Florian Mueller

NO LOBBYISTS AS SUCH

The War over Software Patents in the European Union

Copy-edited by
Wendy M. Grossman

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Author (and the person responsible under German media law):
Florian Mueller (fmueller.nosoftwarepatents@gmail.com)

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Introduction

On July 6, 2005, the world of politics turned upside down. Big money was dealt a blow.

The European Parliament threw out legislation that the world's largest IT companies badly wanted. Under the pretext of protecting inventors against plagiarists, it would have handed those giants sweeping powers over Europe's high-tech markets. An electronic roll-call vote thwarted the wicked plan in a matter of seconds, but that decision was preceded by years of intense fighting.

After spending many millions of dollars, euros and pounds, companies like IBM, Microsoft, Siemens and Nokia did not get their way. They were beaten at their own game – a game called lobbying – by our group of mostly young people, sparsely funded and formally untrained "freedom fighters" who staged a spirited resistance. Many of us seemed utterly unlike traditional lobbyists and yet we proved effective in the political arena.

Two weeks later, I decided to write this book in an effort to capture and convey what we went through: the ups and downs, the moments of joy, the setbacks we suffered, and the high level of intensity we were working under. I wanted to give credit to those who made this miracle happen, and to share my experiences with you.

I hope you will enjoy this opportunity to read what lobbying is all about: what it's like to persuade politicians, to make them aware of your concerns, to help them help you, and to make it unpleasant for them to act against you. You will get a look behind the scenes as I tell you how we took to the streets, walked into the offices of politicians, debated at roundtables, talked to the media, and mobilized people via the Internet.

Why my story? Because life writes the best stories. This is the story of someone who got involved in politics by sheer chance. I had to learn a lot in a relatively short period of time, and ultimately I can take pride in having helped to prevent a piece of legislation that would have seriously hurt Europe's economy and, indirectly, many companies and people around the world. That's the journey on which I'd like to invite you.

The experiences documented in this book have taught me that political decisions which go against the public interest are not an unalterable fate. There are ways to

prevent them if you are determined to do what it takes. There is no such thing as a perfect democracy. But even a flawed democracy is a world of opportunity for committed citizens. The story of our upset victory might encourage others to fight, just like us, for a good cause.

Starnberg, Germany June 2006

Florian Mueller

A Professional Demonstrator

Invitation to Brussels

Nothing taught me more about the unpredictability of life's turns than the year in politics that I had never planned for. How I got involved in the first place, back in April of 2004, is typical.

While spending most of my time on a project of my own, I had an advisory role with a Swedish software company named MySQL AB. Working with that aspiring growth company on a diverse array of strategic matters for a few days per month, kept me in touch with the business world. I didn't want to just program my computer game in solitary confinement.

On March 31, 2004, one of MySQL AB's founders asked by internal email if anyone was interested in attending a two-day conference on the political issue of software patents, to be held in Brussels two weeks later. He wrote that he had been to the same event the previous year, and found it worthwhile. However, the company's management had to be in the United States at the time, so he was looking for someone else to represent them this year. As for their position on software patents, he made it clear that they "do not like them at all".

Shortly before, I had learned a bit about the topic. I had read various writings about the perils of software patents on the World Wide Web, and had gone to the European Patent Office in nearby Munich for a presentation.

From all this, it had become clear to me that software patents are an important issue for the economy, for society, and for technological innovation. At first glance, one would think that a patent would be a good thing, but the more I read about the subject, the better I understood that software patents do much more harm than good.

The conference was going to take place in the European Parliament, and it was going to include a demonstration in the center of Brussels. Up to that point, I had neither been inside a parliament nor had I participated in a demonstration. This looked like an interesting experience. So I volunteered.

Patents: A Programmer's Nightmare

If you're not yet familiar with the software patent issue, it may surprise you that a software company would be opposed to the idea of patent "protection" for software.

However, opposition to patents is normal in our industry. In official surveys conducted on behalf of the European Commission and the German government in recent years among software developers, well over 90 percent of respondents were against the idea of software patents. In my entire network of contacts, I don't know even one computer programmer who really believes that patenting software is a good idea. There are only differences in how vehemently they are opposed.

When programmers think of patents, various problems come to mind:

- basic features that pretty much every computer program needs and that, due to the fundamentally flawed patent system, belong exclusively to certain companies or individuals;

- shell companies that have no products of their own, existing only to sit on patents and rake in "royalties" from others;

- greedy lawyers who send out a never-ending stream of intimidating cease-and-desist letters to software developers, IT consultants, companies, and even colleges that use software, demanding payments and threatening to sue otherwise;

- outrageously expensive lawsuits that smaller companies and self-employed individuals simply can't afford (on average, defending a patent suit in the US costs three million dollars);

- so many software patents that no one could ever steer clear of infringing many of them (how can you avoid infringing patents if you don't even know they exist?);

- patent documents that are written in legalese that the average programmer can't understand;

- large corporations that own tens of thousands of patents each and use them to force smaller companies to cede a percentage of revenues; the smaller company is forced to agree only because the bigger one has such a large

patent portfolio that it will always be able to find some grounds on which to start litigation if it so desires;

- truly innovative companies that never stole anything from anybody being forced to pay totally unreasonable amounts of money to others who previously registered a particular idea with the patent office;

- damage awards that are often in the hundreds of millions of dollars;

- companies forced out of business or pushed to the verge of bankruptcy because of those same huge damage awards;

- monopolists that abuse patents as a strategic weapon, cordoning off entire markets and market segments;

- Microsoft looking upon patents as its ultimate weapon against open-source software, such as Linux.

In other words, programmers dread patents as a risk, and equate them with injustice. They lament the changed meaning of the abbreviation "IP". For a long time, if you saw IP in a computer magazine, it stood for "Internet Protocol", the fundamental set of technical rules for communication over the Internet. These days, patent litigation in the software industry makes the news every day (often several stories on a single day), and IP more commonly means "intellectual property", the area of law that encompasses patents.

Protecting Intellectual Achievements

Being against software patents is not the same as being against the basic idea of intellectual property. On the contrary, those who are against software patents mostly fear that they will be used as a "license to steal" from the true innovators.

In fact, I myself have lived off intellectual property rights ever since 1985, when I first started writing articles for computer magazines. A year later, at age 16, I became Germany's youngest computer book author. Some of my books were software products because most of their value was in computer programs supplied on floppy disks inside those books. Later, I was involved in a variety of software publishing projects (productivity, utility, education, and entertainment software). In 1996 I founded a software company that I sold to a large telecommunications company in early 2000.

I wouldn't have survived in that business if every copycat out there had been allowed to use, without payment, the fruits of my labor or my business partners' products.

However, I always felt that my rights were sufficiently protected by copyright law, which benefits everyone, large or small. Copyright law is the law that protects authors (the book you are reading here is copyrighted). It also protects the work of composers, painters and architects, and it applies to computer software as well.

Copyright protection is available to everyone immediately and without any incremental cost. The moment you write a piece of text or software, the copyright is yours for the rest of your life and will even belong to your heirs for as long as 70 years after your death. Obtaining a patent, however, requires a costly application and examination process that takes years to complete.

Patents – Original Purpose Versus Present Reality

The idea behind the patent system is a good one: to protect inventors against plagiarists, and to encourage inventors to publish their ideas.

For many innovations, such as pharmaceuticals or chemicals, there is simply no other practical form of protection. At least, no one has yet come up with a convincing alternative. In some other fields, and particularly in computer software, the patent system has become distorted over the years, and patents have been turned into strategic weapons for large corporations.

That's not just my opinion. *The Economist* arrived at a devastating conclusion: "The patent systems of the world aren't working." Researchers from renowned universities have also found that patents have much less to do with innovation than one would think.

The European Patent Office (EPO) alone now examines about 180,000 applications per year. About half of those applications result in an actual patent, which means that the EPO is approaching an annual rate of 100,000 patents. And that's just the EPO; many more patents are only filed with national patent offices. A company like Siemens applies for about 5,000 patents worldwide on an annual basis. Looking at those numbers, it's evident that only a small number of patents protect a major invention.

Most of those patents cover minimal steps of progress, and many of them relate to absolutely trivial ideas. Granted, a company like Siemens makes major inventions, but not 5,000 of them per year.

Politicians proudly announce ever higher numbers of patents that are issued by the patent offices. That's preposterous. No one would take a politician seriously if his government were to simply mint a lot of additional money. Everyone understands that increasing the supply of currency is no substitute for economic growth, and doing so may be an indication that something is fundamentally wrong. In the context of patents, however, too many people are victim to the fallacy that more patents equals more innovation.

Patent offices are organizations, and every organization wants to grow. After all, growth enhances the prestige of those at the top, and creates better job opportunities for everyone. If it pleases politicians, even better. Therefore, patent offices have a vested interest in seeing the numbers of patent applications grow. Their clients, primarily the patent departments of large corporations, also want to demonstrate "growth figures". For independent patent attorneys, more patenting activity means more money in their pockets. Therefore, those two special interest groups – patent offices and patent attorneys – formed an unholy alliance to push for the patentability of computer software. The world of software-related ideas is only limited by one's imagination, potentially keeping patent offices and attorneys busy until the end of time.

Patents Can Hurt the Innocent

Software developers have a particular problem: you may need hundreds or even thousands of those patented "inventions" in order to write a reasonably functional program.

If you aren't in a position to secure all of those rights by licensing patents, either because you don't have the money or because a patent owner doesn't want to grant you a license, then you are at the mercy of those patent holders. At any time, they can threaten to force your product off the market. Some of these patent holders are entities that don't even have products of their own. Their business is solely to obtain and hold patents with which they can squeeze money out of those that do create real products. Such companies are known as "patent trolls".

The injustice is that patent law can be used against you even if you never steal anything from anybody. With copyright, you know what you are doing if you

copy someone else's program. By contrast, you typically have no idea you've infringed on a patent until it's too late.

With patents, an infringement is an infringement is an infringement. If others secured a patent by registering their idea with the patent office, it doesn't matter whether you even knew that the patent existed. So you have no assurance that the independent creations of your mind belong to you. You may spend years of work only to find out that it was all in vain.

The law says that you have to know everything in the patent register that may be relevant to you. That's impossible in computer software. It may work in a field like pharmaceuticals where you can search for specific terms with the help of a computer, but in the field of software, you would have to read the entire documents of tens of thousands of European patents. Each of those documents usually has dozens of pages, written in legalistic language that the average programmer can't fully understand.

Even the large players can't perform that research. At most, they look at patents filed by particular companies. Other than that, they simply infringe upon all those patents because they have the resources to deal with the consequences. They have lawyers to fend off the claims, they have patents they can use as the basis for countersuit, and if worst comes to worst, they can afford to pay the patent holder to quickly settle the case.

Unfair Disadvantage for the Little Guy

If a smaller company tells an organization the size of Siemens or IBM that it should stop violating one of the smaller company's patents, then the big guy will say: "We have tens of thousands of patents in our portfolio, and if you really want a pissing contest, then we'll surely find various patents of ours that you violate, and then we'll retaliate with our own suits." Just the cost of defending such patent lawsuits, even if unfounded, might drive the little one out of business.

Large companies often enter into what are known as cross-licensing agreements. Under these deals, Siemens and Microsoft, for example, might have agreed that Siemens can use any of Microsoft's patents and vice versa. Those non-aggression pacts are reminiscent of the Cold War: mutually assured destruction, or "balance of terror", deters both sides from starting a nuclear war that neither might survive (at least not without devastating loss).

That approach, however, disadvantages smaller companies that don't have huge portfolios they can use to gain access to the cross-licensing club. If you don't have a large number of patents, you're not a nuclear power, so the others can do whatever they want to you unless one of the big guys decides to protect you.

IBM prides itself on generating more than a billion dollars in patent licensing revenues every year, and a lot of that comes from small companies that are "taxed" by IBM. IBM sends lawyers to smaller companies, and they basically say (not verbatim, but as subtext): "We have tens of thousands of patents, and if we really check on this, we'll probably find that you infringe upon some of them. On that basis, we can take your products out of the market, and potentially will take your company out of business, unless you pay us something that we consider sufficient. Now, isn't it actually better if you pay something right away, like a percentage of your annual revenues in the future and a lump-sum for the past, and then we leave you alone?" The *Washington Post* once reported on such an incident.

Marshall Phelps, who built that "business model" for IBM, was later hired by Microsoft, and more and more of the large companies are looking at this type of revenue generation. If a big player wants to levy a tax on a smaller one, the most unfair aspect is that the little guy doesn't even have a chance to check whether he actually does infringe on any of those patents. There are just too many. How can you check on 40,000 IBM or 50,000 Siemens patents? It's impossible. If you refuse to pay the patent tax, you don't know what's going to happen next, and it could indeed result in the destruction of your business.

In the worst case, the large player won't be content with that "tax". A patent is an absolute right, and the larger player can simply decide to drive the smaller one out of a certain market. Bill Gates, the founder of Microsoft, understood that problem perfectly in earlier days, when his company had hardly any patents. In 1991, he wrote a memo that contained the following passages:

> If people had understood how patents would be granted when most of today's ideas were invented, and had taken out patents, the industry would be at a complete standstill today.
>
> A future start-up with no patents of its own will be forced to pay whatever price the giants choose to impose. That price might be high: Established companies have an interest in excluding future competitors.

Microsoft is now filing for more patents per year than almost anyone else in the world, and that company does not have a reputation for treating its competitors with kid gloves...

Later in this book, we will look more closely at some of the problems that today's inflationary patent system causes. For now you have the basic idea, and as we talk about the evolution of the political process, there is going to be some more information on the issue of software patents.

Easy Access

That Brussels conference was organized by the Foundation for a Free Information Infrastructure (FFII) and the Green Party. To me, it was amusing that I should take part in an event that was co-organized by the Greens.

While I was growing up in Germany in the 1970s and 1980s, the Green Party was formed by environmentalists and pacifists. It came from nowhere, and within years made its way into various parliaments. The Greens were called "alternatives" because they set themselves apart from the political and societal establishment in a variety of ways.

From my own days at high school, I still remember the teacher who had a colorful sticker on his metallic briefcase that said: "Nuclear energy? No, thanks!"

More than two decades after I observed how the Greens put themselves on the political map, I was their guest in Brussels.

Once I had signed up for the Brussels conference on the Internet, it was a straightforward process to walk into the European Parliament on April 14, 2004. After a one-hour flight to Brussels and a cab ride to Rue Wiertz 60 the next morning, I passed through the metal detector at the entrance gate to the Altiero Spinelli Building. There I stood, not knowing yet that standing in the lobby of the European Parliament was the first step toward becoming a temporary lobbyist.

Quite a number of people were waiting there to register, and I started talking to some who were easily identifiable as free software activists en route to the same conference.

Finally we were met by two Green aides. The first one was Belgian, and he had the long hair that I expected a Green to have. The other was a woman from a regional minority party that belongs to the European Free Alliance. The EFA

consists of left-wing parties from "stateless nations", such as Galicians, Basques and Welsh. They had formed a joint group with the Greens in the European Parliament: the Greens/EFA group. Political groups are privileged over non-affiliated parliamentarians, so there are practical incentives for politicians to join an ideologically compatible group.

We filled out forms, turned in our passports, received our visitor badges, and then walked across the street to the Paul Henri Spaak Building, where we had to clear security once again.

Ping-Pong Between the Institutions

The first event was a press conference. On the panel, there were the president of the FFII, some representatives from small companies expressing concerns over software patents, and several Members of the European Parliament (MEPs) from the Greens.

The room was set up for simultaneous interpretation into all of the EU's official languages. However, interpreters were not provided for our press conference, which was therefore held mostly in English.

From this press conference I quickly learned the history of this legislative process and how the ball had been passed from one EU institution to another.

In 2002, the European Commission, which is the executive branch of the European Union government, had proposed a so-called directive on software patents. A directive is an EU-level law that all member states are obliged to incorporate into their national laws. That particular proposal would have legalized software patents in Europe, which is exactly what we wanted to avoid.

In 2002, the European Parliament held a first reading of that proposal, and in the process made some far-reaching amendments that reversed the effect of the legislation. The parliament's changes were very much to our liking. However, the European Parliament couldn't make the final decision. At that stage, it could only make a counterproposal, and then a third institution came into play: the EU Council.

The Council, which is sometimes unofficially referred to as the "Council of Ministers", is the most powerful legislative body in the European Union. The Council is where the governments of the EU member states meet and decide. At the time of the conference I attended, the EU Council had not yet formally taken

its position, but it was expected to do so within a matter of weeks. Sources familiar with the process said the Council was going to dismiss the really important amendments made by the parliament. Basically, the Council was expected to reinstate the Commission's text, and to adopt only those of the parliament's amendments that were purely cosmetic.

The Irish Interest

Of the politicians on the panel, the one who got most emotional (and who happened also to have the longest hair) was Claude Turmes, a Green MEP from Luxembourg and vice-chairman of the Greens/EFA group.

He condemned the Council's behavior in the strongest terms. It really upset him that unelected civil servants, who represented their countries on a working group of the EU Council, showed no respect for the will of the representatives directly elected by the people. Furthermore, he complained that parliamentarians didn't even have access to the agendas of those Council meetings.

While he was talking, I was thinking that this was an interesting European career. Turmes' tiny home country has less than half a million inhabitants, but as an MEP and one of the leaders of a group in the European Parliament, he is a significant player in an institution that shapes laws and regulations for hundreds of millions of EU citizens.

He accused the Irish government of pursuing its own vested interest in preference to the interests of Europe as a whole. "The Irish presidency is trying to push this directive through", he said. At the time of the conference, Ireland had two months to go of its rotating EU presidency during the first half of 2004. The presidency is a particularly good position from which to influence the agenda and build a qualified majority for a proposal.

There was background to his outburst. The Irish government had made a previous "compromise" proposal, whose text would have allowed the European Patent Office and national patent offices in the EU to grant patents on virtually any concept related to computer software. We, however, didn't want software patents to provide big players with a weapon of mass destruction that could be used against smaller companies and open-source software like Linux.

Turmes explained the Irish conflict of interests in a way that I found plausible. He said that the Irish government was acting on behalf of Microsoft and the other US high-tech corporations that use Ireland as a tax haven and gateway into the

EU market. Those subsidiaries of US corporations were far more important to the Irish economy, and paid considerably larger amounts of taxes, than Ireland's domestic software industry.

I was impressed. This politician really understood how things work in our field. In the 1990s, I went to various software industry gatherings, and often saw the Irish Development Agency promoting the tax benefits of operating one's European business out of their country. In 1995, I had personally persuaded a publicly traded US software company to set up an Irish base, so I knew what Turmes was talking about.

It was unsettling to hear that Microsoft could have such disproportionate influence over a European piece of legislation.

Paid for Demonstrating

After the press conference, we were all sent outside to participate in a demonstration in the city. The gathering point was next to Place du Luxembourg, a square close to the European Parliament. For mid-April, the temperature was quite pleasant, and the sun was shining.

And I was there as a strategic management consultant on behalf of a company. Talk about an unusual assignment! I thought it was hilarious that I should take to the streets of Brussels on a paid basis.

Looking at it from that angle, I was a "professional demonstrator". That circumstance reminded me of my conservative family's reservations concerning the Greens. In the early 1980s especially, there were some large demonstrations in Germany in which the Greens were involved, such as demonstrations against nuclear reprocessing plants and the NATO twin-track decision. Some Green activists participated in many demonstrations every year. My family disparaged those as "professional demonstrators": people who, instead of holding down a real job, traveled from one demonstration to the next.

Professional or not, I was a first-timer. I got to see various elements of a proper demonstration that I had so far only heard about: banners, megaphones, police cars at both ends of the procession, sandwiches being distributed to feed hungry protesters, a pantomime performance, balloons. Many of these would soon become familiar sights.

The route planned for the demonstration led from the European Parliament to the Rond-Point Schuman, a traffic circle next to the buildings of the Commission and the Council. As I had learned at the press conference, the parliament was the "good" institution and these were the two "bad" ones. That's why many demonstrators were wearing yellow T-shirts that were labeled "No Software Patents" on the front and "Power To The Parliament" on the back.

The official number of participants was around 800. That may not sound like much, but it was quite something for such a highly specialized topic. We were a diverse group, and I was not the only one wearing business clothes. However, most of the demonstrators were young people from all over Europe.

Banners identified Green youth organizations from Germany and the Netherlands. Francophone demonstrators formed a large group, most of them wearing black T-shirts that said "Les brevets logiciels tuent l'innovation" (software patents kill innovation). A very few, maybe four or five of the demonstrators, were self-confessed anarchists and anti-capitalists. Their T-shirts featured a penguin with a Che Guevara-style cap. The penguin stands for the Linux computer operating system, which competes with Microsoft's Windows product. It was originally developed by volunteer developers all over the world, though over time it had actually become commercialized. One of the world's largest patent holders, IBM Corp., is also one of the primary supporters of Linux.

High-Density Conference

After the march, we returned to the parliament, and all went upstairs to the Petra Kelly Room, the primary meeting room of the Greens/EFA group. Petra Kelly was one of the founders and most prominent politicians of the Green Party in the 1980s. She was shot by her husband, another Green politician, under circumstances that were never completely understood.

At the entrance to the room, an overview of the events scheduled for this room during that week showed that an official Greens/EFA group meeting had taken place shortly before our conference.

The conference made available simultaneous interpretation into eight out of the eleven languages the EU counted as official at the time.

The conference was packed with information. The quality of most presentations was fairly good, but there was one major problem: The panel sessions had time slots of only an hour each, yet there were about ten speakers per panel. Each

speaker only got a few minutes, and worse, there was no time for questions and answers.

Most of the speakers explained how problematic software patents are to smaller developers and the open-source community that created Linux and many of the technologies underlying the Internet. The pro-patent camp was represented by speakers from the European Patent Office and the European Commission. The rounds of applause that those speakers received were extremely short, so short that it would almost have been more polite not to applaud at all.

Dany le Rouge

The last panel session of that afternoon was chaired by Daniel Cohn-Bendit MEP, co-president of the Greens/EFA group. Having seen him on television, I recognized him immediately when he entered the room.

In Germany, France and, to some extent even in the rest of Europe, Cohn-Bendit is fairly well-known as a left-wing activist. Born in France and raised in Germany, he returned to France after finishing secondary school and became the most prominent spokesman and agitator of the student movement that was responsible for the so-called "May Revolution" in Paris in 1968. Some of those protests turned into riots, and the French government told him to leave the country. Whether it was for the ginger color of his hair or his far-left ideas or both, he was dubbed "Dany le Rouge" ("Red Dany").

Back in Germany, he became a key figure in such alternative movements as "Kinderladen" and the "Sponti scene", which organized spontaneous - sometimes violent - demonstrations. During that time, he made friends with Joschka Fischer, who became the first Green minister of a German state and in 1998 was appointed foreign minister of the Federal Republic of Germany.

On my flight to Brussels the day before, I sat next to an official of a Southern German chemical workers union who once lived down the street from Cohn-Bendit in Frankfurt's university district. Like me, he was on the way to the European Parliament. The purpose of his trip was to lobby against a regulation that he thought endangered jobs in Europe, particularly in our state of Bavaria.

Half-way through the flight, we started talking about what each of us was up to, and I mentioned that Daniel Cohn-Bendit was the chairman of the conference that I was going to attend. The official told me the following anecdote: allegedly, a small procession of demonstrators walked to the house in which Cohn-Bendit

lived and rang the bell. The future MEP opened the window. Since he had just been awakened, he was still in pajamas. He asked the demonstrators: "What's up?" They said: "We're going to demonstrate now! Dany, come on down and join us!" According to this little story, Cohn-Bendit dressed in a hurry and went to demonstrate with them.

Now, decades later, he was moderating a panel on software patents. The Green MEPs who had chaired the previous panels had already impressed me because they seemed to have a pretty good understanding of the economic and societal implications of software patents.

My First Contribution to the Debate

On that last panel for the day, Dany Cohn-Bendit and his co-chair Marie Ringler, a Green member of a regional parliament based in the Austrian capital of Vienna, stressed the importance of involving commercial entities in this debate. They explained that a political majority in favor of our position could only be built if it were clear that the opposition to software patents is a concern of businesses, not just of consumers and ideologues.

Given Cohn-Bendit's political roots, this emphasis on a business aspect of a political topic seemed surprising, but it made him even more credible. Obviously this was a man who had become a pragmatic politician. In the early 1990s, he had called for military intervention in Bosnia, an act of heresy for the predominantly pacifist Green membership. Now, as a leader of a group in the European Parliament, he certainly had to work with other parts of the political spectrum all the time.

Marie Ringler, who co-chaired the session, looked like a pro-business politician to me anyway. Aged around 30, dressed in an all-black pants suit and wearing shoulder-length hair, she had her suitcase with her as if she were just stopping over between flights. She reminded me of those female entrepreneurs one met during the days of the New Economy boom.

In this business-friendly environment, the time had come for me to speak up on behalf of the company that I was representing. As I looked around, I saw those cabins of the interpreters, and unfortunately I wouldn't get to listen to their various translations of what I was going to say. At any rate, I chose to speak English because I wanted to maximize the number of people who would be able to understand my exact message.

I introduced myself as "a German who is here to represent a Swedish open-source database company". To make people smile, I said: "Some of you may know which one it is."

The apparent modesty was ironic because the room was filled mostly with people from the open-source software movement. Linux is the most famous of all open-source programs, but MySQL is among the three best-known ones in those circles. That's why Google delivers far more search results for MySQL than for the world-famous name Schwarzenegger. Even Google itself is a MySQL user.

As soon as I made that remark, I saw that many people in the audience were suddenly looking in my direction. So it had some effect, and I went on to explain that the company I represented is built on the basis of intellectual property rights such as copyright and trademarks, yet considers patents on software to have far more negative than positive effects to its business. "We are in favor of copyright because we are commercial, and we are against patents in our field because we are commercial." Cohn-Bendit acknowledged that it was a very important point to make in the debate.

In closing, I encouraged the free software activists in the audience to work more closely with companies such as MySQL AB on this political issue: "If you have meetings with politicians and would like us to bring our business perspective to the table, please let us know. We want to help, but we need to know from you where we can best complement your efforts."

In my role as an adviser to the CEO of that company, I was not in a position to really make specific commitments on MySQL AB's behalf. However, I knew that the long-standing opposition of the company's founders to software patents went as far as back as the 1980s. I had no doubt that they would always be receptive to ideas for taking a role in this debate, and they had already participated in at least one event in the Finnish parliament.

Lobbyist on the Fly

It wouldn't even be 24 hours before someone took me up on the offer to bring a business background to the table. At noon the next day, a young British activist named Tom Chance asked whether I would join him and two others in a meeting with a British conservative MEP, Nirj Deva. I asked when. He said: "Now." I wanted to know: "When is now? Like in five minutes?" He nodded.

Tom had set up the meeting at short notice. Apparently it happened because he is from Deva's constituency. We took the elevator up a few floors. Our small commando unit consisted of Tom, Edward Griffith-Jones (another British activist), Hartmut Pilch, and me. Soon we arrived at an office that, like most MEPs' offices, was convenient but not overly spacious.

