitor the impact of the Directive on innovation and competition, and in particular on small and medium businesses. This mechanism will guarantee against any adverse effect of the Directive on the community of independent developers, in particular on those that are contributing to the development of open source software products.

4. The Directive should permit to apply for product claims as it is now allowed by the case law. Article 5 has been amended by the Legal Affairs Committee Report (Amendment 18) to allow program product claims in line with the existing practice of the European Patent Office and of Member States' national courts. This guarantees the right of enforcement of patent protection for computer- implemented inventions. The original Commission's proposal would have had the effect that a product claim could have only been enforced when a user implemented the program with some hardware or apparatus. It would have been contradictory to provide for a right that is not easily enforceable against the suppliers (or distributors), which cause (or participate in) the infringement. Curiously, a patent owner would have been able to stop the supplier of a software product if the supplier is in the same Member State where the software was used but not if the software product was exported for use in a different Member State. The Commission proposal, if not amended, would have been a serious drawback in introducing a cross-border anomaly and distortion in the internal market. The Commission's approach would also not have been consistent with the stated objective in that the Directive should not diverge from the existing practice.

The associations below represent a broad cross section of Europe's most innovative industries. We are concerned that adoption of the Legal Affairs Committee Report on computer implemented inventions with Amendment 20 would be highly disruptive to current European patent practice and damage the interest of Europe's innovators. Amendment 20 undermines many of the benefits of the proposed directive and the other positive amendments proposed by the Committee. We ask the Parliament to delete Amendment 20 prior to adoption of the Legal Affairs Committee Report at the September plenary session.

Philippe de Buck,
UNICE Secretary General

Urho Ilmonen,
Chair ICC Commission
on Intellectual Property

Tony Graziano,
Acting EICTA Director General

John Stephens,
ICRT Chairman

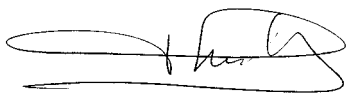
Klaus Bräunig
BDI - Member of the Executive Board
and Delegate for Small and Medium-
Sized Enterprises

Göran Tunhammar,
Director General,
Confederation of Swedish Enterprise

Dr. Bernhard Rohleder,
Director General BITKOM

Anthony Parish,
INTELLECT rep. on the
EICTA Board

Joaquin Oliveras
SEDISI Director General



Christian Vanhuffel,
Director AGORIA