Our objective was to get Deva's help in arranging a meeting with Malcolm Harbour, the MEP in charge of the software patent issue within the British conservative delegation in Brussels. Deva, who is of Indian descent, had visitors in his room, and much later I learned that the people sitting there were actually the Prime Minister of Sri Lanka and his entourage.

When Deva called Harbour's office, he demonstrated a good sense of humor. He said that he had "several outraged constituents" in his office. "They are holding me hostage here and I have to get them a meeting with Mr. Harbour." That, however, was not possible as Harbour was just on his way back to Britain. It was a Thursday, the day many (if not most) MEPs fly back home for the weekend.

Therefore, Deva made available a few minutes of his time even though it meant that his high-ranking visitors had to listen to software patent talk. I still think it's remarkable that he attached enough importance to an activist from his constituency to further interrupt a meeting with a prime minister.

Lobbying like Crocodile Dundee

While Deva was willing to listen to us, he stressed right away that it's impossible for an MEP to personally deal with every area of policy. He explained that he has his own areas of specialization where he wants his colleagues to follow his recommendations, so on software patents, he follows Harbour, the "expert" on that topic. Harbour, he said, had written up a position paper according to which the Conservative Party does not favor the patentability of software.

This reference to Harbour's position provoked a harsh statement from Hartmut: "Harbour always says the opposite of what he does. And he's known for that all over the parliament floor."

Deva flinched in his chair and groaned: "Oh!" Maybe he only pretended to be surprised because he owed that to a party colleague, but a statement like Hartmut's is certainly unusual for a lobbying conversation. One would customarily convey the same message more diplomatically. Such wholesale disparagement of a politician's credibility is generally considered inappropriate.

Even as a first-time lobbyist, I knew that this conduct was usually unacceptable. As I would learn later, the non-political style of some of the FFII activists actually had a special appeal for politicians. It's that same disarming bluntness that made the 1980s movie character Crocodile Dundee so popular when he was turned loose in New York City.

Other Brussels-based professionals, including another lobbyist, told me it was a very fresh experience for many MEPs when they first encountered activists from the FFII and the open-source movement. Many young people would run around the parliament, neither knowing nor worrying too much about the behavioral code. They didn't dress like traditional lobbyists, but ultimately their ways made them a lot more trustworthy because everyone could see that they had not been trained to do this job. It meant they weren't on anyone's payroll for spreading lies.

You just can't beat the natural credibility of real citizens with real concerns from the real world and a no-bullshit attitude. Obviously, some politicians react more favorably to that, while others are less flexible about manners. Also, every strength is potentially a weakness. Breaking the rules is not always the right thing to do. In fact, most of the time it's wrong. One can be forthright and courteous at the same time.

However, there is no doubt that this straightforwardness is one of the secrets behind the FFII's success, and it often makes up for behavior that conventional wisdom would classify as rude.

From Entrepreneur to Entrepreneur

Now it was my turn. Tom told Deva that I was from a software company and could explain this issue to him.

I had already guessed that Deva was a wealthy man even before he told us that he had made "a lot of money" as a shareholder and board member of a company that had gone from zero to £25 million in revenues. The solid gold watch on his wrist made a striking contrast against his dark complexion.

I was confident that I could speak to him as businessman to businessman, as entrepreneur to entrepreneur, and indeed so it worked out. However, I first had to dissociate myself from that wholesale accusation against Harbour, so I said: "I can't really talk about that position paper because, quite frankly, I haven't even read it yet."

That was perfectly true. Besides, even if I had read it, it would have taken me months before I could really explain why the EU directive in question was designed to legalize software patents. It contained misleading sentences like "A computer program as such cannot constitute a patentable invention".

In any case, this was not the time to talk in great detail about the complex issue of software patents, so I had to quickly make a few statements that I thought would help position our concern as an entrepreneurial one. I mentioned that MySQL AB was now at a similar level of revenues as the company on whose board Deva had served. That helped establish a line of communication. I carried on by saying that patents in our field disadvantage the smaller players that don't have a large portfolio of patents to give them access to cross-licensing agreements. "If you don't have the critical mass of patents to get access to the club, then you're at the mercy of the big ones."

I made another point or two, and then Deva asked Tom to send him a quick summary of why we didn't agree with the official position of the UK conservatives, and he would then forward those comments to his colleague Harbour.

A week later, I would receive an email from Tom in which he summarized the meeting with Deva for a larger number of activists: "He was so receptive in our opinion because we talked to him from an SME [small and medium-sized enterprises] angle – he himself used to own a company and was sympathetic to Florian's arguments."

While my first lobbying activity was too short to yield a major breakthrough, it was certainly an encouraging start. I somehow felt that I could complement the efforts of those who were already involved. After that lobbying talk, I had lunch with my friend Sarah who lives in the Brussels area, and when she asked me how I liked this political conference, I already had a presentiment that I would come back to Brussels: "I think the company that sent me here needs to be represented a bit more in this political debate, and I might be the one who could do that for them."

At that point, I didn't know yet that this would become my full-time activity. I just thought I might spend a day or two per month on it.

Late in the Game

An Urge to Act

From the way I have described my impressions during that first trip to Brussels, it may look as though I was having a great time there. But despite the fact that it was a really interesting and memorable excursion, I felt terrible as I returned from my first visit to the European Parliament.

Whenever I went to industry conferences and listened to presentations, I wanted to take immediate action. I could never wait to apply my newly acquired knowledge. In this case, it was a little bit like that, but even more so, because I was deeply worried about the future of software development. I couldn't comprehend why Europe was about to shoot itself in the foot.

When I was involved in organizing conferences like that one, I did things differently. Still I must give the organizers credit. I rarely ever gleaned such a wealth of information in only two days. What I badly missed, however, was a platform for networking with like-minded industry colleagues, such as a private roundtable for company representatives who were prepared to take action to prevent the legalization of software patents in Europe. I didn't even see a lot of businesspeople, at least not from companies that I would have heard of before.

That was disconcerting. After all, medium-sized companies had the most to lose in this. They could be forced out of certain markets by large players just on the basis of patent-related threats and assaults, and entities that use patents to squeeze money out of others would certainly come to prey on them.

Everyone in our industry knows the stories from the United States, where software patents have been legal for a long time and where the problems I have talked about are widespread. Estimates are that lawyers representing patent holders send US companies up to five million letters per year, usually threatening to sue the recipient unless he pays a certain amount of royalties.

Even some of the most basic functions of a computer program, such as the concept of a progress bar that graphically indicates how far along an ongoing operation is, have been patented. Theoretically, someone who owns such a patent can ask for any amount of money or insist that a developer remove such functionality from his product.

Given the inactivity on the part of most colleagues, it seemed miraculous that a majority of the European Parliament had sided with us at the first reading, back in 2003. However, the various speeches and presentations I had heard had made it clear to me that the forthcoming decision by the EU Council would have much more procedural weight, and could effectively wipe out everything that had been achieved.

I thought it was not only unfair but also unwise, purely from a business perspective, for companies to rely solely on the idealism of the FFII, the Greens and others instead of making a dedicated effort to influence this legislative process.

I had no doubt that the so-called "Directive on the Patentability of Computer-Implemented Inventions" would shape the software industry, a number of high-tech markets, and ultimately our entire economy and society for a long time to come.

Turning over the largest and most lucrative segments of the European software market to a few large (and mostly American) players would not only result in tens of billions of euros being sucked out of our economy every year. It would also endanger our freedom of communication if a few IT industry giants were to turn the world of new media into an oligopoly.

I liked the banner at the demonstration which put this in a nutshell: "In the heaven of Gates, you pay the Bill." And I didn't want to let that happen. Not without a fight.

Sounding the Alarm

The first thing to do was to shake up my friends at MySQL AB. Before writing a formal report, I sent an email to the CEO. It started like this:

> Just to prepare you for this: The situation concerning software patents in Europe is terrible.

I couldn't really blame them more than any of the others that should have had a similar interest in this issue, but you always have to start someplace.

It's normal for a small or medium-sized company to focus on almost everything but politics. I had managed my own little company from 1996 until I sold it in early 2000. If you run a business like that, then you are busy keeping up with day-

to-day business and find it hard enough to worry about your company's long-term strategy. You simply don't have the time or energy left to follow political developments, let alone to think about how to play an active role in them. Still I thought the issue of software patents was so important that it deserved attention.

I got a quick reply that indicated real awareness of the problem. The next challenge was to sum up the state of affairs.

A Quick (Really Quick) Digression into Patent Law

What I didn't have to explain to the folks at MySQL AB was why software patents are a bad idea. They had been opposing them for a much longer time than I had. They already knew that the most successful software companies, like Microsoft and SAP, had already been among the most valuable companies in the world even before they owned a single patent.

However, I did have to explain what the existing legal status of software patents in Europe was like, and that one is tricky. I will discuss it in more detail here than I did in that business correspondence. You have my word of honor that we will only analyze a single article of the European Patent Convention (EPC) in all of this book, so let's get it over with now.

The EPC was agreed in 1973 and subsequently ratified by a number of European countries. It is not a European Union treaty. Most of the countries that are party to the EPC happen also to be members of the European Union, but in legal terms the EPC is a totally separate international treaty.

Article 52 of the EPC defines what is patentable. It starts off in a very broad and general way:

> (1) European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step.

From the perspective of someone who has a great idea, it would certainly be nice to take out a patent on just about everything that is a brilliant intellectual accomplishment. However, each patent is a 20-year monopoly, and it's not in the interest of the economy and society as a whole to let some people or organizations monopolize everything.

There has to be a reasonable balance. Inventors have to be rewarded. That's a matter of fairness and justice, and it's in the interests of society. Who would spend hundreds of millions of dollars or euros to research a new medical agent if anyone else could jump on the bandwagon and manufacture the same drug? It probably wouldn't work. So there has to be a legal framework that provides an incentive for such investments.

But would we want to grant someone the exclusive right to a breathing technique, and require everyone who breathes like that to pay him a license fee? Definitely not.

The above example may seem very distant from reality, but in the US, patents have already been granted on ways to comb one's hair or to pack boxes. A patent is a very powerful right. If the patent holder desires, he can insist on being the only one who has the right to do whatever is covered by the patent.

In order to avoid such absurdities, there have to be some exclusions from the scope of patentability. And indeed there are some in the next paragraph of Article 52 of the EPC:

> (2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1:
> (a) discoveries, scientific theories and mathematical methods;
> (b) aesthetic creations;
> (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;
> (d) presentations of information.

As you can see, mathematical methods (which is what computer programs consist of) and "programs for computers" (another way of saying "computer software") were deliberately excluded.

The exclusion of "mental acts" is also important because, in theory, most computer programs could be used as instruction sets for thought processes, just as you can run a mathematical computation with an electronic calculator or perform that same computation in your mind. You might want to at least use a pen and a piece of paper, and you would be very slow compared to a computer, but you can do the job yourself.

In the days when American courts didn't allow computer programs to be patented, they often based their reasoning on what they called the "mental steps doctrine": thoughts are supposed to be free.

Twisted Law

European patent attorneys, examiners, and judges never liked the fact that the law provided those restrictions and limitations. If they were given the choice, most of them would want to be free to define for themselves what is an "invention" and thus patentable.

In order to bend the law and circumvent the exclusions in paragraph 2, patent professionals needed to find a loophole. They thought the next paragraph of Article 52 gave them leeway:

> (3) The provisions of paragraph 2 shall exclude patentability of the subject-matter or activities referred to in that provision only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.

This can be paraphrased more simply. It says: "Paragraph 2 lists various items that are excluded, but they are only excluded as such."

Those two little words "as such" leave some room for interpretation. However, that doesn't mean that every conceivable interpretation is necessarily valid and reasonable.

Certainly the exclusion of mathematical methods doesn't disallow patents on inventions that use auxiliary calculations. In almost every area of natural science, mathematics come into play. Another example is the discovery of a chemical element. There is no monopoly on that element per se. However, if someone makes that discovery and on its basis invents a new type of fuel in which that element plays a role, the fuel may be patentable. But that doesn't prevent anyone else from using the chemical element for other purposes, such as in a medical agent.

In the case of computer programs, it's easy to see that computer programs are in ever more technical devices. Computer programs are used to control everything from anti-lock braking systems to nuclear reactors. Clearly, a computer-

controlled anti-lock braking system is not a "computer program as such". It's something else even though a computer program may be part of it.

However, the European Patent Office didn't want to leave it at that. They decided that anything that runs on any computer should be potentially patentable. A computer on which an accounting package is running could then be labeled a "bookkeeping machine". Thereafter, anyone using accounting software on a run-of-the-mill computer would potentially violate the "bookkeeping machine" patent.

Twisting the law in such a way is tantamount to saying, "Paragraph 2 doesn't allow patents on a computer program, but paragraph 3 allows patents on computer programs that run on a computer." But what else does a program do other than run on a computer? Nothing. Therefore, paragraph 3 would render paragraph 2 totally pointless, which proves that this interpretation of "as such" is fundamentally flawed. It's ridiculous.

Invalid Patents Everywhere

National courts of law have the last word on a patent within their respective territories and cannot be overruled by the EPO. A number of them have been unwilling to follow the EPO's flagrant non-compliance with the law. Consequently, numerous European patents in the field of software are, if challenged at the national level, barely worth the paper they're printed on. They can't be used effectively against someone who defends himself because the courts won't uphold them.

All patents, no matter who issues them (whether it's the EPO or a national patent office), can be later invalidated by courts of law. In fact, a significant rate of failure is inherent to the system because patent examiners generally issue a patent if they can't identify a strong reason to reject the application within the ten or so working hours they have to examine each one.

They do throw out the application if it's clearly inadmissible, for example if there's a formal error. That's easy. However, if there is any doubt, the patent is granted. An examiner needs a strong and defensible basis for any decision to reject because otherwise the applicant's attorney will probably mount an immediate challenge. Whereas, if the patent is granted, the applicant is happy and leaves the examiner alone.

Someone who gets sued for infringing that patent, or who feels threatened by it in any way, still has a chance to correct a bad patent. But to do that, you have to prove that it should be invalidated, and that's a costly and time-consuming process.

The usual reason why a patent is successfully invalidated is that someone proves there was "prior art", that is, the invention claimed by the applicant was already known when the application was filed and was therefore not new. Of course, patent examiners are supposed to have figured that out in the first place, but often they can't do so within the limited amount of time they have available for processing each application.

Inventions occasionally get patented more than once. The examiners sometimes can't find the older patent when they decide to grant the new one; alternatively, they may find it but fail to recognize that the essence of the two patents is the same. The verbal descriptions of the two patents may look very different.

That's just how the system works. Nobody's perfect, and some are less perfect than others. But the percentage of patents that can be invalidated reaches extravagant levels when, on top of the ordinary problems just described, a patent office operates outside of any reasonable interpretation of the law. In this situation, patent holders can't really tell whether they get genuine economic value in return for the time and money they spend on the application.

Legalization by a Double Jump

In this sort of messy situation, complaints are bound to increase. There comes a point when people begin to realize that continuing to bend the law is not really a solution and it would be cleaner to change the law.

In the late 1990s, many patent professionals wanted to do away with the exclusions stipulated in Article 52(2) of the EPC in order to "harmonize" European patent law with that of the United States and Japan. The clause excluding "programs for computers" was the one they disliked the most.

Changing a multinational treaty is not an easy task. You need a unanimous decision at the intergovernmental level, and then the parliaments in all countries that are party to the treaty have to ratify the amendment. If even one country, no matter how small, votes against ratification, the amendment is killed. Nonetheless, the European Patent Office decided to try.

On November 21, 2000, the EPO hosted a diplomatic conference in Munich with the objective of revising the EPC, and one of the proposed revisions would have eliminated the exclusion of computer software. The FFII and the EuroLinux alliance had campaigned aggressively before that gathering. By the beginning of the diplomatic conference, EuroLinux's petition had been signed by about 50,000 people, many of them entrepreneurs. Ultimately, the EPO dropped the plan – at least, for the moment. That was the first political victory software patent critics scored in Europe.

Once it became clear that there was significant resistance to revising the EPC, the proponents of unlimited patentability embarked on a different plan they thought might be more achievable. They decided on a several-stage process. Step one: get the European Union to pass a directive legalizing the EPO's questionable practices, thereby rendering the exclusion of computer programs meaningless. Second: try again to change the EPC. By then, almost all countries that were party to the EPC would be EU member states and would no longer object to the change.

Why the detour via the European Union? Because the EU has some characteristics that come in handy in a situation like this.

First of all, you don't need unanimity for everything. Some EU decisions do require it, but for others, a qualified majority in the EU Council (the body in which the member states cast their votes) is sufficient. That qualified majority is a somewhat higher hurdle than an absolute majority of 50 percent, but no one country can block everything the way it can if you're trying to amend a treaty.

Second of all, the EU is undemocratic in many ways. A lot of power lies in the hands of officials who are appointed, not elected, and those officials can accordingly afford to make themselves unpopular by acting against the public interest. Appointed officials populate the European Commission (the executive branch of the EU government) as well as the administrations of the various member countries, and a specialized issue like patent law is mostly handled by civil servants. There is little transparency and virtually no media attention until after a decision has been made.

The European Parliament is of course elected, but it's structurally disadvantaged. It doesn't have nearly as much power as the Council.

There are valid reasons for that. Simply put, if the European Parliament had either parity with or more power than the Council, which is made up of ministers

representing their countries, the member countries would lose a large part of their sovereignty. In effect, the European Union would become the United States of Europe. Although that is certainly the vision for the long term, it is not a practical option for now.

This flaw in EU democracy is a temporary shortcoming that our generation has to live with. It' is part of the price we all pay in the interests of pursuing of the historical objective of gradually uniting Europe. The debate over software patents is just one example of how special interests – in this case, the proponents of broad patentability – can try to take advantage of it. However, it's also a case study showing how the European Parliament can best exercise the powers that it already has.

The Boomerang Effect

Everything went according to plan for the patent professionals and some large corporations in the beginning. In February 2002, the Commission officially presented a proposal for a "Directive on the Patentability of Computer-Implemented Inventions". That text was a collection of all the excuses the European Patent Office had given to justify the granting of tens of thousands of software patents in direct contravention of Article 52 of the EPC.

The proposal was designed from the ground up to disguise its authors' actual intention. To laymen, it looked as though the proposed directive still prohibited patenting software itself, but everyone familiar with how the patent system works could see that the truth was the complete opposite.

Some new legislation in the EU must go through what's known as the "codecision procedure". Under it, the Commission always presents its proposal to the EU Council and the European Parliament at the same time. The Council starts working on it right away, but can't take a formal decision before the parliament has held its first reading.

Within the parliament, the Committee on Legal Affairs and the Internal Market (known as JURI) took the lead. Within that committee, the British Labour MEP Arlene McCarthy was appointed rapporteur for the software patent dossier. The rapporteur, who is responsible for writing a report that examines the issue at hand and makes suggestions for how to modify the proposed legislation, has an influential role. After discussions are complete, the committee votes on the

rapporteur's report, which then goes for a vote to the plenary (the assembly of all MEPs).

McCarthy was extremely sympathetic to the proponents of software patents and turned a deaf ear to the critical voices of the FFII and others. She may have become more receptive to our side later, and it's possible she was misled and used by the pro-patent lobby for its own purposes. Either way, she tried to bring the parliament on board with the Commission's proposal, to which she only wanted to make cosmetic changes. On June 17, 2003, the JURI committee approved her report.

But JURI was not the only committee reviewing the legislation. Even before the JURI vote, two other committees that were additionally involved had voted to propose substantial changes to the Commission's proposal. Instead of ratifying the EPO's excuses and evasions, those committees supported amendments that would have disallowed them altogether.

Opponents and proponents of software patents fought bitterly in the three-month build-up to the plenary vote on September 24. I was not an eyewitness to those events, as I didn't get involved until some seven months later. All I know about this part of the story is hearsay. The bottom line was that the parliament plenary took a position that was a 180-degree turn-around from the proposals made by the Commission and McCarthy. The European Parliament closed all those loopholes that the European Patent Office had created to allow for software patents.

As the parliament's inclination became known, the Commission was nervous. The EU's Internal Market Commissioner Frits Bolkestein, who had always said he wanted to "open the market" but may have failed to understand that software patents have the opposite effect, tried to blackmail the parliament. In a speech before the vote, he said that if the parliament were to make the expected changes to his proposal, he would exercise the Commission's right to abort a legislative process and would pursue alternative ways to change national patent laws. He said directly that "parliament would then not be involved in this at all".

MEPs didn't bow to that threat, and later events proved that the threat had been a vain one anyway. The Commission didn't withdraw its proposal. The process carried on. All the threat did was to reveal a politician's utter disrespect for democracy. Bolkestein would be removed from office a year later, when a new EU Commission was appointed. Hardly anyone wanted him to stay on board.

The Council's Partial Working Party

At that first FFII conference I attended, various speakers shed light on the fact that the EU Council was all set to act against the European Parliament and our interests.

Ireland held the Council's presidency at the time. As Green MEP Claude Turmes had explained at the press conference, the Irish government was close to the special interests of large US corporations that benefit from Ireland's low corporate tax rates. It was no secret in our industry that Microsoft saw software patents as a means of fending off the threat posed to its near-monopoly of certain segments of the software market by Linux and other open-source software.

Open-source software was dramatically changing the market, creating a new, much tougher, type of competitor for Microsoft, which over the years had built up a position that other software companies could no longer challenge by traditional means. It is in the interest of almost every country that open-source software put competitive pressure on Microsoft because competition results in higher product quality and lower prices for everyone. But Ireland's situation was special. As I found out later, Microsoft Europe accounts for a significant portion of Ireland's total corporate tax income and is one of the country's largest employers.

The Council's so-called working party on intellectual property was made up of civil servants from the EU member countries, and the careers of those civil servants were directly linked to the patent system. Some were dispatched by national patent offices; others worked at the ministries in charge of the respective patent offices.

If you work in the patent bureaucracy, it's understandable if you are inclined to expand the scope of patentability because it means more prestige, more power, and better career opportunities for you personally.

Generally, if you take pride in your work, you tend to overrate the benefits of your "discipline". If you ask a lawyer specializing in tax law whether a lawyer or an accountant is better positioned to give you tax advice, he'll give you plenty of reasons why his profession is the better choice. If you ask an accountant, he'll say that he and his colleagues are more qualified.

Many of the members of the Council's working party were also on the governing board of the European Patent Office. That controlling committee had grossly

neglected its duties by letting the EPO grant software patents on the grounds that a computer program is not a "computer program as such" as soon as it runs on a computer. It was their obligation to use their influence to rein in a system that got out of hand. Instead, they basked in a steady increase, and at times even an inflationary growth, in the number of patents granted per year.

Those officials were hoping to use the EU directive to legalize the behavior of the EPO and thereby sweep their neglectful conduct under the carpet.

At the political level, Council decision are taken by ministers. In most countries, patent policy is subsumed under economic affairs, the department whose ministers are under the heaviest lobbying pressure from big industry anyway. Unfortunately for us, a variety of Europe's largest high-tech corporations were lobbying aggressively for software patents, including for example all five of the big cell phone manufacturers of the time (Nokia, Ericsson, Siemens, Philips, and Alcatel). In some cases, that was because they looked at patents as a strategic weapon that would add to their power. In other cases, the in-house patent lawyers of those companies exercised their vested interest in expanding their area of responsibility and influence.

In those countries that don't let their ministries of economic affairs manage the national patent system, patent policy forms a part of legal policy. For a ministry of justice that has control over it, the patent system is a crown jewel.

Defying the Inevitable

Some speakers at the Brussels conference had given up all hope that the Council would make any other decision than to propose the legalization of software patents in Europe. Others insisted that "It ain't over till the fat lady sings".

We knew that even if worst came to worst, the legislative process wouldn't end with the Council's decision. The codecision procedure only results in a new law if the EU Council and the European Parliament agree upon a text. It can take up to three readings in both institutions to get to that sort of clarity, and so far only one reading in the parliament had taken place.

The general assumption was that the Council would decide in May. The European elections were scheduled for June, and in late August or sometime in September the newly elected parliament would presumably begin the directive's second reading. Everyone expected this legislation to become one of the parliament's highest post-election priorities.

Nevertheless, we knew that an unfavorable decision by the Council would be a setback, potentially even a turning point. There was no guarantee that the post-election parliament would still be on our side. If the parliament accepted the Council's proposal, it would be all over. I didn't then yet know in detail how much more powerful the EU Council is compared to the European Parliament, but I got the basic idea from what other people said.

Humble Beginnings

The FFII was determined to keep fighting for a more favorable Council position until the last day. I wanted to support their efforts, but I was new and therefore limited in my ability to help.

During the weeks between the Brussels conference and the Council decision, I had a number of telephone conversations with Erik Josefsson, a key player whose name you will see frequently in the rest of this book. At the time, Erik was one of the leaders of the South Swedish Linux User Group (SSLUG), most of whose members happened to be in Denmark. He had also been involved in the organization of the FFII conference. By the time I met him, he had already been a fighting full-time against software patents for a number of months thanks to the sponsorship of a Swedish company.

Erik had met personally with the Swedish government officials who represented Sweden in the EU Council's working party. He gave me the name and telephone number of one of them, and I phoned him. It was an odd situation that I, as a native and resident of Germany, would call the Swedish government on behalf of a Swedish company (MySQL AB, headquartered in Uppsala). However, as noted before, MySQL AB's management was traveling in the US.

The person I talked to at the Justitiedepartementet (Ministry of Justice) was very friendly. He even gave me an extensive lesson in the EU's codecision procedure, explaining to me at length all the possible follow-ups to a Council decision. He indicated that his department had already listened to a number of companies and interest groups, but he encouraged me to send him a letter anyway because he expected that this dossier would be back on his agenda later in the year after the European Parliament's second reading.

I wrote the letter, and shortly afterwards sent a similar one to an official at the Danish Ministry of Economic Affairs when reports suggested they might be

sympathetic to the position of open-source software developers. However, given the advanced stage of the game, this type of activity was a drop in the ocean.

Demonstrating on a Rainy Day

On May 12, 2004, the FFII organized demonstrations in a number of European cities, among them Berlin and Munich. I was invited to speak at the event in Munich.

It was a rainy afternoon when our demonstration began in front of the European Patent Office near the Isar River. Due to the weather conditions and the limited amount of publicity, our group only numbered 100 to 150 people. There is certainly a risk that if a demonstration attracts too few participants, it gives the impression that only a very small, albeit vocal, minority cares about the issue. The fact that there were simultaneous demonstrations throughout Europe slightly alleviated that particular concern.

One of the key points in my speech was that the 20-year term of validity that patents have is simply unreasonably long for a fast-paced field such as computer software. To illustrate this, I pointed out that the patents that were just about to expire dated to the days of the Commodore 64, which sold millions of units in the early to mid 1980s. That computer was almost a museum piece then, yet the law still protected ideas that were considered innovations in its heyday.

Toward the end of my speech, I demanded that politicians approach this crucial issue of economic policy strategically, and not leave it to civil servants the way they have others of the many little details that the EU deals with, such as import regulations on big-eye tuna.

After we'd made our speeches in front of the EPO, we walked a few kilometers through the city. We stopped in Schwabing, which is (among other things) Munich's university district, where we went inside for a panel discussion. The room was overcrowded, and many people were standing in an adjacent room where they could hear, but not see, the speakers.

What our panel clearly lacked was a definite proponent of software patents. Gregory Blepp, who worked at a software company named SCO and also had a role in a German software industry association, didn't explicitly support the idea of software patents. He made it sound like copyright law was not enough protection for software innovations. While he attacked some of the statements

made by our camp, he never clarified what he wanted lawmakers to do with respect to software patents.

Economic Skepticism Concerning the Patent System

From my perspective, the most interesting statement came from Joachim Henkel, a senior researcher at the Institute for Innovation Research, Technology Management and Entrepreneurship at Munich's Ludwig Maximilian University. He told us that economists are generally skeptical about the patent system in most areas, not just software.

According to him, the only field in which most economists agreed there were merits in the patent system was pharmaceuticals. Researching and developing a new medical agent costs hundreds of millions, sometimes even billions, of euros, and it's hard to imagine that such investments could be justified without patent protection.

Therefore, economists consider it almost certain that the patent system is beneficial to the bottom line in that field. "To the bottom line" obviously implies that there may be some negative effects (such as patent misuse by some entities), but also that those are far outweighed by the positive ones.

It was interesting to hear that even in areas of technology other than software, economists can't find evidence that the patent system benefits the economy and spurs innovation. On the specific issue of software patents, Henkel then made it clear that the negative consequences of the patent system are particularly bad for software while the positive aspects of patents don't apply much.

In a non-scientific way, I took a similar position. I said that software patents that really fit the parameters of the software industry would have to conform to the following rules: they would only cost a few euros because research and development in the field of software doesn't require a lot of capital; the examination process would be finished within weeks, or maybe months, but not years; they would only be valid for 18 months or so reflecting the rapid pace of innovation in software; they would be assigned a unique Latin nomenclature (which someone would have to create), as pharmaceuticals are, so that electronic search methods could successfully identify patents relevant to particular cases.

Since none of these rules are feasible, there should be no software patents.

Of all the demonstrations that took place throughout Europe that day, the one in Berlin produced the most exciting news.

That demonstration, which had about the same number of participants as the one in Munich, took place in front of the German ministry of justice, the ministry in charge of the software patent directive on behalf of the German national government. Dr. Elmar Hucko, one of the ministry's highest-ranking officials, came out to accept a bundle of signatures and other materials from the FFII.

He also addressed the demonstrators and, to thunderous applause, promised that the German government would not accept the Irish presidency's proposal in the forthcoming Council meeting. Hucko went on to say: "On the issue itself, our position is closest to yours."

Mirroring the FFII, he said that the European Patent Office had incorrectly granted a number of software patents, and that patents should be a reward for "serious inventions", not a "strategic truncheon for clubbing down one's competitors".

When I read about his comments on the Internet the next morning, I began to hope again that a Council decision in favor of software patents could still be stopped. In the Council, the number of votes allocated to the government of each country is determined by its size (although the numbers are weighted to give smaller countries a bigger voice than they might otherwise have had). Germany as the largest EU member state has the maximum number of votes (ten at the time), and its stance should be a strong signal to others.

The FFII still saw major differences between their position and that of the German government, but Hucko's announcement that Germany would oppose the Irish "compromise" proposal seemed to me more immediately important than anything else.

A few days later, Lucio Stanca, the Italian Minister for Innovation and Technology, wrote an open letter to three other Italian ministers (who were responsible for Italy's position on the directive), calling on them to oppose the Irish proposal. Stanca went on to make specific suggestions as to which of the proposed amendments Italy should support.

Public Council Meeting With Special Guest Bolkestein

On May 17 and 18, 2004, there was a two-day meeting of the EU Competitiveness Council.

You may be wondering how the EU Competitiveness Council relates to the EU Council. An EU Competitiveness Council meeting is a meeting of the EU Council in a particular "configuration", that is, made up of the specific politicians from each member country's government who are in charge of the area of policy being discussed. Other Council configurations include, for example, the Agriculture and Fisheries Council or the Transports, Telecoms and Energy Council.

The fact that ministers usually represent their countries in those specialized Council meetings is the reason why you may often read or hear about the "EU Council of Ministers". That term, however widespread it may be, is only an unofficial synonym for "EU Council".

One item on the Competitiveness Council's agenda was the "Directive on the Patentability of Computer-Implemented Inventions", which we more accurately call the software patent directive.

Originally, the Council's Irish presidency had hoped that the meeting would just rubber-stamp its "compromise" proposal. However, further negotiations over the text of the proposed legislation were needed in order to build the necessary qualified majority.

The meeting was public, which means that anyone can walk into the Council building and follow its progress via live video transmission in another room.

The meeting was chaired by Mary Harney, an Irish minister. If a country has the EU presidency, then its ministers get to chair the Council meetings. The EU Commission usually sends the commissioner in charge of the topic being discussed, in this case Frits Bolkestein, then commissioner on internal market policy. The commissioner is supposed to be an adviser to the Council, but can strongly influence a decision.

It is the Commission's job to make legislative proposals and serve as a project manager throughout the process. The Commission can even unilaterally abort a legislative process. Even so, it has to be somewhat cooperative in its dealings with the Council because the Council has the power to remove the

commissioners. Since 2004, the European Parliament also has that right, and appointments to the Commission now require parliamentary approval. The parliament has already exercised its new power once and forced a change in the list of nominees.

Two Bullies on the Block

At the meeting's outset, a quick check of the various countries' positions showed there was no qualified majority in favor of the proposed legislation. On May 1, 2004, ten new member states had acceded to the EU. Post-expansion, the total number of votes in the EU Council was now 124, so a qualified majority required a minimum of 88 votes. No decision could be made with 37 or more votes missing.

Both Bolkestein and Harney pressured those country governments that weren't convinced by the Irish proposal. Since they didn't want to make any meaningful concessions, their strategy was to allow trivial alterations and then urge the dissidents to agree with the rest.

At Bolkestein's suggestion, a clause was inserted into the text that said: "A computer program as such cannot constitute a patentable invention." Bolkestein said: "I repeat: Software as such is not patentable. Is it more clear now?" That was a ridiculous statement because the same exclusion had been in the European Patent Convention for more than 30 years, and the fact that the patent system circumvented it was the very reason why there was a problem with European software patents in the first place. That inserted sentence could only look like a solution to a layman.

The official discussion was interrupted for a coffee break, but some of the delegations continued to negotiate under Bolkestein's influence. At that stage, the German government contented itself by inserting the two words "new and" in a place where they wouldn't prevent even a single software patent from being issued. On that basis, less than a week after Elmar Hucko's announcement at the FFII demonstration, Germany gave up its resistance to the Irish proposal. Therefore, it's questionable whether Germany ever seriously meant it.

Something Was Rotten in the Treatment of Denmark

The German about-face brought the slightly modified Irish proposal very close to a qualified majority. Its impact was so great not only because of Germany's own

votes but also because some of the other delegations had been instructed to follow Germany's lead.

The remaining dissidents were Spain, Italy, Poland, Denmark, Belgium, and Austria. Poland was a special case that played a key role later. Basically, the Polish delegate didn't reaffirm Poland's position when he was supposed to. The Irish presidency and the Commission now only needed to convince one of the remaining dissident countries to support the proposal.

This transcript shows how Harney, the Irish minister, bullied the Danish representative:

> Ireland: And Denmark? Can I hear from Denmark please?
>
> Denmark: I would really like to ask the Commission why they couldn't accept the last sentence put forward by the Italians, which was in the original German proposal.
>
> Ireland: I think the commissioner already answered that question. I'm sorry, Denmark. So are you yes, no, abstain?
>
> Denmark: I think we wouldn't, we're not hap...
>
> Ireland: I assume you're a "yes".
>
> Denmark: We're not happy.
>
> Ireland: Are you 80 percent happy?
>
> Denmark: But... I think we...
>
> Ireland: We don't need you to be totally happy. None of us are totally happy.
>
> Denmark: Oh, I know that, I know that.
>
> Ireland: If we were, we wouldn't be here.
>
> Denmark: I think we're not very happy, but I think we would, we would...
>
> Ireland: Thank you very much.

Denmark: ... we would like to see a solution today.

Ireland: Thank you very much, Denmark. Ladies and Gentlemen, I'm happy to say that we have a qualified majority, so thank you all very very much indeed, and thank you to Commissioner Bolkestein.

Outrage in the Aftermath of the Decision

The appalling circumstances surrounding this Council decision provoked a storm of protest.

Certain members of national parliaments (MPs) felt that they had been ignored by their governments. Jörg Tauss, a member of the German parliament, vented his anger by sending an open letter to the German minister of justice, also a member of the Social Democratic Party.

Shortly afterwards, the Free Democratic Party, then an opposition party, introduced a motion for a resolution by the German parliament that, if approved, would have strongly condemned the government's about-face. My first impression, at the time, was that the motion was just an excuse for government-bashing and therefore wouldn't help our cause much, but as you will see, that initiative actually did help us later on.

Some governments produced interesting reasons when they had to justify supporting the Council's decision, and not all of them were credible. For example, the Hungarian delegation claimed that a fax machine failure prevented instructions from their home country from arriving in time.

Two days after the decision, the Polish minister for EU integration, who had represented Poland in that meeting, released the news about his mistake, declaring in writing that he never meant to support the proposal. He thought that remaining silent and inactive meant he had abstained, but the minutes listed Poland among the countries that supported the proposal. We will return to this point later.

Everyone Accepted the Decision – Except for the FFII

I had hoped that the EU Council would have to continue to negotiate after the May 17-18 meeting. If it had, summer vacation would probably have delayed the process well into the second half of the year. In the interim, I thought it might be

possible to mobilize more companies and investors to help explain the negative economic effect of software patents to politicians.

It was disappointing to read the media reports. Some made it clear that the EU Council had taken a position in favor of software patents. Others spread the propaganda emanating from the Commission and the Council, by saying that the proposed directive was only supposed to establish a uniform standard across the EU for patenting computer-controlled technical inventions, such as a washing machine with a computer chip.

What all the reports had in common was that they portrayed the Council vote as a formal decision. None of them gave any reason to doubt the finality of the vote. The next stop was going to be the European Parliament.

However, the FFII wasn't ready to give up. Even before the Council meeting, they had been working on collecting signatures for an "Urgent Appeal". This effort was now modified to become a call for the Council's decision to be reversed.

They named the new project "consrevers" ("cons" for "consilium", the Latin word for Council, and "revers" for "reversal"). To be honest, I didn't believe they had a chance, but I changed my mind after a while.

The FFII retained the services of Fajardo-López, a law firm based on the Canary island of Tenerife, which belongs to Spain. That firm worked with experts on European law from two universities in Madrid. Their report stated clearly that the Council had only reached a political agreement, which is not a formal decision on a so-called "common position" of the Council. The formal decision would have to be taken later, and it could only be taken if the proposed text were available in all 20 of the EU's official languages.

No one could provide any verifiable evidence that the Council had ever changed its mind between a political agreement like the one of May 18, 2004, and the formalization of the decision when the translations became available. However, the FFII wasn't going to be discouraged by that. They knew that it was legally possible, and they vowed to work to build the political will to force the change.

The ensuing tug-of-war over the Council's common position was indeed going to be unprecedented in the history of the EU. What looked like futile defiance was actually going to produce amazing results.

Later, Brussels-based journalists with many years of experience in following EU politics described the software patent directive as "one of the most bitterly contested pieces of legislation in the history of the European Union", which is how the IDG News Service put it. In the rest of this book, you'll see why even that is an understatement.

Absorbed by the Debate

Until I went to Brussels for that conference in April of 2004, I had no intention of becoming a campaigner or lobbyist. My priority was to develop a computer game. After the conference, I gradually got more involved in politics. Gradually? Maybe I should say "rapidly".

Initially, my focus was on building a network of contacts among software patent critics, all of whom were either members of, or closely affiliated with, the FFII. I also discovered that it is quite time-consuming to learn about the topic of software patents and keep up with the new things happening literally every day.

I only spent a few days on my own project between the Brussels conference and the Council's May 18 political agreement, and after that, I wasn't going to get back into my own project for about a year.

At the end of May, I drew up a list of all of my activities related to software patents. It was a hodgepodge of numerous small things, no one of which was really spectacular. I made contact with a few journalists and got quoted in some of the reports of the Council's political agreement and in some of the follow-ups. I started writing articles that explained why software patents are undesirable for the economy and society, some of which I would use later on. I read the news and told others of what I thought might interest them. I wrote letters, for example one to the German ministry of justice asking to participate in a roundtable that they were going to host in about a month.

Each of those details is too unimportant to be worth discussing in this book. However, unless you're world-famous, these are the things you have to do if you want to be involved in politics. Many people spend years or decades and never advance to the next level, where it gets more interesting. In that sense, I was lucky that I got to experience some truly exciting things rather soon. The next month, June, would already reward me for all that groundwork.

The Unbalanced Battle

When I first thought of creating an alliance of companies to fight software patents, I didn't expect to make it a full-time commitment. I had some rough ideas as to what should be done to influence the political process, but I also had hopes that others could contribute new ideas. I thought I could be a background adviser.

Four days after the disappointing Council decision, I wrote a memo urging my colleagues at MySQL AB to take the lead in bringing like-minded companies together. I felt that this could best be done on a company-to-company basis, and I considered MySQL AB to be in a particularly good position to adopt such a role because almost everyone in the IT industry knows them.

They agreed, and within about a week, we began to get some traction. Within a few months, three companies were willing to support me in starting the NoSoftwarePatents campaign.

That memo of May 22 was titled "The unbalanced battle". Some passages from it:

> The pro-patent lobby works with enormous resources. They have full-time lobbyists working with the EU and in each of the major countries. They buy influence through donations. They can sway the positions that are officially taken by industry associations (such as BITKOM, which mostly has small and medium-sized members but is very much controlled by the big ones, thus takes pro-patent positions in public).
>
> I think we need to really make headway now by contacting other companies with a vested interest and discussing this particular issue with them.
>
> If we see that all those companies really would want to make meaningful contributions to winning the political battle, then we could pool our resources [...] and get going. It would be a significant cost but if software patents in the EU become a reality, then every company will spend a huge multiple of that on patent attorneys etc. in the future.
>
> Time is not on our side. The EUParl will most likely vote in September, and a lot of the efforts really have to start within a matter of weeks. We are also getting closer to general vacation

> time. While we don't even have the infrastructure in place to deal with the issue, the big companies and the EPO already have their full-time lobbyists work on this every day.

The idea that the European Parliament (abbreviated as "EUParl" in that memo) would vote in September was what I had been told at and after the Brussels conference. Everyone assumed that the Council would quickly communicate its decision the parliament, and that the parliament would vote shortly after the summer vacation. It turned out that timelines in such a process are always moving targets. A few weeks later, some media reports suggested that the parliament would not have its next vote on this before the beginning of 2005.

Open Collaboration Over the Internet

Shortly after the disaster in the Council, I started signing up to various mailing lists of the FFII. That was my entry into the FFII's open collaboration system.

I call it open collaboration because many of those mailing lists are publicly accessible. Anyone can subscribe, which means that you receive all emails posted to the list and you may also contribute your own messages. I had been on mailing lists before that dealt with technical topics, but this was the first time that I saw a political organization leveraging mailing lists and other forms of open collaboration to let volunteers contribute to its efforts.

For a pressure group that consists of activists throughout and even beyond the EU, there is no alternative to the extensive use of electronic communication. There is no way to meet physically, at least not frequently.

Those mailing lists are the arteries of a virtual network. The only people who will be removed from the public lists are those who misbehave. There are also private lists, and for those a moderator (or group of moderators) decides whom to invite. It was interesting for me to see who frequented some of the private lists. Most were formally members of the FFII, but the moderators also invited people from other groups as well as independent activists like myself, and a few friendly political aides.

Besides mailing lists, the FFII also used Internet chats (for real-time conversation) and a Wiki. A Wiki is essentially a set of Web pages that everyone can edit – either modifying the pages that are there or adding new pages of their own – and make their changes immediately visible online. Based on that concept, Wikipedia has become the most popular encyclopedia on the Internet. The

"Swpatcnino" Wiki section of the FFII home page is the most up-to-date and complete archive of news related to software patents.

Theoretically, a Wiki is self-regulatory: if someone abuses their editorial rights and posts offensive material or does other things that run counter to the idea, there are usually enough people watching to ensure that someone will immediately undo the edits made by the "trolls" and saboteurs. However, it's also possible to restrict access rights to a group of trusted editors.

A Google search shows that the FFII's Wiki has tens of thousands of pages. That is a knowledge base of enormous proportions, and it wouldn't be possible without the openness and advanced collaboration methods of that system.

An Idea Led to a Debate: Demonstration at LinuxTag

The first major contribution that I made to the mailing lists was the suggestion that we organize a demonstration at LinuxTag, an open-source trade show and conference held in the southwestern German city of Karlsruhe. I tossed out that idea on June 5, a little more than two weeks before that event.

I regarded LinuxTag as a first-rate opportunity for a demonstration because of the fact that the open-source community is particularly opposed to software patents. Here are excerpts from what I wrote:

> I know it's very short-term and none of us wants to be distracted from other priorities, but wouldn't LinuxTag be a perfect opportunity for having the first anti-swpat demo with a quadruple-digit number of participants?
>
> Some would be aware of the demo before they even go there, some might specifically schedule their visit for the day of the demo, but even all others will simply become aware of it on the spot and will then express solidarity.
>
> I can't think of any lower level of logistical effort than on such an occasion. Certainly, Karlsruhe is not the place where EU or German legislation happens (just where some of it is decided in court) but if we were able to claim a demonstration with thousands of participants, wouldn't that be some nice progress over the 150-person demos in Munich and Berlin last month?

> And even over the 800-person one (at least that's what the press wrote) in Brussels?

This provoked a debate, and debates on mailing lists are sometimes very heated because people don't have to face each other while dishing out their abuse.

A few considered demonstrations generally an inappropriate activity, and they objected that our opponents (the lobbying groups of big industry) would never do anything like that, so we shouldn't either. I disagreed because over the years demonstrations had been organized by groups from all parts of the political spectrum and people from all walks of life. Also, organizing a demonstration to generate awareness doesn't preclude a political dialogue at other levels. Demonstrations are obviously not a substitute for other types of action, but they can serve a purpose by giving the press something to write about and by further mobilizing one's supporters.

A Man of Action Made It Happen

In a volunteer group, the most fundamental distinction is between the "doers" and the "debaters". There is never a shortage of people who offer their unsolicited opinions, but there is always a scarcity of those who execute ideas.

Since I had a number of other things to do that month, I wouldn't have been able to pull off the LinuxTag demonstration on my own. It would have become just another one of the countless ideas that never materialized if it hadn't been for Jan Wildeboer, an open-source software developer. He offered to take charge, and got everything done in time.

To plan the LinuxTag demonstration, I went to a meeting of the Munich chapter of the FFII for the first time. Most of those meetings, including this one, took place in a combination of a Vietnamese restaurant and Internet café named "Van". Meeting there enabled the FFII activists to surf the Web, and to send and receive emails, while having internal discussions.

It was Jan's idea to have computer programmers perform in prison uniforms at the demonstration. Their costumes would not only draw attention but also illustrate the idea that software patents endanger the freedom of software developers. That depiction holds more truth than most people would think: software developers can indeed be sent to jail for patent infringement under certain circumstances. We printed the numbers of some European software patents on the costumes. Those

who didn't wear costumes were offered T-shirts with a picture of a programmer behind bars.

You Can't Please Everyone

A major problem emerged even after we were set to go ahead. A majority of the LinuxTag organizers disliked the idea of a public protest against software patents at or around their trade show.

LinuxTag started in 1996 as a gathering of the open source programmer community and since then had become increasingly commercialized. The organizers were afraid that a demonstration against software patents could be detrimental to their event's success with a commercial and professional audience. We also heard they didn't want to alienate some of their larger exhibitors, such as Microsoft, who were known proponents of software patents. The fact that the demonstration was proposed at such short notice was used as a pretext to turn it down.

A number of FFII activists didn't want to proceed with the plan against the will of the LinuxTag organizers, afraid that it might preclude them from having their own booth at LinuxTag. My feeling, however, was that we had to take action now because otherwise by the time LinuxTag came around the following year the legislative process on the software patent directive would have ended badly for us.

Ultimately, Jan and I convinced some of the others to proceed with the demonstration. We couldn't promote it at the show as we would have liked, and we couldn't demonstrate on the grounds of the exhibition center since the LinuxTag organizers had rented it for the duration of their show. We chose a public location right outside the grounds for the official meeting point, so we weren't formally dependent on the LinuxTag team.

Before we even got there, Jan ventured to prophesy that if the demonstration was successful, the LinuxTag folks would make it sound like it was their idea in the first place. Funny as it may seem, that's exactly what happened. When LinuxTag 2005 was announced, our demonstration was listed as a key indicator of the show's relevance.

However, other events took place between this initial planning stage and the actual demonstration. Let's stay reasonably chronological.

EU Elections

In the period from June 10 to June 13, 2004, elections to the European Parliament took place in 25 countries. Voter turnout is usually very low compared to national elections because most people don't fully understand how important the European Parliament now is.

But we did. We knew that the outcome would be key to the fate of the software patent directive.

Based on the voting record from the first reading, we knew which parties from the 15 "old" member states were historically sympathetic to our position and which were closer to our opponents. We were generally optimistic about those from the ten new member states since those countries aren't home to industrial giants like Siemens and Nokia.

Before the elections, our camp refrained from making much noise about its voting recommendations, but many of us told others that the most reliable political groups from our perspective were the Greens and the far-left parties. Those blocs had voted pretty consistently our way in the first reading.

I encouraged everyone at MySQL AB to vote for the Greens on the grounds that the software patent directive would probably be the single most important decision for our industry that the newly elected parliament would be dealing with. Therefore, I said I would cast my vote on the basis of the candidate's stance on the issue of software patents. Not everyone is comfortable with voting for a left-wing party, and I don't expect to vote for the Greens in every election from now on, but in this particular situation, I thought it was a valid recommendation.

While it's unlikely that the software patent critics' voting advice actually made any difference to the composition of the new parliament, it was a matter of principle. All the politicians that voters contacted before the elections said they were against software patents, but only about half of them told the truth. The other half lied. Those who lied wanted it all: our votes and the goodwill of big industry, which sometimes has economic implications. At least we tried to create some transparency.

Most countries went to the polls on June 13. The media, however, only reported on the outcome in their own country. They basically focused on what the European elections showed about the current popularity of the national parties. That's understandable, but in the European Parliament even the largest national

delegation (the Germans) accounts for less than one in seven seats. To understand European politics, one really needs to know the strength of the groups across national borders, and that got virtually no media coverage.

I can't really blame the media because it's a chicken-and-egg problem. If Europeans don't care about EU politics, the media don't see a demand for more reporting, and if the media don't report, people don't get interested. Many Europeans don't even know the name of a single MEP!

An analysis of the various results throughout Europe showed that the election had come out reasonably well for us. It could have been better, and unfortunately some MEPs who were really on our side didn't get re-elected, such as Bent Andersen from Denmark and Olga Zrihen from Belgium. However, some parties that had generally sided with us performed better than many of our opponents. All in all, we didn't feel that the composition of the new parliament was disadvantageous for us compared to that of the previous legislative term. It even looked like a slight improvement.

At a Crossroads

The week of June 21 was going to be busy, with meetings scheduled in three different cities. There would be discussions with prospective corporate partners for the political fight, a roundtable at the German Ministry of Justice, and the demonstration in Karlsruhe. Especially in view of the talks with potential partners, I felt I could no longer put off making my own decision about my personal availability for this political issue.

Given the close working relationship with MySQL AB, I informed them first, and explained my reasoning.

There were pros and cons to offering my full-time involvement for a length of time. I didn't want to be a fanatic who would give up a major personal opportunity in pursuit of an idealistic goal. At the same time, I did consider this a unique situation, and a chance to get seriously involved in politics, an area that I had always been interested in (although without professional ambitions).

It's not an easy decision to stand up and boldly proclaim that one is predestined to fill a certain role. If you say "I'm the one", many people think it's a sign of an inflated ego. However, I'm absolutely convinced that most of the people who ever made something big happen (or contributed to such a thing) had to do the same at some point. Modesty is a virtue, but I wasn't going to let it get in the way.

I was also encouraged by the fact that I had previously run a campaign for a period of a few months under extreme time constraints and difficult circumstances. In the summer of 1995, an American software publisher asked me to handle the sales, marketing and publishing effort for the computer game *Warcraft II: Tides of Darkness*. By the time I got started, an early prototype of the game had already leaked out, and the press had started reporting on it. Action had to be taken quickly to get everything under control.

I took charge of the project, and within a few months became a one-man show that performed just about every function that a local subsidiary of a computer games company would. I managed a variety of PR efforts, such as press trips to the company's headquarters in the Los Angeles area. I changed the business model from local licensing to a distribution deal. I also assisted in the negotiation with distribution companies.

Although my official job was purely commercial, I even ended up translating the game into German. When we were getting close to Christmas and the release date of the game was threatening to slip into the following year, I went to California and spent a week in the developers' offices helping finalize the German-language version in parallel to the US version. In the end, Warcraft II topped the German sell-through charts for computer games for seven weeks in a row and sold about ten times as many copies as its predecessor.

So I believed that I had already passed the test for being able to handle a mission from hell. I was ready to repeat the Warcraft II story in the political fight against software patents. However, I also knew that there was no guarantee that I could match the success I'd had with Warcraft II.

Slow Start With a Conference Call

On June 21, 2004, the first conference call among a group of companies opposing software patents took place. Having a telephone conversation was our second choice. I originally wanted to bring representatives from such a group of companies together in one location.

Three of us met in Frankfurt to make the call from a hotel conference room there: Mårten Mickos, the CEO of MySQL AB; Oliver Lorenz from the legal department of Magix AG (a German multimedia software company); and myself.

Oliver had spoken at the FFII press conference in Brussels two months earlier, and I thought he did a very good job at explaining Magix's critical view of

software patents. He mentioned his company's negative experience in dealing with allegations of patent infringement, particularly, though not only, in the US market. One of his statements was: "From the perspective of my department, which is the legal department, I should probably appreciate the problems that software patents create because that is a growth opportunity for our team of in-house lawyers. However, it's simply not in the company's interest."

On the way to Frankfurt, I had already visited the German Web hosting company 1&1, the largest such company in Europe, if not the world. Our point of contact at 1&1 joined the conference call by telephone, and so did several other companies.

With the exception of Red Hat, the world's premier Linux company, and MySQL AB, none of the companies participating in the conference call had sent a high-level decision-maker. I started to doubt that companies would get serious about the threat of software patents.

We agreed to schedule a follow-up call for July 1. Later that day, at Frankfurt airport, Mårten said that we should be patient, and that it might take more conference calls to get more decision-makers involved. I, however, was worried that we didn't have much time. A couple of days before the follow-up call, I sent out an initial proposal to everyone and suggested that the companies collectively provide me with a war chest, and I would handle a campaign for them. "Full-service, turnkey", I called it, using the lingo of the IT industry.

Preparing for a Roundtable in the Ministry of Justice

I mentioned that the German ministry of justice was planning to host a roundtable. The initial list of invited organizations was heavily skewed: pro-patent lobbyists outnumbered software patent critics three to one. The FFII asked the ministry to redress the balance, and I owe it to Christian Cornelssen, the FFII's Berlin-based primary point of contact for the German government, and Oliver Lorenz that I was included among those who were added to the list. I had, as I said, sent a letter to the ministry myself, but that initiative was fruitless until the FFII put in a good word.

The roundtable was scheduled for June 22, and everyone received a set of documents from the ministry to help us prepare for the discussion. Those documents included the European Commission's original 2002 proposal, the

European Parliament's first-reading opinion, and the text of the Council's political agreement of May 18, 2004.

One thing struck me as I read the Commission's proposal. They admitted that the (vast) majority of respondents to an Internet survey had spoken out against software patents. But then they said:

> On the other hand, submissions broadly in support of the approach of the consultation paper tended to come from regional or sectoral organisations representing large numbers of companies of all sizes, such as UNICE, the Union of Industrial and Employer's Confederations of Europe, EICTA, the European Information and Communications Technology Industry Association, and the European IT Services Association. There were also individual large organizations, other industry associations and IP professionals. Thus although the responses in this category were numerically much fewer than those supporting the open source approach, there seems little doubt that the balance of economic weight taking into account total jobs and investment involved is in favour of harmonisation along the lines suggested in the paper.

I could understand why they weren't going to look at the 1,447 submitted questionnaires as a democratic vote. It's reasonable to weight the response by economic considerations. However, it was plain wrong to describe organizations like EICTA and UNICE as "representing [...] companies of all sizes".

Anyone who is even remotely familiar with those two organizations knows that regardless of how many small and medium-sized members they claim, they are firmly under the control of large corporations. The "E" in EICTA's name stands for European, but some of the driving forces behind it are the European subsidiaries of American companies (IBM, Microsoft, and several others).

Briefing in Berlin

Before the roundtable, Oliver Lorenz and I met up at a café on Gendarmenmarkt, a stone's throw from the Ministry of Justice. Oliver had participated in a previous, similar roundtable, so he was able to fill me in on the tactics and positions of our opponents.

One of them was having a cup of coffee at the very same place: Markus Hössle, the chairman of the software-focused working group of the association of German patent attorneys. Oliver didn't immediately recall his name, but recognized him and warned me: "He's very difficult."

To some extent, Hössle's behavior at the roundtable justified that warning. He constantly tried to put his opponents on the defensive using methods some might disagree with. Even during the lunch break, he kept attacking. However, after the roundtable ended in the late afternoon, he and I actually had a respectful and reasonably friendly chat like political opponents, not mortal enemies.

Oliver also explained that IBM's Fritz Teufel and other corporate patent attorneys have spent almost all of their professional lives on nothing but patent law, continually pushing the boundaries of what is patentable. With this EU directive, they wanted to entrench their philosophy in law.

At a previous roundtable, Oliver had noticed that Fritz Teufel and a high-ranking German patent judge walked out side by side, talking to each other like long-time buddies. Politically, certain courts and the patent attorneys working for large corporations are allies in seeking patent expansion. I had always thought that there was more distance between judges and lawyers.

Among the Chosen Three

The roundtable took place in a meeting room on the top floor of the ministry building. The compound table was rectangular with two extremely long sides. That's common to such events: everyone wants to be there, and the organizers try to accommodate as many requests for participation as possible.

The seating plan did not really group each camp together. Maybe the organizers wanted to avoid an arrangement that would foster confrontation and opposition, but presumably some of the participants also wanted to maintain an impartial image (although hardly anyone was actually neutral on the issue).

People were still introducing themselves to each other when the minister, Brigitte Zypries, entered the room. The invitations had said that Zypries would "participate personally in the initial part of the meeting". Christian, there representing the FFII, thought she would just give a welcome address and then leave.

The minister walked all the way around that long table shaking hands with everyone and introducing herself. She didn't have to do this: she could have just addressed us collectively or had someone introduce the participants to her, but she was very unassuming.

A high-ranking ministry official made the same tour around the table. From a picture taken at the Berlin demonstration where he made the German government's unkept promise, I recognized him as Dr. Elmar Hucko. He was already moving on to the next participant when I seized the opportunity to thank him for my invitation. I don't remember exactly what I said, but I made some reference to my entrepreneurial background, and Hucko, a very courteous man, said that it was "important" to have me there.

That tiny snippet of conversation was, in all likelihood, very productive. After the minister's welcome address, Hucko said that three critics of the software patent directive would be given the chance to speak first. I figured the idea was that the minister would listen to three of us and then leave. It's a kind of consolation prize, like saying: "We decided against you, but now we'll be very receptive to your concerns."

Hucko named first Christian from the FFII, and then a lawyer who was close to an association of Linux-related companies. For the last speaker, he said they wanted someone with an entrepreneurial perspective. I got picked. I put it down to that brief exchange of words with Hucko a few minutes before. Sometimes it's a virtue not to keep your mouth shut when everyone else does.

Rising to the Occasion

Since this was going to be my first opportunity to address a cabinet member, I was glad to get to listen to the other two speakers first.

Christian spoke very quietly, but he was persuasive in his own way. He made some good points, such as this one: "We represent many computer programmers, and the prevailing sentiment is that they need to be protected *from* patents more than *by* patents." After he finished, the second speaker, the lawyer, launched a tirade of abuse. Toward the end of his diatribe, he gave the minister the unsolicited advice that she should seek out "more competent advisers", and she coolly replied that he'd have to leave that choice to her.

Both speakers went into detail about the proposed legislation. I wasn't really in a position to do that at the time, and Hucko's introduction had emphasized my

entrepreneurial background, so it was obvious that I should focus on the economic aspects of the issue.

Even before the roundtable, I had some idea of the points that I wanted to make, but I hadn't prepared for the possibility of speaking to the minister herself, so now I had to improvise. My message needed a different angle for a politician than for the specialists in the audience.

I started by taking some of the tension out of the atmosphere. I expressed my appreciation for the invitation and for the minister's recent participation in an online chat discussion, some of which included some very impolite rants from people who disagreed with her government's having backed the EU Council's decision in favor of software patents. Her presence in that online discussion had generated some media awareness, which had value in itself.

After two or three sentences, I was feeling great, and that enabled me to deliver an impromptu speech which was very political. I sounded much like a politician speaking in a parliament, and that was without notes. I was lucky. I peaked for this extremely important moment, and don't know if I could have done it the same way a day – or even an hour – earlier or later.

Patents and Political Priorities

To give some structure to my speech, I began by outlining three political priorities and expressing my hopes that those were also the government's priorities: The legislation should have a positive effect on economic growth (and thereby on employment); software buyers, including the ministry of justice itself, should get maximum value for their money; and to the extent that there is room for the pursuit of a noble cause, justice should be done.

Although Zypries was sitting at the far end of the table, I could see from her facial expressions that she agreed, at least philosophically. My conciliatory tone and the politician-like approach seemed to be working. I was also watching the others, and as I kept talking, I realized that those from my camp were pleased although the body language of some pro-patent lobbyists revealed uneasiness. That was wonderful feedback.

I went on to explain why software patents wouldn't serve any of those three purposes. A copyright regime without patents works best for computer software, I said, and pointed out that I had been living off copyrights since 1985. "Copyright law has served our industry very well, and if some say now that it's insufficient,

then let me tell you why: copyright law can only be used against criminals, and some people want a legal device that they can use against honest people."

As patents grant 20-year monopolies to those who register an idea first, they make the market less competitive and erect new barriers to entry. There should be competition to implement those ideas, and if only one company has the right to solve a certain problem, it can get away with a solution that is too expensive, too slow, or too insecure. That is clearly not in the interest of large parts of the economy and the public sector that use software, including the ministry of justice itself.

With a single patent being of little value in a field in which large numbers are needed to put together a meaningful product, large patent portfolios give an unfair advantage to large organizations. In that case, I said, might makes right.

I don't recall any more what else I said, but I was (and still am) confident that I succeeded in tailoring my message to the minister's level of understanding. I didn't go into details, but I didn't need to: the experts on her staff would deal with that.

When I was finished, the minister had a question for me: why, in my view, would the proposed directive lead to software patents? She said it wouldn't, in her opinion, allow patents on "the kind of software we [the ministry of justice] are using here".

I pointed out that the German government had itself proposed a clause to the EU Council that established an important requirement for patentability, and that the EU's internal market commissioner, Frits Bolkestein, had then declared it to be "unnecessary". I said: "Whenever I've been sitting at a negotiation table with someone who said that something was superfluous, it warned me that it was probably even more important than I had previously thought."

I also mentioned a presentation I had attended a few months earlier in the European Patent Office in which they had listed the types of software they considered patentable; the list had included the largest and most lucrative market segments. I encouraged Sabine Kruspig, a departmental manager from the EPO who participated in the roundtable, to interrupt me if I was wrong. She didn't.

But still the minister wouldn't do me the favor of agreeing with me, and I realized that she couldn't. She was stuck with the official position that they only wanted to allow patents on technical inventions like a computer-controlled washing

machine. I would have to wait another six months, minus one day, for her to admit in an official statement that the proposed directive had room for improvement in terms of drawing the line between software-driven technical inventions and pure software concepts.

SAP Eliminated All Reasonable Doubt

The rest of the day was interesting, but obviously it was impossible to find common ground between the proponents and opponents of software patents. Our group was too large to have a more productive discussion, and the differences couldn't be bridged.

When I was addressing the minister, I knew that a few minutes of talking wasn't going to be enough to change her mind. However, I did hope I could draw her attention to some of the implications. The rest of the roundtable would just be a debate in which both camps wanted to make their case in front of two ministry officials and parliamentary observers.

Once Zypries had left, Günther Schmalz, SAP's European intellectual property director, made his opening statement. The proposed legislation was acceptable to SAP: "We believe that this text allows us to obtain patents on the software that we develop."

Since SAP is a pure software company, that statement alone disproved the minister's official position that the directive was not about software patents. Companies like IBM and Siemens can claim to be in the business of computer-controlled technical devices as well as pure software, but SAP doesn't produce washing machines or anti-lock braking systems. It produces only software for accounting and other basic functions that keep a business running. It is exactly the kind of software that a ministry uses.

After the roundtable, I sent a follow-up letter to Zypries, in which I mentioned that SAP statement. There were only two possibilities: either she didn't know the truth or she purposely misstated the facts. I believed that the latter was the case, but either way I wanted her to know that SAP had contradicted her only a few minutes later.

Economic Skepticism Meets Legalistic Dogmatism

I also thought it was too bad that Zypries didn't get to hear Robert Gehring from the Technical University of Berlin. His background is that of a computer

scientist, but as a university researcher he looks at software development from an interdisciplinary angle, with a particular focus on economics. Like Joachim Henkel at the Munich panel the month before, he stressed that there is no economic evidence for the bottom-line benefit of software patents, but strong indications that software patents stifle innovation.

Gehring was quite critical of the fact that the patent system is error-prone. Many patents that are granted are ruled invalid in the courts when they are challenged. The fact that they are granted and used by their holders is a burden to the overall economy. Some companies pay license fees for such patents even though a court would rule that they didn't have to, just because they're afraid that patent will force their products off the market due. Those who fight back have all the expense, effort and risk of litigation.

Gehring's most astonishing claim was that, given the general problems of the patent system, its benefits were so questionable "that it might not even serve its constitutional purpose anymore". Oliver Lorenz also raised doubts concerning the patent system as a whole, and that got Hucko really upset. He insisted that "a patent is a good thing, in principle" and wanted consensus.

I didn't agree with Hucko, but we only want our own field to be free from patents and don't need a broader war. I had read on the Internet that Hucko had started working at the ministry of justice in about 1970, and that for some time he had been in charge of anything related to commercial law. He reminded me of some of my relatives from the generation that made the "economic miracle" happen in post-war Germany.

Despite the broken promise he made at the Berlin demonstration, I have the greatest respect for Hucko and his personal integrity, but I still hope that a new generation will be less emotionally attached to the patent regime. The issue must be approached with a less dogmatic mindset. Reverence for intellectual property is not a substitute for good policy-making. With the excessive proliferation of patents in the past and almost daily news of patent abuse, something has to be done.

A broad claim that "a patent is a good thing" stands in the way of a fundamental overhaul of a system that has, regrettably, been corrupted and perverted by special interests. A legal device that nominally protects someone's intellectual property has increasingly become a weapon for those who want to deprive others

of the fruits of their independent intellectual creations. And I wouldn't call that "a good thing".

Roundtable Ramblings

The roundtable made it clear that the FFII is respected for its profound knowledge, even by its opponents. Wolfgang Tauchert, the chief judge of a chamber of the German federal patent court, made specific reference to an analysis published by the FFII on its Web site, and so did other participants.

Even though Raimund Lutz from the ministry of justice referred to the FFII's May demonstration in a patronizing manner, the FFII represented a credible pressure group to the ministry officials.

Both Hössle, the patent attorney Oliver and I had seen at the café in the morning, and Susanne Schopf, from the industry association BITKOM (the German chapter of EICTA), claimed to represent the interests of small and medium-sized enterprises. But when I asked Hössle whether he could name even one example of a small company that had successfully used a software patent against a large one (unless the smaller company had no products of its own that could infringe upon any other patents), he didn't respond. I can't blame him: it's money in some patent attorney's pocket whenever someone files a patent, wants to enforce a patent, or has to defend himself against a patent suit. But none of those things are in *our* interest.

The EPO's Sabine Kruspig, and the German Patent and Trademark Office's representative, Hans Hafner, were both more reserved than the company representatives at the table. Kruspig was decidedly in favor of software patents, while Hafner was probably closest to neutrality of anyone who attended.

That difference may be attributable to personality, but don't forget that the EPO finances itself out of its fees while the German Patent and Trademark Office is paid for by the government (therefore ultimately the taxpayers). At first sight, it's always positive if an institution doesn't use tax money, but self-financing creates a vested interest in broadening the scope of patentability. Every organization wants to grow, and so does the EPO.

Kruspig went on the defensive when one of us brought up the fact that EPO patent examiners receive better internal performance ratings if they grant many patents, which is an absurd state of affairs. The whole purpose of the examination process is to reject applications if the examiners can identify a reason to do so.

Alternatively, they may work with applicants to modify the application, which usually results in a narrower scope and therefore a less harmful patent. Rewarding a patent examiner for approving many applications is like giving a detective an incentive to abandon investigating a case.

At first, Kruspig denied that the EPO works that way. However, after further questioning she had to concede that patent examiners get one point for each application they process, whether rejected or accepted, and also that rejection is a lot more work because they then have to prepare for an appeal by the applicant. Even the German ministry officials seemed to dislike that system of counterproductive rewards.

Early in the day, I got trapped in the debate. I was talking about the different market dynamics under which the software industry operates, and Kruspig pointed out that the patents they grant on processes relate to solutions that can be implemented in software or in hardware. That was a real pitfall. The software patent debate has quite a number of things that sound, from the perspective of common sense, as if they are valid points, but they can be used against you. By now I know how I could have avoided that one, but back then I didn't.

In-Flight Conversation

On my return flight to Munich, Tauchert, the senior judge, happened to sit next to me. We had a friendly conversation even though there had been some temporary hostility between us at the roundtable.

I had always thought judges were politically neutral, but today I know that many of them are not. In fact, Tauchert said that he was part of the German delegation to the EU Council's working group. I already knew from the FFII that he had been the head of a department at the German patent office, and as such, a proponent of extending the scope of patentability. Now, in his last few years before retirement, he was fighting for that same goal at the political level.

Interestingly, I wasn't the one who brought up the issue of software patents, not after a full-day roundtable. But after some discussion about foreign languages and how we learned and used them, Tauchert brought the conversation around to the directive.

It was then that I realized what a shock position the European Parliament's decision the previous year must have been to people in the patent system. Suddenly, there was a majority in a democratically elected body that wanted to

seriously curtail the scope of patentability rather than continue to give the patent system's practices free rein. Tauchert predicted that the directive would be on the political agenda for a few more years. I guess he also included the time that it would take after passage for member countries to implement the directive in national laws.

Speech at LinuxTag

The next day was my speech at LinuxTag in Karlsruhe, the open-source software conference and trade show. There was a special area for company presentations, or, in my case, political speeches. I had the last slot for the day, and although the officially allotted time was 30 minutes, I actually had well over an hour available counting from my scheduled start time until the grounds closed.

I started by explaining the status quo of European patent law, in particular Article 52 of the European Patent Convention and its exclusion of software patents. When I started, only about half of the seats in that area were occupied. Over time, they filled up and by the end more and more people were standing at the back.

Because I saw the level of interest in the topic, I took more time than I had originally intended. It would have been easy to rush the presentation, but now that I had time and a patient audience, I wanted to make sure that the audience could understand this complex and abstract issue as fully as possible.

After about an hour, I noticed that the crowd was gradually getting smaller. That was a clear sign that I had to stop. Later, I was told that the hall was almost vibrating because I was so loud. In my defense, I must say that I didn't know. Before I started, I asked people in the last row whether they could hear me, and got no feedback. Granted, my speech was emotionally charged, and it had to be.

Peaceful Demonstration with Friendly Cops

The next day, June 24, was the day of our demonstration. Jan and various other FFII activists had done a first-rate job in preparing for the rally. The organizers of the show didn't want us to promote our demonstration aggressively on-site, but Jan and a MySQL employee, Georg Richter, capitalized on their extensive contacts in the open-source community and mobilized a variety of people, project groups and companies. By an hour before the exhibition hall officially closed, there were people in anti-software patent T-shirts all over the place.

The meeting point was just outside the grounds. Programmers in prison costumes were practicing some derivative songs such as "Killing my software with patents". Just as at the two previous demonstration I'd seen, we had a unique blend of demonstrators: university students walking alongside businessmen dressed in suits.

Someone who must have been in his 50's, maybe even 60's, walked in front of me in a blue suit, sharing a banner. I overheard him saying that the last time he had demonstrated was in 1968. For others, such as Thomas Schwartz, the managing director of MySQL's German subsidiary, it was the first time ever.

There were different estimates of the number of participants. To me it looked larger than the one in Brussels, and the organizers later claimed about 1,000, although as always the police were more conservative about the numbers. Jan, our master of ceremonies, needed a loudspeaker to make himself heard. Guess who helped out? Our police escort allowed Jan to use their megaphone!

The officers realized pretty quickly that this was going to be a peaceful demonstration. Some of us explained to them what it was about, and they figured rightly that this was a different kind of issue than those that lead to riots. They said to Georg from MySQL: "This is the kind of demonstration we like. Nice folks, no violence. Makes our job a lot easier."

The sight of Karlsruhe's Marktplatz (market square) filled with our demonstrators was gratifying. Afterwards, Oliver Moldenhauer from Attac, a network of globalization critics, suggested to Joachim Jakobs of the Free Software Foundation Europe and to me that we issue a joint press release to report on this successful demonstration. We walked back to the FFII booth at LinuxTag and quickly wrote one on one of their computers. I had to leave to catch a train, but asked to be called me on my cell phone for final approval if any changes were made after I left.

I must admit that I had watched Attac's involvement in the demonstration with some concern because they are considered far left and therefore not exactly compatible with conservative politicians' value system. As in business partnerships, there is always a risk in politics that in opening one door you may close several others. I didn't know if MySQL AB as a company would have wanted to issue a joint press release with Attac, but I was comfortable with contributing a quote from my demonstration speech.

Two days later, I saw an article on *spiegel.de*, the Web site belonging to *Der Spiegel*, Germany's most influential weekly, that was clearly derived from our press release. That piece of publicity alone was worth all the effort that Jan, Georg, and many others had put into the Karlsruhe demonstration, and more. The article said that software patents "are no longer an exotic topic" and that they are of concern to a growing number of people. I was glad that I had vigorously defended my idea for this demonstration on those FFII mailing lists, and that I was flexible enough to work with Attac on this occasion. What a week!

The Dutch Did It

Tweede Kamer Made EU History

The first major breakthrough countering the Council's proposal for a software patent directive came in the Netherlands.

On July 1, 2004, the Dutch government took over the rotating EU presidency from the Irish. Shortly before midnight, the Dutch parliament (Tweede Kamer) passed a resolution with an overwhelming majority, calling on the government to abstain in future votes on the current proposal for a software patent directive – as noted above, thereby effectively voting against the proposal.

It was a first in EU history. Never before had a national parliament made a resolution opposing its government's voting behavior in the EU Council.

The resolution was proof that overturning the Council's position was much more than an *idée fixe*. The Dutch activists' success gave hope to software patent critics all over Europe. It also showed us a way forward: getting parliamentarians involved. We already had another example: the motion that the German liberal democrats had introduced into the German parliament in late May. In the light of the Dutch decision, that and other initiatives appeared as true opportunities rather than futile acts of protest against a done deal.

The Text of the Resolution

When the Dutch parliament made its decision, I only had the most basic information. I heard that a Dutch activist named Arend Lammertink had taken the initiative to contact parliamentarians. I was told that Social Democrat Member of Parliament (MP) Martijn van Dam had introduced a motion that was approved by a vast majority that included almost all parties. Even the largest party in the coalition that makes up the government, the Christian Democrats (Christen Democratisch Appèl, CDA), voted for it. The lone exception was EU commissioner Bolkestein's party, the People's Party for Freedom and Democracy (Volkspartij voor Vrijheid en Democratie, VVD).

One rumor was that some MPs thought it was time to teach the Dutch Minister of Economic Affairs, Dr. Laurens Jan Brinkhorst, a lesson. Among other things, he had misinformed the parliament about the legal consequences of the proposed

legislation. Even though the Council's text allowed for software patents, he described it as being in line with the European Parliament's suggestion that clearly excluded software from the scope of patentability.

The FFII published this translation of the July 1 resolution, provided by Rishab Aiyer Gosh, a university researcher from Maastricht.

> The Parliament,
>
> having heard the deliberations,
>
> whereas in the [EU] Competitiveness Council of 17 and 18 May 2004 a political agreement was reached on a proposal for a directive concerning the patentability of software;
>
> whereas the minister of economic affairs on behalf of the Netherlands has expressed his support for this proposal;
>
> whereas the proposal on essential items differs from the text previously accepted by the European Parliament;
>
> considering that the minister of Economic Affairs misinformed the Parliament about the nature of the planned proposal shortly before the Council meeting, as a result of which the Parliament was unable to duly fulfill its controlling task;
>
> considering that a directive about the patentability of software must lead to harmonization of legislation within the EU in order to prevent excesses with regard to the patentability of software;
>
> EXPRESSES its [the Parliament's] opinion that the political agreement as reached at the Competitiveness Council of 17 and 18 May 2004 offered insufficient guarantees to prevent excesses with regard to software patentability;
>
> CALLS UPON the government to convey this opinion of the Parliament to the other [EU] member states;
>
> CALLS UPON the government to act according to this opinion in further discussions of the Council proposal, and from this present moment, abstain from supporting the current Council proposal,

and proceeds to the order of the day.

The motion was introduced by a cross-party group of MPs: van Dam (PvDA; center-left workers' party), Vendrik (GroenLinks; Greens), Kraneveldt (LPF; List Pim Fortuyn, a populist party described in foreign media as being nationalistic), and Giskes (D66; liberal democrats, Brinkhorst's own party). The parliament voted along group lines, not individually. 122 votes were in favor of the motion, and only 28 (from Bolkestein's VVD) against.

Democratizing Europe

Until the Dutch resolution, national parliaments throughout the EU had passively accepted a fate of gradual marginalization: executive branches are in charge of EU policy and can take legislative decisions at the EU level without any involvement by national lawmakers, who then must implement EU directives into national law.

Once the EU has decided on a directive, national parliaments have only minimal leeway. If the national law they write strays too far from the directive or if they don't complete this national implementation within the timeline specified in the directive (usually two years), their country can be fined by the European Commission, and the European Court of Justice can decide any relevant cases appealed to it on the basis of provisions in the EU directive. Essentially, if a member country is unhappy with a directive, it can only gain a little bit of time by non-compliance. The only (theoretical) way to prevent the directive from affecting the country's citizens and companies is to leave the EU.

Separation of powers is a traditional concept of European democracy. It is attributed to political philosophers John Locke (17th century) and Charles de Montesquieu (18th century). Both thought it was important that lawmakers and the executive government be separate, and Montesquieu additionally saw the need for an independent judiciary.

I can't think of any better validation of their ideas than our experience with the EU Council and its software patent working group. Emissaries from the national patent systems of Europe, most of them closely involved with the European Patent Office, were empowered to overturn a decision taken by directly elected parliamentarians. So what did they do? They wrote a directive that would benefit their institutions and their profession. The proposed directive would have allowed continued patent inflation. Large numbers of patents (and of patent law suits)

enhance the power, the prestige, the careers and the money-making opportunities for patent professionals. but they are certainly not conducive to Europe's overall prosperity.

That's a terrible conflict of interests, and while there's no assurance that parliaments always make the right decisions, there's at least a better chance of it because elected representatives are closer to, and somewhat dependent upon, their voters. Appointed officials, on the other hand, can cause whatever damage they want as long as their superiors have a *laisser-faire* mentality. They usually won't lose their jobs unless they do something serious, such as stealing something or ceasing to show up for work. Parliamentary seats, however, are periodically up for reelection.

The only way national legislatures can continue to play their important constitutional role is by influencing the votes their governments cast in the EU Council. On paper, they have always had that right. By way of its resolution on July 1, 2004, the Tweede Kamer of the Netherlands seized the opportunity to bring its political weight to bear.

Three other national legislatures eventually followed suit. By now, the politicians of several European countries use the software patent directive as a point of reference whenever they consider parliamentary participation in an EU legislative process.

As I said earlier, it's unfortunate that EU politics don't yet receive much media attention. This unprecedented historic breakthrough went largely unnoticed. We couldn't even generate much publicity for it in the IT press at that time. There were a few mentions: one article on the Web site belonging to the UK's *PC Pro,* titled "Support for software patents faltering in Europe", a couple in the German media, and a few on international Web sites. The general news media didn't pick it up even though this parliamentary resolution transcended the special topic of software patents and had implications for EU politics in general.

We definitely had a PR problem, and we were going to tackle that one just a few weeks later.

Unclear Implications

This was the first of several such situations that taught me that a declaration by a legislature or a government is one thing and how the declaration is acted upon is another story. For better or worse, that's politics.

The resolution called upon "the government to act according to this opinion in further discussions of the Council proposal, and from this present moment, abstain from supporting the current Council proposal". This looked like it should change the Dutch vote from a yes to an abstention. Depending on the positions taken by other countries, it could take the level of support for the May 18 proposal below the required number of votes for a qualified majority.

However, the Dutch government wasn't going to do what the legislature wanted. Formally, the Dutch parliament doesn't have the authority to represent the country in the EU Council. If it instructs the government to act in a certain way and the government doesn't obey, its only recourse is a vote of no confidence, which would force a general election. Obviously, the parties in power will be very reluctant to take down their government, especially over an issue that, like software patents, is understood by a very few people.

In view of those political realities, the Dutch government decided to interpret the resolution in a way that was absolutely unjustifiable by any reasonable standard, knowing they'd get away with it because a vote of no confidence would fail to garner a parliamentary majority sufficient to depose the government. Again, that's politics.

Undersecretary Karien van Gennip told the parliament that the Dutch government would observe the resolution and abstain, but only in the event of a *new* vote. Further, she wouldn't necessarily classify future approval of the May 18 political agreement as a new vote because the EU Council would typically put it on the agenda as an "A item". That is, an item on a Council meeting agenda that is automatically approved without a vote or debate, simply because no one objects to its presence on the agenda. Van Gennip would view that as merely formalizing the vote that had already taken place.

Van Gennip's plan may sound strange, confusing, or both, but this concept of A and B items in the EU Council comes into play several more times in this book, and it's a key element of decision-making in the EU. So I will explain in more detail.

Two-Stage Decision-Making: A Items And B Items

As of May 1, 2004, the EU has 25 member countries and a total of 20 official languages, and on the order of 2,500 translators, interpreters and linguists. Before

the enlargement of May 1, 2004, there were 15 countries and 11 official languages.

Formally, the Council can't take a legislative decision unless the text of the proposed measure is available in all of the EU's official languages. While most of the people who represent their countries in the EU Council speak English, French, or both, there is no obligation for anyone to do so.

Even if they all did understand a single English-language proposal, they couldn't really make a decision because the devil is in the details, and some of those details are language-specific. There are some things that can be expressed in a certain way in one language, but have a broader or narrower meaning in another. The Swedish translation of "computer-implemented" means "computer-assisted" if you translate it back into English, and while the difference is subtle, it can make all the difference in a litigation. Legal structures also may be similar but not identical: a German "AG" and a British "Ltd." are subtly different.

Grammar can be tricky in legal documents. For instance, some languages make it clearer than others what certain pronouns or attributes refer to because they have gender-specific endings. In English, "which" can theoretically be linked to anything: male, neutral, or female, singular or plural. German has three singular genders ("welcher", "welche", "welches"), but there is no gender-specific distinction in plural pronouns (it's always "welche"). Roman languages like French may distinguish genders both in plural and singular forms ("lequel", "laquelle"; "lesquels", "lesquelles").

Simultaneous interpretation, coupled with some linguistic knowledge on the part of the negotiators, cannot substitute for a translation carefully crafted by linguists and legal experts. That takes a lot of time because many of their decisions are far more difficult than one might think.

Negotiating a legislative proposal is an iterative process: it takes many steps to arrive at the final result. Someone comes up with an initial draft, then someone adds something, someone else deletes something, another party convinces the others to replace something. The Council can't go into a lengthy translation process at each stage because there may be dozens or hundreds of iterations during a negotiation, and it would take forever.

Therefore, the EU Council first negotiates the text on the basis of simultaneous translations even though those are inherently imperfect. While the member countries are still negotiating the substance of a particular proposal, it is listed in

part B of the meeting's agenda and is accordingly known as a "B item". The letter doesn't stand for any particular word.

A political agreement on a B item doesn't have to be a unanimous decision. In some areas, the Council only needs a qualified majority, and in those cases, the political agreement is like a tentative vote. If a poll of the members shows that a qualified majority supports the proposal philosophically, that is also called a political agreement. In the case of our software patent directive, too few countries dissented to prevent a decision at the time.

A "tentative" vote is not a final decision. The poll just checks what the result would be if there were a vote on a final decision that day. It's not legally irreversible, but it is politically binding. It's like a letter of understanding for a contract to be signed later.

The final decision is made after the translations have been furnished, which can take weeks, months, or, in some rare cases, more than a year. At that stage, approval is considered a formality, so those items are listed in part A of the agenda of the relevant Council meeting.

The meeting's chair (usually a minister from the country that has the EU presidency at the time) only mentions the title of the proposed A item, and it is adopted if no one protests. I've seen Council agendas that had more than 20 A items on it, and usually they are processed very rapidly. It's a matter of minutes, not hours.

Written And Unwritten Rules

In the world of diplomacy, and especially in the EU, the written procedural rules may grant someone certain absolute rights, such as the right to veto, but that doesn't mean that those rights can really be exercised at will. There is an unwritten code of diplomacy that in practice is sometimes superimposed on the formal statutes. There is a difference between having a right and being able to use it without paying a hefty price for making oneself extremely unpopular.

Let's compare this to daily life. If you are in a road accident with someone from a far-off town whom you've never seen before and expect never to see again, you want that other person to pay for all the damage, if possible. It's an easy decision to hire a lawyer to defend your rights vigorously, and letting the dispute go on is not out of the question.

But what if the same happens with a neighbor of yours? Someone who's lived in your street for 20 years and will likely do so for another 20? Someone who's a friend and who knows many of your other friends? Unless it's a huge amount of damage and you really need the money, you'll be much more likely to make concessions so the issue can be resolved amicably. You won't want the hostility that comes with being represented by lawyers or the dynamics of a lawsuit.

In the longer term, your now disaffected neighbor might play loud music at all hours, dump garbage on your front lawn, poison your pets, or block your parking space. He might also decide to sue you every time you do something wrong, and they'll have to set up a shuttle bus service between your neighborhood and the court. In order to avoid all of that, you may agree to a 50-50 arrangement even if you think that the court might, all going well, give you a 70-30 deal.

Going back to the EU Council's Rules of Procedure, there is nothing in them to prohibit a change of position between a political agreement on a B item and the final decision on an A item. However, the unwritten rule is that you don't make such an about-face except under the most extraordinary of circumstances – more extraordinary than any situation that has ever occurred in the history of the EU since its foundation.

So what Undersecretary van Gennip was really saying to the parliament was, essentially: "Look, guys, we know that we have that right in legal terms, but no one has ever done it in the history of the EU. We want to respect your decision. At the same time, we have to continue to live and work with all those other EU member countries." Hence my analogy with trying to avoid neighborhood lawsuits.

If you now believe that I'm sympathetic to the Dutch government's position, then I've done my job as a devil's advocate. I just wanted to explain the framework within which they justified their stance. I can see some logic to it, but I do firmly believe that the Dutch government acted undemocratically. The Dutch parliament had been misinformed, which a broad majority, including some government parties, made plain in the resolution. Therefore, the parliament couldn't have intervened before the Council's political agreement, and the Dutch government acted on an illegitimate basis in the first place. The obligation to make up for that extreme misconduct should have outweighed other considerations.

Brinkhorst's Untruthfulness

This wonderful breakthrough in the Netherlands was primarily the fruit of hard work and persistent effort on the part of Dutch anti-software patent activists, but some unique circumstances also contributed. We owe that success in no small way to the fact that Laurens Jan Brinkhorst's unspeakable behavior had infuriated large parts of the parliament.

Oddly enough, Brinkhorst has an excellent reputation in Brussels, quite the opposite of his image in the Dutch capital, The Hague. At one time, he was a professor of European law and ambassador of the European Union to Japan (his official title was "head of the delegation of the Commission of the European Communities to Japan"). Many sources say that he also used to be a very well-liked MEP. By contrast, I heard that many Dutch politicians and citizens call him "the most arrogant man in The Hague".

Brinkhorst's personality appears to have undergone a fundamental change after he returned to his homeland from Brussels. In 1966, he co-founded the reform-oriented D66 party. D66 has been described as a blend of left-wing liberals and right-wing Greens.

Forty-odd years ago, Brinkhorst was a progressive politician. By now, though, he's almost 70 years old, and, since his daughter married one of the Dutch queen's sons, father of a princess. It says a lot that even the parliamentarians from his own D66 party supported that resolution, which explicitly condemns Brinkhorst's conduct.

For the most part, he didn't handle the software patent dossier personally. He had delegated it to van Gennip, but she went on maternity leave shortly before the Council's political agreement. While she was gone, Brinkhorst sent a letter to all legislators, stating that there was an "agreement" between the Council and the European Parliament. Therefore, the members of the Dutch parliament believed that the Council was going to concur with the position of the European Parliament, which everyone knew was an unambiguous vote against software patents. Since that's what the Dutch parliament, other than Bolkestein's party, wanted, they saw no reason to act.

No portrayal of the situation could have been further from reality than the claim that there was an "agreement" between the Council and the EP.

MEPs like Finnish conservative Piia-Noora Kauppi, who supported the key amendments made by the European Parliament at its first reading, complained publicly about the Council's disrespect for the EP's position. MEPs who, like German conservative Dr. Joachim Wuermeling, generally opposed the amendments, welcomed the Council's decision as "a wiser one" that "did away with the irrational stance" they said their colleagues took in the first reading by "dismantling large parts of the patent system as we know it".

There was even a small third group: MEPs who were against many of the amendments that the parliament made at the first reading, but who still believed the Council acted undemocratically by disregarding the parliament's will. British Labour MEP Arlene McCarthy later expressed exactly that opinion.

None of the three camps ever said there was an "agreement" between the Council and the EP. Brinkhorst grossly misinformed his parliament. Not one of the Dutch MEPs would have described the situation the way Brinkhorst did. In the Netherlands, they call that "onjuiste informatie" ("incorrect information"), and a minister can be ousted for it.

Arend's Good Neighborhood

Part of the reason was groundwork that had been laid even before the Council's political agreement. On May 14, a young computer programmer, Arend Lammertink, approached some of the key activists of the FFII and the FFII's Dutch chapter, Stichting Vrijschrift, after a demonstration in front of the Brinkhorst ministry. The demonstration was, like those we held in Berlin and Munich on May 12, part of a last-minute effort to prevent an unfavorable Council decision.

Arend happened to know Annie Schrijer, a Dutch conservative MP and vice-chair of the Dutch parliament's Economic Affairs Committee. The activists encouraged him when he offered to contact her. He lives only a few kilometers from her home, which is close even by the standards of such a small country, so she invited him over on the following Saturday. Sometimes politicians can be amazingly accessible and approachable.

Schrijer was well aware of the general issues surrounding patent policy, but didn't see a way for her committee to become involved at that stage. However, she made the great suggestion that our activists should deliver an urgent petition to the Dutch parliament on May 18, the day of the Council meeting. They had not

thought of this. They had contacted some civil servants at the Brinkhorst ministry, but since those were in all likelihood the same officials who were responsible for Brinkhorst's untruthful letter to the Dutch parliament, they wanted to cover it up. Contrary to hushing up, someone had to rock the boat, as Schrijer put it in her conversation with Arend.

The upshot was that five software patent critics put on their Sunday suits and went to The Hague on May 18, 2004, to present their petition. Usually, that's a swift process. They give you five minutes to make your case, and then it's "thank you and goodbye". In this case, the approach was effective because Schrijer had looked into the issue and identified the claim that there was an "agreement" between the Council and the EP as a factual error. As a result, the opposition parties, who are naturally always interested in government actions that deserve to be criticized, got involved, and a cross-party group of parliamentarians wrote a letter to Brinkhorst asking for an explanation.

All this was too late to prevent the May 18 Council decision, but neither our activists nor our political allies were prepared to accept this *fait accompli* as the final outcome. The fight had only just begun.

Tough Questions Asked

A parliamentary debate was scheduled for June 3. In the public gallery, there were ten software patent critics and some journalists and lobbyists, including one from Microsoft. The world's largest software company was the number one driving force behind the effort to legalize software patents in the EU via a directive. At times Microsoft's lobbyists hid behind organizations such as EICTA and the Business Software Alliance (BSA), but for an event like this they showed up in person.

The June 3, 2004 debate in the Tweede Kamer turned into open fire. Brinkhorst was absent, leaving van Gennip to represent the ministry. She was attacked by opposition and government parties alike. In addition to Dutch national MPs, a Dutch MEP was invited as a guest speaker: Johanna Boogerd-Quaak (D66).

Martijn van Dam from the social democratic party PvdA demonstrated his detailed knowledge of the directive. He stressed that the passage in the directive which disallows patents on "computer programs as such" is meaningless because the European Patent Office nevertheless believes it can grant patents on

"programs running on a computer". Van Dam demanded that the Dutch government retract its support for the Council's political agreement.

Guest speaker Boogerd-Quaak and MP Francine Giskes (D66) noted a contradiction in Brinkhorst's letter to the parliament. On the one hand, he claimed that he didn't want to allow patents on computer software. Yet he also complained that the European Parliament's amendments would disallow software patents.

Arda Gerkens from the Socialist Party, who also spoke on behalf of her Green colleague Kees Vendrik, insisted that the Dutch government revoke its vote in the Council. While the Brinkhorst ministry had previously claimed that the vote was "final" and irrevocable, Gerkens quoted the legal analysis by Fajardo-López mentioned earlier; it showed the contrary. By half an hour after its delivery it had been forwarded to many Dutch legislators. Without it, the Dutch parliament would probably not have made the kind of resolution that it passed.

That the firm of Fajardo-López had been hired was thanks to Laura Creighton, a venture capital investor and vice president of the FFII, who paid for the report out of her own pocket. Over the years, Laura had helped out as a sponsor when the FFII's funds were insufficient for a particular project, and the Fajardo-López report was a particularly noteworthy contribution.

On the basis of the report, Jos Hessels from the largest government party, CDA, realized that the minister had misinformed the parliament a second time when he claimed – incorrectly – that the Dutch vote was irrevocable. Only days earlier, Brinkhorst had told a reporter for a major Dutch newspaper that he wished he could "open the heads of the members of the Dutch Parliament in order to put in some knowledge about Brussels [meaning the European Union]". In the debate, Hessels therefore suggested that the minister might need to further his own knowledge about the workings of the EU.

A Weak Excuse And Yet Another Untruth

Undersecretary van Gennip was forced to admit two things. One: there was no agreement between the Council and the European Parliament. Two: the Dutch vote in the Council could indeed be retracted. She conceded: "That would be highly unusual, but possible."

She later blamed the ministry's having given the parliament misinformation on a "word processing error". The explanation was weird and not very credible. I

wonder what she would have said if she'd been asked to specify exactly the nature of the "word processing error". She could hardly have claimed that a word processor program committed treason. Probably she meant that someone used an early draft of the text, but that is inadequate. Ministers should always read the documents they sign. Of course he knew what he was doing, and if he didn't, then someone else in his ministry did. But they were hardly going to admit they had lied to the parliament.

After the debate, van Gennip sent the parliament another letter, in which she compared the Council's proposed directive to the European Parliament's position. Unfortunately, she made a complete misstatement of fact. Van Gennip claimed that in order for an invention to be patentable under the Council's proposal, "the inventiveness of the invention must be in the technical aspects of the invention. The technical solution to the problem must be inventive".

That may sound very complicated, but it can be explained. What van Gennip wanted to tell parliament was that the Council's proposal would only allow patents on computer-controlled technical inventions, such as an anti-lock braking system with a computer chip on it, and wouldn't allow patents on pure software, such as a progress bar on a computer screen or an Internet payment system. This is simply wrong.

For a patent examiner, it's important to investigate what constitutes the inventive step in whatever the patent applicant claims to have invented. No technical invention is ever completely isolated. It's always a combination of something old and something new. When the first anti-lock braking system was created, it was the first of its kind, but it was certainly not the first braking system that had ever been designed for a car. Now if someone comes up with a new anti-lock braking system, it may stop the car in a shorter braking distance or it might have other advantages over its predecessors, but nothing will ever again be the first anti-lock braking system.

If a patent examiner wants to make the distinction between a technical patent and a pure software patent, it's essential to look at the differential between what is already known and that which is built on top if. If this difference is a shorter braking distance, then that's at least potentially a technical invention. If the difference is a reduction in computing time, then it's just software and in our view should not be patentable.

Van Gennip was wrong because the Council's text says that the patent claim must include technical features, but may also include non-technical features. The application must always be considered "as a whole" under the Council's text. Simply put, if someone takes an old computer and runs some new program on it, then the Council's logic would make it a "technical invention" because the computer is technical, even though it's not really a new invention.

For an analogy that's easier to understand, imagine you have two stereos that look externally alike. You can see that all the settings (equalizer, volume, and so on) are identical. Both have a CD player with a CD inserted, and you hear Beethoven's Ninth from both if you hit "play". However, one of the two stereos has a fullness of tone that is hugely superior to the other.

But you don't know why. Maybe one is simply a better stereo. Maybe the CDs are different, with one of them being a recording of a high school orchestra from a small town and the other a performance by the New York Philharmonic.

You can find out easily if you look inside. The better stereo is a technical invention, while the better music on the CD is just a better piece of software.

In her letter, van Gennip made it sound like a patent would only be granted on a better stereo. That is the way it should be. However, the Council's proposed text would instead – this is still just an analogy – allow the New York Philharmonic to obtain a patent on the combination of the same old stereo with the superior performance, reasoning that the stereo, even though it's old, is a technical device and therefore meets the criterion that something technical is part of the patent claim.

A Textbook Example of Political Activism

At some point, the Dutch parliament, fed up with this treatment by the government, passed that resolution. Van Gennip said there was still time to give the government instructions, since the Council wouldn't make a formal decision before September.

It could have been worse for the government: Gerkens (Socialist Party) had introduced a motion that would have required the government to change its vote from yes to no. This proposal didn't garner majority support because the government parties wanted to reproach Brinkhorst, but not make him lose face entirely.

It was van Dam (Social Democrats), along with colleagues from other parties, who introduced the slightly less aggressive motion that was finally passed. Still it was very helpful that Gerkens had put forward a stronger proposal, making the van Dam motion "moderate" by comparison even though it was still quite strong.

Our Dutch activists' success was really inspiring. The Council's text was still hanging over our heads, and the Dutch government wasn't inclined to do anything about it, but a few more breakthroughs like this and anything could happen.

It was a fantastic story of how a group of committed citizens made a difference by taking an initiative that resulted in an unprecedented parliamentary resolution. The parliamentarians were the ones who took the decisions. Activists can't file motions. Nor can they vote in parliament or speak in a plenary debate. Even so, the key initiative in this case came from citizens.

That doesn't mean the politicians failed to do their homework. They have too many areas of policy to deal with, too many appointments, too many obligations. They cannot stay on top of an issue like software patents with the same focus and attention to detail as a group of activists can. Parliamentarians are, generally speaking, hard workers. But even the ones I know who work 100-hour weeks need input and external initiatives when an issue is as complex and esoteric as this one.

Subsequent to Arend's initiative, Ante Wessels, Dieter van Uytvanck, Benjamin Henrion, and other activists from the Netherlands and Belgium made important contributions.

While pressure groups rely primarily on volunteers, there are times when they inevitably have to spend money. A perfect example is the Fajardo-López report on the legality of a country's changing its position after a political agreement in the Council. Without it, it would have been the word of our activists against that of the Dutch government. With the Fajardo-López analysis, it was instead the professionally phrased opinion of an independent law firm and two Spanish professors against that of a minister who had already misinformed parliament before.

Know Your Enemy

Propaganda in the Patent Capital

At the ministry of justice roundtable, our camp was urged to refrain from organizing protests at an event that was going to take place in Munich on July 6. My initial inclination had been that we should honor that request in order to improve our relations with the government, but Hartmut Pilch, the president of the FFII, convinced me that the symposium was going to be a chance for our opponents to spread propaganda. Inactivity was not an option.

Hartmut pointed out that the ministry of justice had two distinct roles in the debate. At the roundtable, they were a somewhat neutral moderator. In those situations, we want to be completely cooperative. However, that "symposium on innovation and intellectual property" was going to be part of their effort to promote their patent policy, including their support for the Council's proposed directive on software patents. In that context, we had to view and treat them as political adversaries.

The title of the symposium and the choice of speakers, who included various patent professionals plus the CEO of Siemens, left no doubt that this was going to be one-sided self-promotion on the part of the patent system.

We took issue with the ministry's decision to apply the broad term "intellectual property" to an event that was exclusively focused on patents. IP is a lot more than patents; it's the collective term for patents, copyrights, trademarks and other forms of protecting intellectual achievements. The software industry has become what it is today on the basis of copyright law. A company like SAP was worth tens of billions of euros/dollars on the stock market at a time when it had less than a handful of patents. Patent law came into play much later, and has created far more problems in our field than it has solved.

Unlike some other software patent critics, I'm not opposed to the term "intellectual property". I know that it's also used as a euphemism for anti-competitive action that has little to do with true intellectual achievements. That's regrettable, but every rose has its thorn. When I hear IP, what comes to my mind is that it's been the basis of my livelihood for about twenty years. But I do strongly object to any suggestion that patents are the only way to protect IP, especially with respect to software.

Patents and Innovation: A Common Mismatch

The conference program made it clear that the upcoming event in Munich was going to equate patents and innovation. That oversimplification was another strong indication of the symposium's propagandist nature.

That equation is the same fallacy that leads people to believe, falsely, that more patents are a sign of increased innovation. If the number of patents grows faster than innovation, then the average patent corresponds to less innovation, just as the value of a currency actually goes down if the money supply is increased beyond the actual creation of economic value.

Most of those who demand that the scope of patentability keep broadening have ulterior motives. For many, patent law is simply their profession. Others want patents as strategic weapons. They may never actually use them, but they like to stockpile them. Since they don't want to admit their self-interest, they say they represent the public interest, claiming that there would be no innovation in software if computer programs can't be patented. Empirical evidence proves them wrong: The software industry had virtually no patents in the 1970's and 1980's, yet it was highly profitable and innovative.

In 1990, Microsoft had revenues of more than a billion dollars, but the company had only five patents (now they apply for twice as many every day). At a 1994 US Congressional hearing, representatives of other leading software companies such as Adobe and Autodesk vehemently opposed the concept of software patents. Some of those speakers even said that it's unethical for the government to give away monopolies on pure logic. Oracle, the world's second-largest software company, had a comprehensive statement on its Web site for many years, in which the company made clear its opposition to software patents.

There are many other disciplines in which the human mind has made enormous achievements without patent protection. Astronomers who discover planets and galaxies don't get patents. A chemical element isn't patentable, nor are mathematical discoveries – except that software patents are basically patents on mathematical logic.

For a long time, if a bank created a new service, it couldn't secure exclusive rights on their innovation. Now, it could in the United States, where business models are patentable, and increasingly in Europe because the EPO has already granted numerous software patents that are effectively banking patents. But the financial

services industry does not need exclusivity to protect its new ideas: it has been innovative and creative all along.

The fact is that the basic motivation for companies to innovate is a competitive market. They want either to gain a competitive advantage or to fend off a competitive threat. Either way, they have to have a business model that rewards them for their efforts and for the risks they take. Some business models depend on intellectual property rights to work, and there I'm speaking from my own experience. Without IPR, I probably wouldn't even have decided to write this book.

However, an intellectual property rights regime that makes the market less competitive will ultimately stifle innovation. There must be a reasonable balance.

Leveraging the Opponent's Energy

The ministry of justice didn't want to discuss that "reasonable balance" at the Munich event. Together with the German patent office, they wanted to stage a one-sided celebration of the glorious patent system. The FFII decided that they couldn't let that happen, in front of German chancellor Gerhard Schröder and the press, without making themselves heard somehow.

At that stage, my only concern was that we might not be able to mobilize a sufficiently large crowd on a Tuesday morning, when most people are at work, in the less than two weeks we had available. Therefore I urged the FFII to stick with announcing something small.

Christian wrote to the ministry of justice that the FFII was going to protest against the Munich event. In reply, Hucko wrote: "I've spoken with the Minister and she has now decided that four of you may attend the event. Please send me a list of the names."

That was progress. About a week earlier, at the roundtable, Hucko had ruled that option out. Those four invitations weren't tied to a cancellation of the protest. The ministry had made a unilateral gesture of goodwill.

I remembered something Hartmut had said when we were talking about whether we should organize a demonstration: "The fact that Chancellor Schröder will participate in the event provides us with an excellent opportunity to write to him." He had a point. If the others were going to bring in such a political

heavyweight, then we'd have to copy the methods of judo and leverage our opponent's strength in our favor.

That, however, is easier said than done. Multitudes write to the head of a government every day. Other politicians. Large organizations. Teachers with different views on education policy. Farmers who need more subsidies. Taxi drivers complaining about oil prices. Senior citizens who don't know what to do with their free time. And plenty of crazies, like the ones who believe they've been abducted by UFOs.

All of those people believe the chancellor is the right person to contact about every remotely political issue. Unless you can clearly set yourself apart from the rest, you waste your time and potentially discredit your cause, since it looks amateurish to contact the chancellor in a way that is just going to get you ignored.

The Triumvirate's Open Letter

I suggested to Hartmut that I try to orchestrate a joint letter he could sign along with the presidents of two other organizations: Dr. Heiner Flocke of Patentverein, an association of companies that all believe the patent system needs to major reform, and Mario Ohoven, the president of BVMW, Germany's leading association of small and medium-sized enterprises.

That way, the letter would have more than enough credibility. I presumed that Ohoven would almost certainly know the chancellor personally. He frequently gets mentioned in the media. His wife is a special envoy for UNESCO (United Nations Scientific, Educational and Cultural Organization), and a major newspaper named his daughter on a list of German equivalents of Paris Hilton.

Ohoven's name, and that of his organization, would definitely ring a bell with the staff at the Chancellor's office, and they'd give a letter signed by him to the chancellor or at least tell him about it. It would also be taken seriously by the media.

I was reasonably hopeful that Ohoven would be willing to support the effort. He had criticized the software patent directive on previous occasions, and he's also the president of the Brussels-based CEA-PME (Confédération Européenne des Associations de Petites et Moyennes Entreprises). CEA-PME is a European umbrella organization of associations like Germany's BVMW, and it had generously given office space to the FFII's primary Brussels lobbyist, Erik

Josefsson. I had also seen some really valuable contributions to certain FFII mailing lists from Alexander Ruoff, who worked at CEA-PME.

Fortunately, all three organizations were receptive to my idea. I drafted a version that everyone was pretty comfortable with. The open letter underscored the commitment of all three signatories to protecting intellectual property and fostering innovation, but pointed out that over time the patent system has increasingly neglected those objectives. The letter began by complaining about the "deluge of patents" and the way it disadvantages small and medium-sized enterprises. Toward the end, the letter narrowed its focus on the issue of software patents: "Should software development in the future be solely the privilege of a few large corporations, then the entire economy and society will have to carry the burden."

We had the letter ready late in the afternoon of Monday, July 5. Philipp Vohrer of Ohoven's BVMW personally called the chancellor's office to ensure that the letter would be delivered to the chancellor before his flight to Munich the next morning.

On the morning of the symposium, July 6, we issued a press release including the text of the open letter. We got several mentions in the media during the day, the most notable of which was a major news agency that referred to the letter in a report on the Munich event. Piggybacking on the chancellor's visit was exactly our PR strategy.

The Unguarded Minister

I arrived at the Deutsches Museum ("German museum") in Munich, where the symposium was going to take place, about an hour early. The museum itself was still open to the public. The event was to take place in a kind of ballroom with a separate entrance.

It was raining, which reminded me of the May 12 demo in Munich and suggested that we'd have few participants for the protest. Our protesters were greatly outnumbered by the school classes waiting on line at the entrance to the museum. That they were visible at all we largely owed to the prison costumes the FFII had purchased for the LinuxTag demonstration.

The four of us, including me, who had registered to attend the symposium, were wearing formal suits and couldn't fully participate in the demonstration. Still, we stood with the protesters for about an hour before walking inside.

While we were there, I unexpectedly spotted a familiar face: Brigitte Zypries, the minister of justice, was walking by. She was accompanied by someone who looked more like an assistant than a bodyguard.

I knew she was going to speak that day, but I thought a cabinet member would only appear in a public place with greater security precautions. Instead of walking in, I thought she would be chauffeured in an armored government car. Surprisingly, no one else seemed to notice her, neither the school classes at the entrance nor our protesters.

Zypries had apparently just walked over the bridge that connects the museum with the street in which the EPO and the German patent office are located. Presumably, she had visited one of those offices first, and then decided to walk.

It is, by the way, not at all a coincidence that the Deutsches Museum and the two patent offices are so near each other. The Deutsches Museum is primarily a technology museum, and at the time it already had an extensive library of scientific and technical literature. The German patent office was built next to it in order to give patent examiners easy access to that library. Then, in the 1970s, the EPO was built next to its German equivalent. I am told that Germany and France were the two driving forces behind the EPO, and supposedly those EPO employees who are neither German nor French continue to be disadvantaged in terms of career opportunities.

The Chancellor's Freudian Slip

Zypries opened the symposium. As usual, she untruthfully denied that the EU directive would allow software patents. Still we really liked her two references to the fact that a demonstration was taking place outside. It no longer mattered that we had little more than a dozen demonstrators outside. The minister of justice did us the favor of bringing our protest to the attention of the Chancellor and everyone else in the room, including the media.

Immediately after Zypries was the chancellor, whose speech, like those of Zypries and Siemens CEO Heinrich von Pierer, had already been handed out to everyone. Schröder deviated from his notes in only two places.

He highlighted the fact that German companies had filed for more European patents during the previous year than companies from any other country. In a humorous reference to the European soccer championships that had ended the previous week and in which the German national team had performed very

poorly, he said: "At least in this category we're champions of Europe. At least in this one! It would be nice to hold that title in other fields, too, though."

If this had been a speech in parliament followed by a debate, the opposition would have attacked him for this. For years, Germany's position at the bottom of the table of economic growth among European nations had been blamed on the Schröder government. Of all disciplines, economic growth is really the one in which you would want your country to be at the top. That the country with the largest number of filings at the EPO has the lowest economic growth rate is merely another example of the disconnect between inflationary patent numbers and actual innovation.

His other improvisation was hilarious. There was a passage in the manuscript that talked about "computer-implemented inventions", and included the explicit, blunt lie that patents on "computer-implemented inventions" were not the same as "software patents". Instead, Schröder said "software patents" two or three times before he noticed what he had said. He then giggled and said: "Oh, I just realized that I must not say 'software patents'. I'm supposed to say 'computer-implemented inventions'."

He had reduced the untruthfulness of the Ministry of Justice, where the text of his speech had probably been drafted, to absurdity. Schröder has a reputation for being down to earth and speaking the language of the common people. It was typical that someone like him would say, simply, "software patents" and not embrace a lengthy euphemism like "computer-implemented inventions". That artificial term was coined by the patent system to deny its flagrant violation of the law.

Car Pool with Microsoft

Two days after that symposium, I went to another government roundtable, hosted by the ministry of economic affairs. The primary topic was a research study on the economics of open-source software, but it was clear beforehand that software patents would also be debated.

The venue was the Baltic Sea island of Rügen to the northeast of Germany. The nearest airport is Rostock, the capital of the thinly populated and economically challenged state of Mecklenburg-West Pomerania. Rügen is about 60 miles (100 kilometers) east of Rostock. There were only four passengers on the flight, so I guessed at least one was also a participant in the roundtable. On the bus that took

us from the gate to the aircraft, I met Walter Seemayer, Microsoft Germany's National Technology Officer.

During the flight, we discovered that we had also booked the same return flight the next day: the last flight from Berlin to Munich. The roundtable was going to end too late to make the last flight out of Rostock, and Berlin is only about 180 miles (300 kilometers) from the island of Rügen. There, we both planned to drive. Clearly, it was pointless and uneconomical to rent two cars.

It turned out that the car I'd been allocated lacked the navigation system I had been promised. Consequently, we went in Seemayer's. He couldn't help quipping that I was "being chauffeured to an open-source event at Bill Gates' expense".

Considering the antagonism between Microsoft and the open-source community, it was funny. Many open-source developers refer to Microsoft as the "Evil Empire", and Microsoft CEO Steve Ballmer once called Linux, the most well-known piece of open-source software, "a cancer".

However, Seemayer and I viewed each other as industry colleagues. The programming project I interrupted to fight against software patents is a computer game based on Microsoft's .NET platform. Seemayer had personally been in charge of promoting .NET in the German market during the initial phase. So we had common ground, even though we were far apart on the issue of software patents. He's all for them, I'm absolutely against. We had to agree to disagree.

Microsoft's Change of Mind on Patents

I'm going to dwell on Microsoft a little longer because no other company was as anxious to get an EU directive to legalize software patents. Our big PR breakthrough, a few weeks later, is covered in the next chapter, and indirectly it also involved Microsoft.

As I said in the first chapter, Bill Gates himself told his staff in 1991 that software patents can be used as anti-competitive devices by large corporations against smaller ones. At the time, Microsoft's annual revenues had just crossed the billion-dollar threshold. The company viewed IBM as a potential competitor, even though it had 50 times the worldwide revenues.

Plus, there was Apple. Years before Windows, Apple developed its Macintosh computer and pioneered the concept of graphical user interfaces using ideas first developed at Xerox's famous PARC lab. Had software patents been available in

the 1980s, Apple could have prevented Microsoft from releasing Windows – or Xerox could have stopped Apple from doing the Mac. Back then, Microsoft benefited from a market in which the incumbents could not use patents to erect barriers to entry.

But in the following years the 3.x generation of Microsoft Windows became the *de facto* operating system standard in personal computing. In the change to graphical interfaces, Microsoft's office applications Word for Windows and Excel displaced the word processors and spreadsheets that had led the market before: WordPerfect, WordStar, and Lotus 1-2-3. By the second half of the 1990s, it was standard procedure to equip computers in productivity environments with Microsoft Office, which included Word, Excel, and other Microsoft applications.

Microsoft's revenues and profits exploded. Five years after Bill Gates' critical remarks on patents, Microsoft's annual revenues were $8.7 billion, and profits had risen to $2.2 billion. By then, Microsoft owned about 100 patents, still a tiny number compared to IBM's tens of thousands. These days, Microsoft applies for 100 patents in less than two weeks.

Microsoft's patents of the era were not really the foundation of its success. It had only just started to build up a patent portfolio as the company considered it a necessity and could afford it. By 2000, Microsoft had well over 1,000 patents, which was significant but still not aggressive.

At some point in time that is hard to pinpoint from the outside, the company modified its stance on patents, upgrading them from a mere necessity to a major strategic opportunity. There is every indication that the change was due to the new competitive pressure of open-source software, especially the Linux operating system.

The Stacker Case

So far, Microsoft has usually been the defendant in patent law suits. A famous example was Stac Electronics, which sued Microsoft in 1993 over a patent on its Stacker software. That program used data compression to effectively increase the capacity of storage media. At the time, hard disk capacity was scarce. It was measured in megabytes, not gigabytes.

Stacker more compactly represented repetition. If you had, say, ten consecutive occurrences of the number 75 in a computer file, Stacker would store the

information "number 75, ten times in a row",. On average, Stacker might double the amount of data that could fit in a given space.

In 1993, Microsoft released version 6.0 of its MS-DOS operating system, and included in it a data compression program named DoubleSpace. Clearly, customers were no longer going to need Stacker. You couldn't use the two together to gain even more space. Compressing data is like letting the air out of a balloon: once you've deflated it, there's no more air left, and you get no incremental benefit from repeating the procedure.

Realizing that the end was near, Stac sued Microsoft for patent infringement. Initially, Stac was awarded indemnities of around $120 million by a California jury. Microsoft countersued Stac on the grounds of "illegal reverse engineering", and succeeded in reducing its liability, but still had to pay $50 million in damages and was required to invest about $40 million into the dwindling company.

In 1994, I happened to sit at the same table as head of Stac's European operations at an award dinner held at the conference of the SPA (Software Publishers Association) Europe in Cannes, France. When Stac received the award, this executive (whose name I don't recall now) mentioned the ongoing litigation in his acceptance speech: "With your support, we will win!"

He didn't pass the hat to collect donations, but I guess most of us were sympathetic Stac. At the time, I had a simplistic notion of the little guy being driven out of business by a big bully, and I thought that patent law could indeed bring justice.

Now I know there is a different way to look at *Stac versus Microsoft*. Yes, the idea behind Stacker was clever. But there are many clever ideas out there, and the implementation of that idea was not a big deal. In fact, it was a relatively small program. Stac had the first-mover advantage because it was first to publish a program like that, and for a couple of years it made them many millions of dollars. They had already received a more than fair reward.

Microsoft wasn't guilty of wrongdoing or reprehensible intentions in this case. The court concluded that Microsoft had not willfully infringed on the Stacker patent. Contrary to stealing intellectual property, the company had liked the basic idea of compressing data on a hard disc and decided to implement it independently, from scratch.

There was no strategic reason for Microsoft to want to annihilate Stac specifically. There were easily 100 other companies back then that were more of a threat to Microsoft than Stac. Microsoft wanted to give its customers an additional benefit – and it wasn't even going to be able to charge more for MS-DOS because of that.

It makes sense in the context of a large multi-functional program (in this case, an operating system) for something like Stacker to be one of many features. It really shouldn't be a stand-alone product for which consumers have to pay separately.

The court determined that Microsoft would have to pay Stac more than $5 for each copy of MS-DOS that came with that feature. Even if Microsoft were to pass on those $5 with no mark-up, the retail channel would add its margin on top, and all of us would have to pay about $10 more per computer so equipped. There are literally thousands of ideas in a computer operating system these days that are at least as smart as the one behind Stacker was. If every one of those clever ideas added $10 to the price of a computer, hardly any of us could afford one.

A History of Building on Past Successes

Microsoft's rise to power began in the late 1970s. IBM, which viewed itself as a company making and selling large computers, had grudgingly decided it needed a personal computer to sell, and rather than build all the pieces, as per its normal operations, it decided to buy in standard components. Accordingly, it needed an operating system (the software that controls the most basic functions of a computer). It turned to Microsoft, which was known for its personal computer version of the BASIC programming language interpreter and which had previously acquired a piece of software officially known as 86-DOS (DOS for disk operating system as computers in those days used floppy disks as the primary storage medium). Internally, it was called QDOS (quick and dirty operating system).

IBM shipped that product, later called MS-DOS, with every IBM PC. Without MS-DOS, you couldn't even have started an IBM PC. The strategic mistake that IBM made – and the smart move on the part of Microsoft – was to include a clause in the contract allowing Microsoft to sell MS-DOS to other computer manufacturers as well as IBM.

IBM's dominance of the computer hardware market made MS-DOS into the software standard, overcoming earlier entrants in the personal computer market.

By a few years later, "IBM compatibles" dominated: personal computers from other manufacturers, typically priced lower than IBM's offerings, but with the same type of Intel processor and running the same operating system software, MS-DOS. All programs that were designed for the original IBM PC could also run on an IBM compatible, but to do so, they needed MS-DOS.

Microsoft later leveraged the unique position MS-DOS gave it in order to establish its next monopoly, Windows. Through pricing structures and contract terms, the company created a situation in which computer manufacturers that sold MS-DOS machines had no economically viable alternative to shipping a copy of Windows with every machine they sold. US antitrust authorities eventually deemed that behavior anti-competitive, but too late: Windows had become impregnable.

Microsoft's second-largest cash cow after Windows is its Office suite of productivity applications, all of which took over their categories from established players. At least some of the companies that lost their leadership to Microsoft blamed their failure on Microsoft's "unfair advantage" of being the developer of the operating system. Allegedly, Microsoft didn't give others an equal opportunity to develop software for Windows.

I, however, don't subscribe to that theory. When Microsoft brought out Windows, companies like WordPerfect and Lotus simply missed the opportunity to jump on the bandwagon because they didn't believe in it while they had the chance. And Microsoft's competitors also made other management mistakes. Years ago, I defended Microsoft against some of those accusations in a letter to the editor of *Wirtschaftswoche*, a German weekly.

No matter how you look at Microsoft's competitive strategies, the company has historically built one success on top of another. That's what companies should do, and Microsoft has been particularly effective at it. In contrast, the company's track record in building new businesses where it couldn't leverage past successes is relatively poor. It has wasted a lot time and money in a variety of fields.

Silicon Valley venture capitalists built such businesses as AOL, Amazon, eBay and Google from scratch, while Microsoft missed out on those opportunities. I can't think of a single groundbreaking new idea in the world of software that Microsoft ever had first. It's been a highly successful imitator.

Microsoft's desire for software patents is typical of an organization that wants to maximize the rewards for its past successes and extend them as far as possible into the future.

The Emergence of Open Source

In recent years, a new type of competitor has arisen to pose a serious challenge to Microsoft: open-source, or "free", software. Some prefer to call it "free" in order to emphasize the freedom users have to modify the software or reuse the code. I prefer "open source" because it's the more common term.

Open-source software can be used free of charge. An individual or a small team comes up with an idea for a program, writes an initial version (or even just a nucleus of a prototype), and uploads the program code onto the Internet. Many of the programmers who work on this type of software are unpaid; most projects are coordinated via Web sites such as SourceForge.net. Everyone can make contributions, the best of which are incorporated into the software.

In the world of commercial software, most vendors don't work like that. Companies like Microsoft publish only the compiled program (that is, in a form that you can run on your computer), but keep the source code as a company secret. They won't let anyone look at their program code except possibly governments and other large customers (and then only after they sign non-disclosure agreements).

If you have the source code, you can technically analyze and, if you like, modify the program. Theoretically you could also do that with the executable that you run on your computer, but practically speaking it's difficult and time-consuming without the source code. To fully analyze a large program from only its object code without access to the source code is a task that could take hundreds or even thousands of person years.

In 1987, I wrote a book that analyzed every line of the program code for the operating system and BASIC programming language interpreter for the Commodore 64 computer. It took me about six months for 16 kilobytes of code. Comparable software for today's computers is millions of lines long – thousands of times larger.

The object code is basically just numbers (slightly more descriptive than a row of zeros and ones) in a computer-readable format, while the source code is written

in a programming language much more like human language. Source code usually contains comments that document how the program is structured.

By sharing the source code with everyone via the Internet and granting an extensive license to everyone to use the code and modify it, open-source developers encourage collaboration: anyone can potentially contribute. Of course, unless you work at a company that wants you to do this, you won't get paid for your efforts. Most open-source developers do it for other reasons: for fun, to show themselves what they can do, for glory, or to make themselves a name and reputation in the field (which may bring career opportunities).

Open source is really a new production method; it has been dubbed "commons-based peer production". That approach also seems to work for some forms of content production, for example the Internet encyclopedia Wikipedia that challenges the traditional publishing model by allowing anyone to contribute to and edit its contents. There are adaptations of the concept in other fields, such as an "open-source soft drink", but it seems doubtful that this method will in general make much sense outside of the digital universe.

No Conventional Match for Microsoft

The evolution of Microsoft's position on open source is reminiscent of a famous Gandhi quote: "First they ignore you, then they laugh at you, then they attack you, then you win." While the jury is still out on the last part, open-source software has gone through the first two stages and is now in the third.

Initially, hardly anyone (inside or outside of Microsoft) believed that open-source projects could seriously threaten the world's largest software company.

In one corner, there were projects that were started by hobbyists and depended on volunteers who received no compensation. In the other corner, there was a company that not only dominated the market but also had virtually unlimited financial resources (a market capitalization in the hundreds of billions of dollars and cash reserves in the tens of billions) and the ability to attract some of the best talent in the world.

Open source software powered the Internet, and with the explosive growth of the Internet, open source software grew in popularity. It's a symbiosis.

Most of the initial Internet infrastructure was and even today is built on open source software. More important, the Internet connected programmers from all

around the globe and enabled them to work together on open source projects. Finally, the Internet provided a distribution mechanism that made the results of their collaboration available to everyone, bypassing the traditional channels. A good piece of software can spread like wildfire without requiring any marketing or distribution budget.

By the late 1990's, Microsoft must have realized that open source software was used for some highly professional and commercial purposes. Even so, they weren't seriously worried about a few sporadic installations of Linux and other open-source programs in places where one would traditionally have expected to find commercial software.

Open source continued to grow in popularity, but up to a certain point it may be possible that Microsoft's senior management actually welcomed its arrival on the scene as a visible competitor. In 1997, for example, Microsoft invested in Apple Computer to help keep that company, which was partially a competitor, in business through a cash infusion.

In theory, a total monopoly makes a company maximally profitable, but in practice it's not as desirable a situation as one might think. If a company has an absolute monopoly, there's a high risk that just about anything it does could lead to an antitrust proceeding (a fear that dogged IBM throughout the 1980s). Worse, a monopoly market may be subject to governmental regulation.

Also, if you have absolutely no competition, how do you motivate your sales force and your developers? It's a fact that people run faster if someone else runs alongside than if they run alone.

I usually don't believe company executives when they're asked to comment on a new competitor, because they almost always say they like to see new entrants and that this will only serve to grow the market and so on. Most of the time, it's just marketing talk meant to reassure shareholders and employees. It's hard to see why anyone would really want competition unless you are Microsoft, you do have a monopoly, and judges have already found you guilty of abusing your dominant market position. In the late 1990s, even such draconian measures as splitting Microsoft up into two or three separate companies were being considered.

The Challenge Became a Threat

In the early 2000s, open-source software began to make inroads with governments and governmental agencies. They had two distinct reasons for

choosing open-source solutions: first, they wanted to save money. Second, many of them thought open-source software would provide better security than Microsoft's products. This is often true, and open-source activists believe better security is testament to the "overall superiority" of their development method. If a security hole is identified in a Microsoft product, only Microsoft itself can fix it, while large numbers of contributors can fix a hole found in an open source project. "To enough eyes," open-source activist Eric S. Raymond has famously said, "all bugs are shallow."

Governments are not only large accounts but also potential multipliers. If governments install and use a particular set of software products, businesses will be comfortable about making the same choice, as they run similar applications and have installations of a comparable size. Also, a government may require the businesses it deals with to use software it specifies.

In early 2003, Munich's city administration seriously evaluated two possibilities: new products from Microsoft or migration to open source. The administration's existing installation included older versions of Windows and other products for which Microsoft was shortly to discontinue technical support.

When Microsoft CEO Steve Ballmer heard that Munich was considering migrating to open source rather than upgrading to more current Microsoft products, he interrupted a skiing vacation in Switzerland to fly to Munich and talk to the mayor personally. Ballmer's alarm was less about the prospect of losing a large customer with more than 15,000 computers than about the signal that such a decision would send to others. If Munich, one of the most famous cities in the world thanks to Oktoberfest (among other things), were to replace a large number of Windows and Office installations with Linux and OpenOffice, others might follow suit. Especially if it became a major success story.

Despite Ballmer's persuasive efforts and major price cuts, Munich decided to switch to open source. The mayor admitted that there would be no short-term cost saving. They would get the software for free instead of paying license fees to Microsoft, but they would have to buy in various services such as technical support, installation, training, and rewriting legacy software to run under Linux. If there were savings, they would come later. Nonetheless, the mayor and all political parties represented in the city council except for the conservative CSU believed the move would help create a more competitive software market.

It was in its annual report for the fiscal year 2003 that Microsoft first admitted to the financial community that open-source software could negatively affect its sales and profitability:

> Since our inception, our business model has been based upon customers agreeing to pay a fee to license software developed and distributed by us. [...] In recent years, there has been a growing challenge to the commercial software model, often referred to as the Open Source model. [...] The most notable example of Open Source software is the Linux operating system. [...] the popularization of the Open Source model continues to pose a significant challenge to our business model, including recent efforts by proponents of the Open Source model to convince governments worldwide to mandate the use of Open Source software in their purchase and deployment of software products. To the extent the Open Source model gains increasing market acceptance, sales of our products may decline, we may have to reduce the prices we charge for our products, and revenues and operating margins may consequently decline.

In fact, since about that same time Microsoft has indeed felt forced to grant discounts of unprecedented proportions to governments and other customers whenever they threatened a Munich-style open-source migration. In negotiations over new projects, software buyers in large corporations began saying they were planning a test installation of open-source software for their most expensive projects just to bring down Microsoft's prices.

The Anti-Netscape Strategy Wouldn't Work

Open-source software, especially Linux and OpenOffice, had become a strategic issue of major proportions, and Microsoft had to formulate a response.

High-volume discounts were only a first step. Microsoft also introduced lower-priced versions of some of its products. But the Netscape strategy wasn't going to work against open source.

In the mid 1990s, Netscape developed a Web browser that became the standard. When Netscape went public in 1995, its market capitalization quickly reached several billion dollars. Netscape executives openly stated that they wanted their

product to become the Windows of the Internet and reduce the relevance of Microsoft.

That awakened the sleeping giant, which up until then had mostly ignored the development of the Internet. Microsoft decided that it had to come up with its own Web browser and server to fend off Netscape. The result: Internet Explorer and Internet Information Server. In a remarkable move, Bill Gates personally studied various projects in progress and canceled or postponed many of them in order to free up resources for Internet projects. Microsoft made its Internet programs available for free, while Netscape, with no other products, was financially dependent upon software licensing revenues, especially from its server.

In the ensuing battle of attrition, Netscape progressively lost market share until it was finally bought by AOL. Internet Explorer meanwhile grew to a near-monopolistic market position until 2004, when, interestingly enough, an open-source descendant of Netscape, the Mozilla/Firefox browser, began recapturing some of that lost market share.

Microsoft's problem is that its most aggressive strategy of the past, the one it used to marginalize Netscape, won't work against open source, which by definition is available for free. There is no way to price your products below free. There is no single Linux company that can be driven out of business. Worse, in the early 2000s IBM decided to leverage Linux for selling services and hardware products, becoming one of Linux's major backers. Some say it wants to settle old scores with the viper it once nurtured in its bosom.

If anyone was going to be "Netscaped" this time around, it would be Microsoft itself.

Microsoft's Multi-Faceted Response to Open Source

Knowing that its success depends on continuing to be able to charge licensing fees for its products while open-source software is free, Microsoft has increasingly emphasized the "total cost of ownership" of software. The idea is that there is typically a variety of costs associated with using any software that sometimes is many times larger than the cost of the licensing fee. In a million-dollar IT project, 90 percent of that cost may be spent on services over and above licensing fees. Therefore, saving those 10 percent may not be a sufficient reason to decide not to buy commercial software.

User productivity is also an issue. Any savings on the software purchase price can be a penny-wise and pound-foolish decision if the staff becomes less productive. Microsoft claims it can provide a better user interface and other functionality to enhance productivity than its open-source competitors.

That point is debatable, but it's true that most open-source software is developed by programmers whose perspective on usability is often different from that of company product managers. A design that seems extremely complicated to an average user may not stop a programmer from using a particular piece of software, and developers in general tend to be more interested in implementing new features than in enhancing ease of use. Installing Linux is a job for a reasonably knowledgeable user, but once it has been installed and configured, it's potentially just as usable by a secretary as Windows.

Microsoft realized that the community approach of open-source software, which involves extensive communication between users and developers, has its benefits. Consequently, Microsoft has tried to creatively and adaptively imitate it to some extent.

I have been using Microsoft products since the 1980s, and it's my impression that in recent years Microsoft has become much better at understanding the customers' priorities. It's happened to me a couple of times recently that a new version of a Microsoft product included a list of new features that was almost identical to my own wish list. That was not the case before. In that sense, even Microsoft's most loyal customers have benefited from the competitive pressure imposed on Microsoft by open-source programs.

Open source forces Microsoft to be better, and the more successful open source is, the lower the prices of Microsoft's products will be. Those are simple market dynamics, and they are working in the interests of all of us. But for Microsoft, the triumphant progress of open source is now going too far. The company can live with the status quo, and it may even be willing to accept a little more market share for open source because for now, its revenues and profits are still growing significantly. But in the event that the competitive pressures become too much, it wants to be able to use patents as a last resort to defend its extremely high levels of profitability.

The Hewlett-Packard Memo on Microsoft's Patent Strategy

On June 3, 2002, Hewlett-Packard executive Gary Campbell wrote a memo to his fellow senior HP executives bearing the subject line, "Microsoft Patent Cross License – Open Source Software Impact". In it, he reported the conclusions he drew from negotiations he had just concluded with Microsoft:

> Today we agreed on a new patent cross license with Microsoft that protects HP in the short term, but it has significant impact on HP's use of Open Source software in the long term.
>
> More importantly, we now understand that Microsoft is about to launch legal action against the industry for shipping Open Source software that may force us out of using certain popular Open Source products. [...]
>
> Microsoft's Intentions:
>
> Microsoft could attack Open Source Software for patent infringements against OEMs, Linux distributors, and least likely open source developers. They are specifically upset about Samba, Apache and Sendmail. We believe Samba is first [...]
>
> OEMs that don't have a cross(like SUN), or OEMs like HP that they force a change in their cross license to exclude open source software are probably the first target. Intel, Red Hat, SuSE, UBL, Oracle are probably in the first wave as well. [...]
>
> Basically Microsoft is going to use the legal system to shut down open source software [...]

The abbreviation OEM stands for "original equipment manufacturer" – in this case meaning computer makers like Hewlett-Packard itself. The word "cross" near the beginning of the last quoted paragraph is short for "patent cross-licensing agreement".

The memo was leaked to the Net in 2004 and published by *Newsforge.com* on July 19 after Hewlett-Packard confirmed the memo's authenticity but denied that it was still relevant. The denial doesn't really mean much because the company would never admit publicly that its internal thinking was anything like the content of that memo.

Certainly the memo exaggerated the facts by predicting that Microsoft was "about to launch legal action against the industry". Microsoft seems simply to have renegotiated the terms of its patent licensing arrangement with Hewlett-Packard, which was presumably up for renewal, and to have expressly reserved the option of using patents against open source. It's not as if open source were staring down the barrel of a loaded gun. But you do want the alarm to go off, as if a loaded gun is packed in someone's hand luggage.

The Monopolist's Interest

There are reasons why Microsoft might use patents against open source, and reasons to avoid doing so if at all possible.

Open-source developers have all along been afraid of patents. A few years ago, a journalist asked Linux creator Linus Torvalds what he considered the greatest danger to the future success of open-source software, and that was his answer: "Software patents."

Part of the reason is that making the source code available makes it easier for patent holders to search systematically for possible "infringements". Not all patents cover functions that are visible from the outside; some relate to internals that are very hard to track down without access to the source code – for instance, patents on ways to organize data in the computer's memory.

The primary reason, however, is that the most popular pieces of open-source software are competing with the most profitable product lines in the industry and particularly with Microsoft's two largest cash cows, Windows and Office.

In the history of mankind, no monopoly has proved to be permanently sustainable. Some lasted a relatively long time, but sooner or later their markets opened up or disappeared, usually due to paradigm shifts in technology. Beyond all doubt, Microsoft's senior management is aware of that fact. They know that they cannot defend the company's current monopolies forever, and that they have to look for new business opportunities for the future.

However, as long as it is in a monopoly position, Microsoft can generate earnings of more than $1 billion per month. Delaying the erosion of its monopolies by, for instance, just another five years would net it another $60 billion. That's enough to gobble up companies the size of Disney and Siemens.

There are other consequences. As long as profits are massive, the company's market capitalization stays high. Profits underpin share price – and the more valuable Microsoft's shares are, the fewer it has to spend to acquire other companies by way of stock swaps. The longer it keeps its *de facto* monopolies, the more time the company has to build up new businesses itself. It hasn't done a superb job of that in the past, and as the company has gotten bigger it's become harder for it to develop any new business area big enough to be significant by Microsoft's proportions, but it's certainly going to keep trying.

Patents could indeed help it extend its monopolies a little further into the future. Antitrust authorities and lawmakers may rush to the aid of open source, but any initiative would probably take years even if the political will is strong – and there is no assurance that it will be. Intellectual property ranks high in importance within the legal system, as we've seen. Restricting the enforcement of intellectual property rights against "infringers" is possible under certain circumstances, but it's not easy.

Microsoft has huge business interests at stake. It would be naïve to assume that it is never going to be tempted to use patents against open source. This is not just my opinion or that of that Hewlett-Packard executive. A speaker from Siemens at a spring 2004 industry networking event gave a general presentation on open source. The last bullet point on his final slide, about risks and dangers, mentioned patents. The speaker explained: "There are not only winners in this game. The growing popularity of open source also turns some into losers, such as Microsoft, which may at some point use their patent arsenals against open source."

I also happen to know that one of the then highest-ranking Microsoft executives confidentially told one of the most influential people in Silicon Valley: "You know, if it comes to worst with this open-source thing, then we'll bring our patents into play." Some target company names were also mentioned, but I can't list them here because it would expose the source, who was speaking in strictest confidence.

While the motivation exists beyond reasonable doubt, there are still reasons why Microsoft must proceed with caution.

Containment Policy

Using patents for strategic purposes is complex. The HP memo oversimplified things by predicting that "Microsoft is going to use the legal system to shut down

open-source software". It's hard to imagine that they would try to "shut down" Linux entirely. They couldn't prevent the whole world from using Linux as we know it. Doing so would be very difficult, and the results might not necessarily be desirable.

However, the company could pursue a containment strategy and try to prevent open source from proliferating beyond a certain level of market penetration. It could, for example, use patents to exclusively control a particular functionality that gives its products a competitive edge over open-source offerings. If a corporate or governmental customer points out that Linux and OpenOffice have no licensing fees and Microsoft can counter that Windows and Office have significant advantages in terms of productivity, security and total cost of ownership, that would be a strategy consistent with their current methods of dealing with open source.

A good example is what Microsoft has already done with respect to preventing email spam. In 2003, it applied for two patents on "reducing unwanted and unsolicited electronic messages". Those patents would, if granted, cover technological ideas that were simultaneously under discussion in a working the Internet Engineering Task Force, the international body that sets technical standards for the Internet.

Microsoft hoped that the IETF would declare its patented "Sender ID" anti-spam techniques industry-wide standards. However, it ruled out the possibility of granting everyone, including open-source projects, a free license to those patents. The company wanted to define its licensing terms that would either be prohibitive for open source or even exclude it specifically.

Spam email reduces productivity because workers have to delete unwanted emails, and may accidentally delete emails that they should read. It's furthermore a security issue because some spam emails are designed to exploit security holes by way of malicious data and code.

So if it costs a customer $500 per seat to license Microsoft products while the open-source alternative is free, then it may actually be smarter to spend the money if Microsoft has the only solution to the spam problem. The $500 will be made back quickly if hours wasted on deleting and reading spam can be reclaimed for productive work.

Spam is just one example. Microsoft could, over time, try to reserve other key functions in the same way. They don't all have to be as fundamental as spam

prevention; small details can also affect productivity, security, or total cost of ownership.

There will always be some prospective customers who choose the free alternatives even if their quality is inferior, but Microsoft can live with functionally limited competitors.

Obstacles And Hurdles

It would still be a difficult decision for Microsoft to use patents aggressively against open-source programs, even if only to limit their functionality. In recent years, the company has tried to position itself as "Mr. Nice Guy", at least compared to the past. Microsoft isn't entirely credible in that role, but it has made the effort, all of which would be in vain if it started to use the software industry's most unpopular strategic weapon.

A senior patent lawyer of one of Europe's largest companies told me that Microsoft wouldn't use patents against open source in the short term "because they have too few [patents]". That was in late 2004, when Microsoft held some 4,000 patents and had about 6,000 patent applications awaiting a decision.

By comparison, IBM's portfolio held about 40,000 issued patents. IBM now pays approximately 500 programmers to contribute to Linux and other open-source projects. But IBM hasn't publicly declared that it would protect Linux in the event of patent litigation against it, and no one can predict how committed IBM will be to open source several years hence.

Besides, IBM and Microsoft presumably have a cross-licensing agreement in place. Therefore, IBM couldn't use any of its own patents against Microsoft to protect open source, nor could Microsoft use any of its patents against IBM or IBM's customers if they receive Linux or other open-source software from IBM.

In recent years, Microsoft has started an arms race. In 2003, it filed for 1,000 new patents, then for 2,000 in the following year, and in 2005 its plans called for 3,000. Very few companies can match that, and it's likely that the pace will continue to increase. By way of comparison, Siemens is at an annual rate of 5,000. At some point in the not too distant future, Microsoft will be a nuclear superpower in the world of patents. At that point it might then be in the position to modify its arrangements with IBM and expressly reserve, as it already has done with Hewlett-Packard, the legal option of using patents against open source without having to fear a backlash.

Microsoft knows quite well that using patents against open source could open a Pandora's Box and trigger all sorts of reactions, by the market and by other patent holders, that might not be in its interest. For as long as possible, it will use only "conventional weapons". No one knows how far open source will get. It's made enormous headway, but it may reach saturation point long before Microsoft is seriously endangered.

For now, Microsoft continues to grow in both revenues and profits. However, if either ever starts to decline, a trend that could lead to lay-offs, I'm sure that Microsoft's management will seriously evaluate the possibility of dropping the atomic patent bomb.

Alternatively, the company doesn't have to be the bad guy itself: it could work through a third party. When the software company SCO sued IBM and DaimlerChrysler, some suspected that SCO's legal action was part of a Microsoft "fear, uncertainty and doubt" strategy. There was no incontrovertible evidence to back up that suspicion, but is true that SCO had received many millions of Microsoft dollars, directly and indirectly, in two transactions, one of them shortly before and the other during SCO's anti-Linux crusade.

Artificially Inflating the Cost of Software Development

While no one knows if, when, or how Microsoft will bring patents into action against open source, other large organizations definitely share with Microsoft a strategic desire to artificially inflate the cost of software development.

It's unsettling that the wealthiest company in the history of the world now has to slash prices in order to compete with projects that were started by volunteer programmers with virtually no capital investment. For the sake of accuracy, I do have to mention that by now quite a few contributors to major open-source projects such as Linux and OpenOffice are on the payrolls of companies like IBM and Sun, either directly or through such organizations as the Open Source Development Labs (OSDL). Even so, those programs were initially created by programmers with little more than a PC and an Internet connection.

In other words, a bunch of talented programmers with an average equipment cost of maybe $1,000 each can potentially challenge the flagship products of a company that for the fiscal year ending June 30, 2005 posted annual revenues of $39.79 billion and a net income of $12.25 billion. And those independent

developers don't just compete, sometimes they win: far more Internet servers run open-source software than run Microsoft products.

That's why patents are so strategically attractive to Microsoft and other monopolists and oligopolists. Patents are a way to (unnecessarily) up the ante and make software development more expensive and capital-intensive.

The average cost of obtaining a US patent is around $10,000 (roughly ten times the cost of an open-source developer's equipment), and the average European patent costs between €30,000 and €50,000 (depending on which source you believe).

But sufficient muscle to qualify for cross-licensing deals with the large players needs more than just one or two patents. You need thousands.

The average software patent litigation costs around $3 million in the US, a number that is consistent with a Microsoft's statement that the company spends about $100 million per year to defend itself against an average of 35 infringement allegations. Many of these are groundless, yet they still cost that much to fend off. For Microsoft, that amount is almost trivial. But most programmers work for companies that don't even reach $100 million in annual revenues.

The cost of losing a patent litigation is incalculable because it can take a company out of business. The giants of the industry, like Microsoft, eBay and Google, have already settled a number of cases by handing individual patent holders checks for about $25 million dollars. Companies like Intel have made payments of $100 million or more. Google had to resolve a dispute before going public by ceding $300 million worth of shares (a number that actually grew as Google's share price went up afterwards) to its competitor Yahoo. Microsoft paid $1.6 billion to Sun Microsystems to settle a larger conflict in which patents played a major role.

Everything to do with patents is expensive. If you want to check for possible patent infringements, the average cost for even a superficial analysis is about €5,000 per patent. If you just want to check on the 3,000 new patents that Microsoft now files per year, you're looking at €15 million. At a conference in the European Parliament, Christoph Mohn, the CEO of Lycos Europe, said his company asked an American law firm about screening newly issued patents, and the firm estimated it would cost $1 million per year just to check on potentially relevant patents from a few select competitors.

But the biggest problem is that usually you don't even know where to start. Before you can perform patent clearance, you must know which patents to look at. With huge numbers of patents that might be relevant to your products, there is no chance of steering clear of infringement. Even the largest corporations have given up trying, but they are reluctant to admit it.

Those numbers make it pretty clear what software patents do: they increase the cost of software development, and that works in the favor of the few large players who'd like to collectively own the market. It disadvantages a cost-efficient development method like open-source software, as well as small but innovative players just entering the market. With respect to software, patents put the power of money above the power of the mind.

Microsoft doesn't have to use even a single patent against open source to achieve that effect. All it takes is some "patent trolls" to plague the entire industry.

Microsoft's Push for Software Patents in the EU

Microsoft pushed strongly for an EU directive to give software patents a stronger legal basis in Europe. Not only did Microsoft involve its own lobbyists in Brussels and throughout the EU, but the company also backed every noteworthy organization and initiative with similar goals:

- European Information and Communications Technology Association (EICTA);
- Business Software Alliance (BSA);
- Computing Technology Industry Association (CompTIA);
- Association for Competitive Technology (ACT);
- Campaign for Creativity.

CompTIA and ACT must be particularly strongly influenced by Microsoft because those two groups try to persuade governments to abandon plans to promote open-source software. They also criticized the European Commission's March 2004 antitrust ruling against Microsoft.

The Campaign for Creativity is managed by Simon Gentry, a British PR agent who orchestrated a €30 million campaign on behalf of SmithKline Beecham to promote patents on genes. The pharmaceutical giant later merged with Glaxo

Wellcome to form GlaxoSmithKline. Gentry's campaign was the second try. The first attempt to legalize gene patents in Europe had failed when the European Parliament rejected the proposal in a third reading. The second time around, Gentry employed tactics that some found objectionable, for example, organizing a protest featuring people in wheelchairs who claimed they depended on medications that could only be developed if patents on genes became available.

Getting back to software patents, it's telling that the BSA's director of public policy, Francisco Mingorance, was either a principal author of the European Commission's proposed directive or had at the very least modified it. We know this because of the way Microsoft Word documents track changes: it's often possible to identify who saved previous versions, and the relevant document information (the "metadata") for the Commission's proposal included Mingorance's name. The BSA's most influential member is Microsoft.

While the European Commission's Directorate-General Competition (DG COMP) had fined Microsoft €497 million for anti-competitive conduct, the software patent directive was handled by the Directorate-General Internal Market (DG MARKT). One can only speculate about the extent of former Internal Market Commissioner Bolkestein's personal motivation to put helping Microsoft over Europe's public interest. In the case of Bolkestein's successor, Charlie McCreevy, the connection is long-standing: McCreevy was previously the Irish minister of finance, and Microsoft has long been Ireland's largest taxpayer.

In February 2005, Bill Gates' personal involvement in Microsoft's pro-patent lobbying twice made it into the media. First, he visited the European Parliament and the Commission. Then, two weeks later, a leading Danish newspaper reported that Gates pressured the Prime Minister of Denmark to support software patents in Europe. According to press information from a Microsoft official, Gates threatened that otherwise he would close down a Danish company he had previously acquired, which would have hurt Denmark's relatively small high-tech sector.

Microsoft's Political Allies

Microsoft took a stronger interest in the software patent directive than anybody else and presumably spent the most money, but it had allies.

Before talking about the other companies that shared Microsoft's interest in software patents, I have to start with the patent bureaucracy, including the

European Patent Office, national patent offices, many national ministries and the European Commission's DG MARKT.

The political influence of those civil servants is huge because patent legislation is a highly specialized area, and therefore there are few elected politicians to interfere. If politicians would just look at Europe's strategic interests, they'd come to rather different conclusions from those civil servants, who primarily have the benefit of the patent system in mind. For a patent professional, Microsoft's potential action against open-source software is, unfortunately, not nearly as important as maximizing the power and size of the patent system.

For example, the president of the Greek patent office had the power to give voting instructions to the country's permanent representative (ambassador) to the EU. No ministry felt responsible. Certainly, a patent office has the most competence when it comes to the details of patent law, but it's not the place to find much competence with respect to economic policy. Even if it were in exceptional cases, there would be a conflict of interest.

I have mentioned before (and I will again) that no government was as close to Microsoft's interests as Ireland's. That country, which held the EU presidency during the first half of 2004, was succeeded in office by the Dutch, who took over for the second half of 2004. The Dutch also listed Microsoft among its "sponsors", and our Dutch activists were surprised to note the presence of a Microsoft lobbyist in the audience of a parliamentary debate.

On a mailing list, I saw an email from one of our Hungarian activists that explained how the position of the Hungarian government's position was shaped. The same information appeared on *NewsForge.com*.

The key driving forces in Hungary were the Hungarian patent office, the Hungarian ministry of justice, and the Hungarian ministry of foreign affairs. And there were two "dynasties", the Barandy and Ficsor families.

The elder Ficsor worked in the justice ministry and is a long-time friend of the elder Barandy. The younger Ficsor worked at the Hungarian patent office and was the chairman of the Hungarian government's working group on the software patent directive. He had been appointed by the younger Barandy, who was the minister of justice. In other words, the minister of justice appointed the son of a close friend of his father's.

Interestingly, the younger Ficsor then arranged for the Hungarian patent office to donate money to an organization named Magyar Szerzői Jogi Fórum Egyesület (MSzJF), in which the elder Ficsor was a key player. Besides the Hungarian patent office, the largest donors to that same organization included Microsoft and the Business Software Alliance, which is strongly influenced by Microsoft. It is even conceivable that the BSA was merely a funnel for more Microsoft money.

There are probably many cases like this, if we only knew the details. Microsoft has bought influence all across Europe with donations to political parties, governmental initiatives, and organizations like the MSzJF.

In the United States, with its much stricter transparency laws, statistics show that Microsoft's lobbying expenditures were limited until about five years ago, but have since surpassed the outlays of some of the largest companies in the arms and tobacco industries. Part of the reason may be the antitrust proceedings against Microsoft both in the US and in Europe. Microsoft's activities with respect to the EU software patent directive show, however, that the company increasingly relies on political connections to influence governments and legislators to act in a way that gives Microsoft competitive advantages over its competition, especially open source.

Reports on the Web say that Bill Gates once claimed that he has "of course as much power as the president [of the United States]". Whether Gates made that statement and whether or not it's true, in July, 2005 President George W. Bush announced that his choice for the US ambassador to the European Union was C. Boyden Gray, a lawyer and Microsoft lobbyist. American diplomats in Brussels and the capitals of many (if not all) EU member states have also consistently lobbied for software patents.

IBM's Pro-Patent Push

In the world of politics as well as in the world of big business, *ad hoc* alliances are common. Companies may compete fiercely in many areas and yet cooperate in others ("coopetition"). Microsoft's relationships with some of the other forces pushing for European software patents are therefore complex. It had some strange bedfellows.

For example, take IBM. IBM and Microsoft officially cooperate in some ways, but in its role as the largest backer of Linux, IBM goes head to head against Microsoft. It may seem schizophrenic for IBM to simultaneously bet on open

source and lend political support to giving Microsoft the ultimate legal weapon against open source, but there are logical reasons.

IBM's patent department generates more than $1 billion per year by forcing smaller companies without patent portfolios that qualify for cross-licensing to pay what is often called the "IBM tax". That is a major business area for IBM.

The executives in charge of IBM's open-source relations don't speak publicly in favor of software patents. Key open-source developers, such as Linus Torvalds, the creator of Linux, are directly or, indirectly, through the Open Source Development Labs on IBM's payroll. Those programmers are known to be against software patents. In fact, Linus actually supported *NoSoftwarePatents.com* (more details later).

It's possible that IBM has a hidden agenda to use its patents to gain control over Linux and open source in general. If IBM holds the only major patent portfolio that forms a protective shield over open source, then it would have a competitive advantage over other companies that offer open-source solutions: IBM's customers would always benefit from IBM's protection against patent infringement claims. It's in the nature of patent law that a commercial user of a computer program, not just the developer or vendor, can potentially be sued for infringement.

If that is IBM's strategy, the company may underestimate Microsoft's ability to become a more powerful patent force than even IBM. Microsoft's financial strength has outstripped that of IBM, and with an equally large patent portfolio, Microsoft would easily outdo IBM in a "pissing contest". Though in fact the confrontation wouldn't occur: IBM might simply be forced to surrender and accept Microsoft-imposed limits on the functionality of key open-source programs. History repeats itself, and IBM has underestimated Microsoft before.

From Microsoft's point of view, it would even be desirable if IBM were to gain immense control over open source. A loose network of unpaid programmers that let the world use their creations for free is a much less predictable and therefore much more frightening competitor than another large corporation. Under the firm control of IBM (possibly in conjunction with others), open source would no longer have the same competitive edge. Open source might still be called open source, but it wouldn't be the open source we know today. It would be more like another corporate competitor with a comparable price structure and inertia. And Microsoft has always known how to deal with that type of competition.

SAP: Gamekeeper-Turned-Poacher

While German business software vendor SAP AG competes with Microsoft in some market segments, the two companies were exploring the possibility of merging (or, more precisely, much larger Microsoft acquiring SAP). During the course of the European software patent debate, SAP became very aggressive.

This was contrary to the company's history. SAP's most prominent founder, Hasso Plattner, was philosophically opposed to the patentability of software, and as long as he ran it so was the company. That's why at the beginning of the 2000s, SAP only had a handful of patents.

Plattner's successor as CEO, Henning Kagermann, is rumored to be afraid of the competitive challenges that open-source software could pose to SAP in the future. Several open-source projects do indeed perform SAP-like enterprise resource management functions. So far, the open-source ERM solutions only have very limited traction. It is doubtful whether they will ever play a major role since business software is a service-intensive area. Still, Kagermann is allegedly worried that the situation could change, and then his company's high prices and margins would be under threat from competitive solutions with a licensing cost of zero.

Even so, Linux is a key platform for SAP's software products, and SAP operates a large testing lab for Linux. It also has a strategic partnership with MySQL AB. If a customer runs SAP on Linux and MySQL instead of Windows and a high-priced database (be it from Oracle, IBM, or Microsoft), potentially SAP's own revenue opportunities are better. To some extent, of course, SAP is simply reacting to customer demand for Linux-based solutions. However, if open source were ever to become a serious threat to SAP's own products, then the company would prefer to be able to use patents as a strategic weapon. They would pay the price if its ability to use patents came with the undesirable side effect that others were simultaneously using patents against Linux. At the end of the day, to SAP Linux is just a platform.

At the ministry of justice roundtable, SAP's European intellectual property director, Günther Schmalz, made the relatively cautious statement, "We're new to this business [of patenting software] and have to see how it works out for us." However, on other occasions another SAP patent lawyer, Dr. Harald Hagedorn, has unequivocally demanded legislative measures to strengthen the legal basis for software patents in Europe.

If there were ever any doubt concerning the position of SAP's senior management, it was eliminated shortly before the final decision in this process occurred. At that point, SAP unmasked itself by placing full-page ads in EU-targeted newspapers supporting software patents. SAP's ads came in handy for us at the time. More about that toward the end of the book.

Convergence of Industries

There are five European industrial giants that push for software patents: Siemens, Nokia, Ericsson, Philips, and Alcatel. They all have one thing in common: each of them is, or was until recently, in the business of manufacturing mobile telephones.

A mobile telephone today has more computing power in terms of processing speed and memory than the computers most of us had on their desks in the early to mid 1990s. While input (the numeric keyboard) and output (the tiny screen) are limiting factors, in principle those devices are just as multifunctional as any computer. The border between "smart phones" and small portable computers is getting muddy, as some products are in the middle between the two: convergence.

If two or more industries converge, the question they must answer is which rules will govern the new game. If you wanted to merge the UEFA Champions League and the US National Football League, you'd have to choose between the rules of European soccer and American football, or devise a whole new set. Different rules favor different skill sets and athletic conditions. Several Americans watching soccer during the 1994 FIFA World Cup in their country commented that the most surprising thing was that professional soccer players didn't look like real athletes: "They don't have much muscle." Body building is not a requirement for succeeding in soccer, just as you don't need a huge patent portfolio to create good software.

Some large corporations take it for granted that their patent portfolios will lend them additional power as strategic weapons. They don't like hearing that a capable programmer with a €500 computer could compete with them when it comes to developing and offering pure software for those new devices. So far, their revenues come primarily from hardware products, but they realize that one day the business of selling the blades (the software) may be a bigger opportunity for them than selling the razor (the hardware).

They want the new game to be played by the rules of the industry they're used to, in which the power of money is stronger than the power of the mind and might makes right. That's where they have a common interest with Microsoft and SAP.

Siemens: Microsoft's Closest Friend in Europe

There are still differences between the attitudes and approaches of Siemens, Nokia, Philips, Alcatel and Ericsson. Most of the time they are competitors, and they have distinct corporate cultures. They may also differ in the extent to which the push for patents comes from their patent departments and the amount of thought their chief executives have given the matter.

Of the five, Siemens is the friendliest with Microsoft. Siemens utilizes open-source software for certain internal purposes and has poured some investment euros into the Linux company MontaVista, but neither represents a major strategic commitment.

On May 3, 2004, Microsoft and Siemens announced a patent cross-licensing agreement. At the time, Siemens had a worldwide portfolio of about 50,000 patents, and Microsoft had about 10,000 including outstanding applications. Under the arrangement, each company guaranteed not to sue the other for patent infringement.

In recognition of the disparity in the number of patents, Microsoft made a payment to Siemens. The amount was never publicly disclosed but the announcement described it as "minor in comparison to the size of the two companies".

There are many such cross-licensing deals in place, and only a small fraction are announced to the press. A deal like the one between Microsoft and Siemens perfectly demonstrates how distorted the patent system has become. If those patents really served to protect inventions, Siemens would never want to risk giving away all its innovative capital to a financially stronger, ruthlessly aggressive, American company. And Microsoft would not have wanted to give Siemens unfettered access to intellectual property rights that arguably exceed the value of Siemens, considering that the public stock market values Microsoft about four times higher than Siemens.

However, as *The Economist* said, "the patent systems of the world aren't working". Patents are ever increasingly decoupled from protecting intellectual property and innovation. They have much more to do with divvying up markets

than anything else. They can be used as legal weapons, but the descriptions of those so-called "inventions" in those patents are far from specific enough to enable someone to create actual products.

Microsoft and Siemens didn't exchange any technology by giving each other full access to their patent portfolios. They just agreed to lift the barriers to entry that each of them had erected in certain market segments. Or, to use the Cold War analogy, they formalized a mutual non-aggression pact.

One of the initiatives that software patent critics should pursue in the future is to get antitrust authorities, such as national trade commissions and the European Commission's DG COMP, to investigate those patent cross-licensing deals.

The cross-licensing agreement also increased Siemens' and Microsoft's collaboration on the political front. After all, European politicians are more likely to listen sympathetically to a industrial giant than to a foreign company. It was well-known in the industry that Microsoft and Siemens coordinated some of their lobbying efforts. It was particularly conspicuous in February 2005, when Microsoft hosted, and presumably paid for, a Berlin breakfast meeting for lobbyists and aides from the German political parties and invited Uwe Schriek, a senior Siemens patent attorney, to do essentially all the talking.

Nokia's Offensive IPR Strategy And Network Effects

Nokia is generally afraid of Microsoft and has therefore supported the European Commission's antitrust proceedings against the American software company. However, Nokia and Microsoft collaborate in some areas, and both lobby for software patents. The two companies' efforts are separate, except that both support EICTA, the industry association I have mentioned before.

In 2003, Illka Rahnasto, Nokia's vice president of intellectual property, published a book titled *Leveraging Intellectual Property Rights in the Communications Industry*, which talks a lot about how Nokia views and uses patents as a strategic device. A key paragraph says that intellectual property rights (by which he primarily means patents) can be used to control the activities of other companies in a given market. Nokia pursues an offensive IPR strategy, which Rahnasto describes as one in which a company not only defends its rights, but proactively starts litigation against others and lobbies for legislation that increases its ability to do so.

In fact, a former Nokia employee, Lars Wirzenius, now an open-source software developer, explained in his blog that he left Nokia because he was shocked at how aggressively the company used its patents against other companies, usually ones that are much smaller than Nokia.

Rahnasto also discusses, among other things, the way patents can enhance network effects in certain industries. This interaction between patents and network effects was also stressed by Robert Gehring, a researcher at the Technical University of Berlin, at a couple of roundtable discussions hosted by the German government. Some may not be familiar with the term "network effects" or its synonym, "increasing returns", so I'll explain it.

"Network effects" mean that the more people buy or use a product, the more attractive it becomes. For example, the fact that most people use Microsoft Word makes it likely that you, too, might choose Word because doing so will make it easiest to exchange documents with other computer users. If Nokia lets you play a popular game only with other owners of Nokia phones, excluding those who use phones from other manufacturers, then those of your friends who already have a Nokia phone will tell you to buy one, too, so you can play with them.

This predisposition of customers to choose a certain product effectively limits their freedom of choice, and it enables the market leader to charge ever higher prices for the same product or service.

Let's compare this to traditional markets that have no network effects. If you go grocery shopping at your local supermarket, you choose goods based on their (perceived) quality and price. It matters whether the lettuce is fresh, but whether other people are simultaneously buying the same lettuce you are doesn't play any role in your purchase decision.

If there's a special promotion, you might be one of many people buying the same kind of lettuce. However, the fact that others are also buying it is at worst an annoyance (if it slows down your shopping trip) and at best a minor reassurance. High market share wouldn't justify a higher price. Now say this were not about salad, but about jewelry. Then the fact that many people buy the same product is actually detrimental to the perceived value because the product is less exclusive if "everyone" has it.

Some non-tech businesses do have network effects. You'll probably go to the disco your friends already patronize. Even if you want to meet new people, a club with only a handful of guests is not what you'd usually be looking for. If there are

only five people in such a place, two of them will say: "There's nothing going on here, let's head out." After they leave, the others may do the same.

But unlike a high-tech market, there is a limit to those network effects. A disco with ten guests fails to serve its purpose, but one with 10,000 would be well beyond the point at which it loses its appeal. The network effects in high tech are, however, scalable until the market is saturated, and they are stronger and more sophisticated.

Patents benefit market leaders who capitalize on network effects. Those leaders can use patents to prevent competitors from providing alternative solutions. For instance, a company like Nokia could stop other manufacturers' phones from communicating with Nokia phones. Of course, I'm not talking about simple voice calls, which would always work between phones of different brands, but the more exciting features of future phones, which will be software-powered interactive services.

It's questionable whether Nokia can use its patents against Microsoft. With its greater resources, in a few years Microsoft will own far more patents than Nokia, which has "only" a number on the order of 10,000. Microsoft's annual rate of new patent applications is far ahead of Nokia's. Besides the sheer quantity of patents, Microsoft is likely to turn key strategic areas, including several that will be of importance to Nokia in the future, into "patent thickets". Nokia is considered to be aggressive for a European company, but Microsoft is tougher and more sophisticated.

Philips and Political Blackmail With Lay-Off Threats

Oddly, Philips pushed extremely hard for software patents even though it owes most of its early success to the fact that the Netherlands had temporarily abolished the entire patent system, thereby creating an opportunity.

Among EICTA's major corporate members, Philips was reportedly the most willing to engage in constructive dialog with us, but failed to gain support from other large players. Philips did not display this constructive attitude on other occasions.

In September 2004, leading Dutch newspaper *Allgemeen Dagblad* quoted Hans Streng, the CEO of Philips' software division (in Dutch, "directievoorzitter van Philips Software"), as threatening to discontinue all of Philips' software development in Europe unless software patents were allowed by that EU

directive. He said that high labor costs made software development in Europe prohibitively expensive, and therefore development would have to be relocated to other regions of the world, such as Asia, if Europe didn't provide what he called sufficient legal protection of software development.

According to a newspaper report, Bill Gates later made a similar threat in a discussion with the Danish prime minister. Also, various letters have surfaced from those five large European companies (Siemens, Nokia, Ericsson, Philips, Alcatel) that effectively voiced the same threat. Those letters were not as direct as the statements attributed to Microsoft and Philips, but they still left no doubt about a connection between the passage of an EU software patent directive and those companies' willingness to invest in existing or new jobs for computer programmers in Europe.

Unfortunately, those threats did have an impact on some national governments' decisions. We know that from a very good source: someone with excellent contacts in the government of Luxembourg received that information directly from one of that country's ministers. Luxembourg itself wasn't affected because those companies don't employ a significant number of software developers within its borders. It just knew that other countries were very worried.

Availability of Patents Is Unrelated to Location of Inventor

Those threats were political blackmail of the most despicable sort, and lacked any factual basis: the ability to receive a patent in a particular market has absolutely nothing to do with the country in which the inventor works. If you want, say, a patent from the European Patent Office, the only one person who has to be based in Europe is the patent attorney. The applicant and the inventor can be anywhere on earth.

Patents regulate a target market into which products are sold, not a place in which inventions are made. A European patent is a patent in the European market, not necessarily a patent of a European company. In fact, an estimated 75 percent of European software patents belong to non-European companies. Likewise, some European companies, such as SAP and Siemens, own large numbers of American patents.

By laying off developers in Europe and employing them in territories with a broader scope of patentable subject matter, those companies would not receive a single patent that they can't get anyway. If they favor the American approach of

patenting everything under the sun including manual methods to comb one's hair, they are always free to apply for American patents. Those patents are valid in the American market only, so if someone else sells an infringing product in the US, then he can be sued – but not if he sells that product anywhere else in the world.

If US companies want to sue Europeans in the European market, they can't use their US patents. They can only do so with European patents. If European companies want to use patents as a strategic weapon in the US market, their programmers can still be in Europe or even in the Antarctica; they just need a US patent attorney to represent them at the US Patent and Trademark Office (USPTO).

Certainly, patent legislation could be changed to make it easier for Philips to take out more European patents, but the same changes would equally benefit its competitors from all over the world, such as Microsoft, General Electric, Motorola, Sony, Hitachi, LG – you name them. In the end, Philips' competitive position with respect to other global players wouldn't improve in the slightest. Patent offices don't discriminate based on the country of origin, nor do global companies: if a Siemens engineer invents something, be it in Berlin or in Bangalore, the company routinely files for patents on that invention wherever there is a market in which Siemens has a strategic interest.

So those large corporations' threat to kill European jobs had only one purpose: to intimidate governments and lawmakers into making the specific decision that those companies wanted but which is, when you think it through, unrelated to the issue of where they employ software developers.

Politicians Must Stand Firm Against Such Threats

Bowing to such threats like the one Philips made doesn't pay off. Those companies would continue outsourcing jobs at the same pace one way or the other, and they'd use the same blackmail tactics over and over.

In other scenarios, threats can be legitimate. If a large corporation demands that a government reduce labor costs in order to preserve a certain number of jobs in a particular location, its claim that the cost reduction is necessary may just be a truthful representation of economic facts. A company has to be competitive, and if the discrepancy between labor costs in different countries (presuming a similar level of productivity and quality) becomes too extreme, the disparity may lead to relocating jobs. Similarly, it may even be reasonable for a company to advise a

government that tax rates and the attractiveness of an industrial location are connected. Unlike the scope of what is patentable, labor costs and tax rates are *location-specific* factors that affect the competitiveness and profitability of a company.

A company that publicly threatens a government with destroying the livelihood of innocent people causes great sorrow to the employees who are potentially affected and their families. While there still is a major difference between such extortion and terrorism, the pattern of behavior is parallel to that of hijackers who threaten to kill their hostages.

European politicians, many of whom lack the knowledge to understand the disconnect between patents and job locations, would be shooting themselves in the foot if they gave Philips the software patent legislation it wants. In December 2004, *China Business Daily* reported that Philips' Shanghai research center "produced 90 patents" the previous year, "three patents per person on average". The article talks about plans by Philips, Siemens and other large corporations to move ever more jobs from Europe to China.

That high output – three patents per person year – is yet another indication of how dysfunctional the patent systems of the world have become. If someone creates an "invention", he has to spend a significant amount of time explaining it to a patent attorney and helping field questions from the patent office. It seems as if those Shanghai-based Philips employees invent patents – they think of things that can be patented – instead of patenting inventions.

What the Shanghai "success story" also makes clear is that Philips and other such corporations don't want European software patents to protect the work of their European employees from Asian imitators. On the contrary, many of those software patents would be granted in Europe on work performed by their Asian employees – and then turned against European small and medium-sized enterprises whose employees are generally based in Europe, not Asia.

Microsoft Monopolies Hurt Europe's Economy

The car ride with Microsoft Germany's national technology officer, Walter Seemayer, on the way to a government roundtable was a chance to discuss Microsoft's role in the European software patent debate. That led us to Microsoft's formal and informal allies, and next to the way large corporations try

to connect patent legislation and job location in order to pressure politicians. We have finally come back full circle to my conversation with Seemayer.

A large part of what Seemayer and I talked about was industry-related but of no relevance to the software patent story. However, one particular point that Seemayer made is part of Microsoft's official position on software patents: Microsoft's contribution to employment in Europe.

He said: "There are many jobs in Europe at a company like Microsoft." I can't deny that. Microsoft has roughly 10,000 employees on this continent. What I strongly disagree with is the claim that those jobs are a good reason for Europe to give Microsoft software patents and thereby enable it to fend off the competitive challenge posed by open source.

In its fiscal year 2005, Microsoft generated sales in Europe of more than €10 billion, according to external estimates. That money goes to Ireland, where Microsoft pays a corporate tax of only 12.5 percent on its earnings, and from there the profits go straight to the US. In the US, Microsoft employs about four times as many employees (around 40,000, three quarters of them in the Seattle area) as in all of Europe combined. Worldwide, only about one in six Microsoft employees is based in Europe.

Let's assume that Microsoft has an average annual cost of €200,000 per European job, including salary, social charges, travel expenses, office overheads, and so on. That number is probably too high, but if you multiply even that number by 10,000 European jobs, you only arrive at a total European labor cost of about €2 billion. While it sounds like a lot, €2 billion is only about 20 percent of the money Microsoft sucks out of European governments, companies and consumers per year.

Obviously, Microsoft has other costs here as well, such as physical manufacturing of some goods (nothing major compared to Microsoft's product prices), marketing expenses, and legal fees. But there is no question that most of the company's European revenues don't benefit European employees or subcontractors. The beneficiaries are Microsoft's mostly American shareholders, Microsoft's mostly American employees, and the Irish government, and to a much lesser extent, the US government.

Microsoft's subsidiaries in countries like Germany or the UK pay hardly any corporate tax. Fiscally, if you buy a Microsoft product anywhere in Europe, you buy it from Microsoft's "European Operations Center" in Ireland. Local

subsidiaries like Microsoft UK or Microsoft Germany only function as internal service providers that operate on a "cost-plus" basis: the parent company transfers just enough money so the service provider can cover its costs and turn a negligible profit in the high-tax countries, while the real profit is generated in low-tax Ireland.

At the roundtable of the German ministry of economic affairs and labor, I once again met Robert Gehring from the Technical University of Berlin. He and I were the only participants in that roundtable who had also participated in the ministry of justice roundtable two weeks earlier. Gehring mentioned the US economy's trade surplus in intellectual property, whose annual value is in the tens of billions of dollars, 75 percent of which is generated by the European subsidiaries of US corporations.

Those numbers are not staggering if you consider the strength of the US's software companies and entertainment industry. However, Gehring pointed out that a significant part of that trade surplus is attributable to the fact that due to the aforementioned network effects monopolists such as Microsoft can overprice their products. They can charge more than a competitive market would tolerate.

It's primarily due to its monopolies that Microsoft can move far more money out of Europe than it has to spend here. If competitive pressure from open source forced Microsoft to cut its prices in half, the ratio would become much more favorable to Europe. Microsoft would still extract a lot of money from the budgets of European governments (that is, taxpayers), corporations, and consumers, but a more substantial percentage of it would actually be spent over here.

If the major European governments (Germany, UK, France) additionally forced Microsoft to pay a reasonable share of its corporate taxes in the countries in which it generates its sales rather than in Ireland, home to only 1 percent of the EU's population, Microsoft's contribution to the European economy would indeed be appreciable.

The Venal University of Münster

The Ministry of Economic Affairs and Labor organized the roundtable in conjunction with the Kiel Institute for World Economics (Institut für Weltwirtschaft, or IfW), which is one of Germany's most respected economic research institutes. It enjoys an excellent reputation worldwide.

At the roundtable, Professor Dr. Henning Kloth and Dr. Jens Mundhenke presented the preliminary results of a study on the impact of open source on the German economy that the IfW had conducted on behalf of the German government. They generally portrayed open source as an opportunity for cost savings and economic growth. Among their policy recommendations, they were concerned about network effects in the software industry, and described open source as a major opportunity to make the market more competitive.

Mundhenke explicitly said that software patents represent a threat to open source, and criticized the proposed EU directive for being insufficiently clear on several legal aspects. He also mentioned that the German government's antitrust commission (Monopolkommission) had previously taken a position against broadening the scope of patentability. None of that was new to me, but it was very reassuring to hear it from such a reputable research institute.

After the IfW's introductory presentation, Dr. Stefan Kooths from the University of Münster's Institute for Computational Economics (MICE) outlined a contrasting position. He denied that open source represents an economic opportunity, and he said that patents represented a better way of sharing information among programmers than making computer programs freely available.

MICE was easily bought: it had conducted two studies on open source that were financed by Microsoft. The university's reputation is mediocre at best, and it is extremely rare for it and the IfW to appear together even in the same sentence, let alone at a government roundtable.

In responding to the open-source challenge, Microsoft has funded many such studies. Most of them were meant to buttress Microsoft's claim that their products offer a lower total cost of ownership (TCO) or better security. But one only has to read the headlines of IT news sites to know that Microsoft has a terrible track record at securing its products. However, universities and institutes constantly complain that they are underfunded, and some of them are venal: they are willing to say almost anything that a sponsor pays for.

It was interesting to see how the IfW's representatives reacted to Kooths' presentation. His "findings" were not new to them because they had seen his studies before. Even though he arrived at completely opposite conclusions from theirs, they didn't want to start an argument over who was right. They merely acknowledged that Kooths' methodical approach was consistent with theirs. In

other words, he followed the general rules of economic research, and they weren't going to debate him.

They might as well have said: "We read your study, and we couldn't find any major spelling errors or grammatical mistakes." That, of course, doesn't say whether the text makes any sense at all.

Presumably they didn't want to attach more importance to it than necessary. Unfortunately, Microsoft can still cite those sponsored studies, which deserve no credibility whatsoever, in discussions with politicians.

EPO Is Its Own Judge

One of the participants in the roundtable was an entrepreneur whose company had previously been sued over a European software patent, and he expressed his dissatisfaction with the EPO's *modus operandi*. In that context, I made a rather polemical contribution to the discussion and compared the EPO to a "dictatorship" and a "banana republic". The EPO simultaneously performs executive, judicial, and quasi-legislative functions at the same time, and is under no parliamentary control.

I've already discussed the way the concept of separation of powers is not applicable to legislative procedures in the European Union unless national parliaments become more involved. In the EPO's case, that problem is even worse.

The EPO is an independent multinational institution whose decisions cannot be appealed to a regular court of law. If one disagrees with a decision taken by the EPO's patent examiners, the final decision rests with the EPO's Boards of Appeal. That means the EPO is the final judge of its own decisions, because those judges are neither impartial nor independent.

Under Article 23 of the European Patent Convention, the members of the Boards of Appeal are appointed by the EPO's administrative council for a term of five years. Many appointees have previously worked at the EPO. Coming from that background, they are potentially prejudiced, or at least predisposed. That is not an insinuation. It's simply a fact that many people who come from a particular profession tend to believe that their profession is a blessing for the world.

For an example, take a university with a department of law and another of economics. The two peacefully coexist until they have to decide which faculty

gives lectures on taxes because there aren't enough students for both departments to teach it. The law professors will say that tax law is a part of law. The economists will say that taxes are a matter of business administration. Both can give specific reasons why they're right.

If the university now creates a special committee to resolve the conflict and all the members of that committee are retired law professors, they will probably rule in favor of their former department. If the committee consists only of former economics professors, they'll probably be inclined to decide the opposite. Both groups believe in what they used to do in their former professions, and want to enhance the prestige and importance of their respective disciplines. Consequently, if you consistently appoint members of only one of the two groups to that committee, one of the two departments will over time absorb substantial parts of other departments. It may take some time since some of the committee members will be less partisan than others, but it's bound to happen.

Another major problem is that five-year terms make the members of the Boards of Appeal dependent on reappointment after a relatively short term. It is a commonly accepted standard in today's civilized countries that judges should be appointed for life or until they reach retirement age. Only a judicial decision in the event of a breach of duty should be able to terminate their employment. Alternatively, the independence of judges can be ensured by appointing them for a single term with no possibility of reappointment under any circumstances.

One way or the other, the idea is that a judge should have nothing to gain or lose by taking a particular judicial decision. If he fears dismissal, demotion, or not being reappointed, he is not truly independent. There is a high risk that a judge will try to please those who can hire and fire.

Five years is an extremely short term: even the rules of the International Federation of Football Associations (FIFA) allow soccer clubs to sign professional soccer players to five-year contracts, and athletes' careers are very short-lived compared to those of judges.

With the members of the Boards of Appeal being biased in favor of patents and dependent on periodic reappointment, the Boards of Appeal are more like a corporate "customer complaints department" than a truly independent judiciary. Therefore it's no surprise that the Boards of Appeal have a long history of pushing for ever broader patentability: a member of a Board of Appeal who doesn't serve the EPO's interests may be looking for a new job in a few years.

For the sake of accuracy, I have to point out that the EPO's decisions to grant patents can be overturned by national courts, one country at a time. Even if the EPO's Boards of Appeal have upheld a contested patent, a court in for example the United Kingdom can still declare that patent unenforceable within its jurisdiction. However, no independent court can order the EPO itself to grant or invalidate a patent at the international level. Thus the applicant can receive a European patent from the EPO in a single procedure, while if the EPO's Boards of Appeal uphold the patent, an opponent would have to contest the patent separately in each of a few dozen countries.

Autocracy and Presidential Lawlessness

The EPO's legal foundation, the European Patent Convention, isn't detailed enough for day-to-day work. Therefore, the "examination guidelines" that the EPO itself creates have quasi-legislative status.

As if this mixture of executive, legislative, and judicial responsibility were not enough, the EPO's only control is the European Patent Organization (EPOrg). Neither national parliaments (countries are represented in the EPOrg by their governments) nor the European Parliament (the EPO is not an EU institution) have control over the EPO.

The EPO is also its own ministry of finance as it finances itself through its fees, with the effect that the more patents it issues, the more the EPO benefits financially. This is not in the interest of the economy.

Now here's a real shocker for everyone who believes in law and justice: according to an email from an EPO employee to the FFII, a leader of the union of EPO employees was kicked in the stomach by a former EPO president. The email was published on the Internet, and a Google search may retrieve the relevant president's name.

The female victim was hospitalized. The Munich police was not authorized to enter the EPO building because it's on diplomatic territory, so the culprit, protected by diplomatic immunity, couldn't be prosecuted for causing this bodily harm.

Hijacked Industry Associations

At some point, the roundtable's moderator, ministry official Dr. Ulrich Sandl, asked us where BITKOM, the German chapter of EICTA, stood on the subject of

software patents. Several of us immediately laughed. It wasn't clear from Sandl's expression and gestures whether he meant to display understanding for us, or was begging for understanding from us. To me it seemed to be the latter, as if he wanted to say: "Look, you may laugh about that organization, but they claim to represent your industry and all the big names are involved with them. As a ministry official, I have to take them seriously, at least to some degree."

So we explained to him that BITKOM is in favor of software patents because its largest members have essentially hijacked the organization. They use an association with 700 members, most of them small and medium-sized companies, as their propaganda mouthpiece.

In addition to issuing individual statements supporting the EU Council's proposed directive, IBM, Microsoft, Siemens, and the others got BITKOM to proclaim that "the German information and communications technology industry favors the proposed legislation". That statement couldn't be further from the truth, but to media and politicians it appears credible until someone explains who really calls the shots in these organizations.

In 1996, I served on the Board of Governors of the Software Publishers Association Europe. I shared some of my related experience with the roundtable: "There are three reasons why the large corporations effectively control those industry associations. One, they pay the largest membership fees. Two, having their names on board is essential for the prestige of such an organization and, particularly, its full-time functionaries. Three, and this is the most important factor: they have the management resources to dispatch people to all of the association meetings and activities. Some people from smaller companies may also devote a large amount of time to that, but generally they can't afford to take as much time as those from the industry giants."

The accuracy of that portrayal was widely acknowledged. The next question was: what can the little guys do to prevent the bigger ones from hijacking their organizations and politically using their names and membership fees against them?

I was working on creating a NoSoftwarePatents alliance, so I had already thought about this question and had arrived at my own conclusion: no existing industry association could reliably advance our cause against software patents. Even if one were to do it temporarily, there would always be a risk that large corporations would gain disproportionate influence.

With respect to existing organizations like BITKOM, there are in principle two possibilities: either the smaller companies leave the associations as soon as they turn against their interests, or they instigate an internal revolt (in which case they might first threaten to leave the organization unless certain demands are met). If a number of companies had voted with their feet as soon as EICTA and BITKOM started to promote software patents, it's possible those organizations would have been forced to at least stay neutral.

Making Serious Noise

The Power of the Fourth Estate

Media influence on politics is self-evident. The press is often called the "Fourth Estate", to add to the three estates of the executive government, the legislative bodies, and the judiciary system. Without the media, even the Watergate scandal might have been swept under the carpet. When the spotlight is turned upon them, politicians are forced to act more honestly than if they stay behind closed doors.

It was obvious to me from the beginning that we needed to generate far more media coverage for our cause. If there had been more reporting, I would have become aware of the issue much earlier. I knew as early as 2003 that something was going on in the EU that could lead to the legalization of software patents, but I hadn't read about the issue and its implications before then.

When I went to the April 2004 joint press conference of the Greens/EFA group and the FFII, looking around I could see hardly any journalists. It worried me that most of those present seemed to be activists. In the succeeding weeks and months, there were some interesting things to report such as the groundbreaking resolution by the Dutch parliament, but we couldn't generate much coverage.

An editor of a reasonably well-known German-language IT news site told us that he and his colleagues didn't see much reader interest in this topic. Whether that was true at the time (spring 2004), I just don't know. However, only a little while later that same site was going to get interested, and its reporting since then has been regular. How things can change!

I never saw public relations and political activities as separate ball games. The two overlap, and there are interdependencies. Political events and decisions are always the best context for the media to report on an issue such as ours.

Hidden Importance

Some political issues, like health care, are of immediate interest to a large audience. Others, such as a regulation requiring compulsory insurance for ski instructors, concern only a small group of people. Software patents are in between: while there are few who understand the subject and feel directly

concerned, the repercussions for the economy, technological innovation, and ultimately even society as a whole are huge.

At issue is control over the huge and strategically important software market, and over the world of new media. Software patents could make some of the software-based products and services that we use every day several times more expensive.

This is not just my opinion. Former French prime minister Michel Rocard, the European Parliament's second-reading rapporteur on the software patent directive, classified the software patent directive as one of the most important decisions facing Europe in all of economic policy. The president of the European Commission, former Portuguese prime minister José Manuel Barroso, called it an "important file" ("file" in the sense of "dossier") in a letter to the president of the European Parliament, Josep Borrell.

Those statements were made in 2005, but when exactly they said it is of secondary importance. The key fact is that high-profile politicians attached such a high priority to the topic. Both of them know how to discern and define priorities, as they headed their countries' governments for several years. Why didn't the media arrive at a similar conclusion long before?

There are a few reasons for that, and they all originate from the fact that software patent legislation is highly specialized. Law is a special field. Patent law is a sub-specialty within law, and understanding it requires some technical knowledge. Software patents, finally, are an even more special case within patent law.

If you're a journalist and you want to write on a subject like that, you are likely to find it very hard to convince your editor and colleagues that this is truly an issue of general concern. At first sight, it looks like it's only a story for "geeks".

Most journalists wouldn't even want to try to dig into it. If you don't have the necessary specialized background, you have to spend a fair amount of time just to acquire a general understanding. Journalists are under pressure to be productive, either from their bosses or because they are freelancers trying to make a living. They will in general only devote a lot of time and energy to such an undertaking if there's a strong demand for articles on the topic.

There are exceptions, but generally you get a chicken-and-egg problem: the demand isn't there unless there is a large, informed audience. Without the demand, there's little interest in reporting and the audience can't become informed. In July of 2004, our cause was still caught in that vicious circle.

How do you get the genie out of the bottle in such a situation? How can the issue's importance become recognized even though it's not exactly striking in the eyes of most people? There are several possible approaches.

Some overcome this public relations challenge with untiring patience and perseverance. I know an Australian software company named Typequick that has been developing and marketing computer-based typing tutors. At first sight, that's a niche market. However, these days almost every white-collar worker spends a significant amount of time at a computer keyboard, and if you can type faster, with fewer errors and less fatigue, you're more productive. It also makes some people more confident in using the computer generally. If everyone learned to touch-type, it would definitely contribute to economic growth, but it's not obvious until you think about it.

The Typequick folks took their time and worked their way up. They started by generating publicity in computer publications, then after a while began getting coverage in the business press, and over time even made it into high-profile newspapers. They always presented the best recent articles to others they wanted to motivate to write on the subject.

I mention that approach because for some political activists it is an option. However, in July 2004, we had to assume that we only had two months before the EU Council formalized its common position on the software patent directive, and only three or four months after that before the European Parliament would conclude its second reading. By then, we might already have definitively lost.

I had been trying to raise funds from a group of companies to pay for an advertising campaign so we could generate rapid media coverage of the potential threat. While I hadn't given up completely, the first three conference calls had not gone to my satisfaction. There was a discrepancy between companies' concerns over software patents and their willingness to spend money to counter the threat. They all knew software patents could take their companies out of business, but they hoped that unfavorable legislation could be avoided without significant expense.

If companies spend money to raise the level of awareness for a political issue, the effect can be significant. Actions speak louder than words, and those who put their money where their mouth is always have more credibility than those who

only pay lip service. But by late July of 2004, I had become skeptical about the feasibility of my original plan of paid advertisements.

Another way of proving an issue is important is to hold a demonstration that attracts a really large number of participants. Petitions signed by many people also show this, but they never have the same credibility and impact as a mass of people taking to the streets. I saw some calls in Internet discussion forums for people to write letters to targeted newspapers and magazines, but I don't know of a single case in which that was productive.

In the specific case of software patents, I think a demonstration with 20,000 or more participants would have an effect. Politicians would see that the issue concerns many voters, and journalists would be more willing to report. Previous demonstrations against software patents have, however, not even attracted 5 percent of that. Organizing a large-scale demonstration also requires funding. Someone has to pay for busing in protesters from other cities. I wouldn't rule out that possibility for the future, but in July of 2004, it was out of reach.

That left us with only one possibility: a shocker.

Last Resort: Shock Treatment

There had to be a real-world event that would illustrate the serious consequences of software patents in a dramatic way. As long as we were only talking about a theoretical fear, people could discount it as unfounded paranoia, and we wouldn't make much headway. We needed a practical problem. Something easy to understand, like a scandal.

Microsoft wasn't going to do us the favor of using its patents to sue open-source users across Europe. Not then. Not until long after the final decision on that EU software patent directive.

If the media hadn't reported much on what had happened so far with respect to software patents, then we had to make something happen that they would report on.

We had to provoke a real crisis. Right away.

In retrospect, that train of thought seems obvious, as if it was in the air and one could just smell it. But this wasn't a strategy that someone designed on a drawing board. It had much more to do with the right combination of people ganging up,

and it took a whole series of fortunate circumstances as well as the intuition and determination to capitalize on them.

One Friday Afternoon at G34

Jens Mühlhaus, a Green alderman in Munich, invited companies and individuals from the open-source community to join him and some people from the city in attending the kick-off meeting of an initiative called the LiMux Project. The idea was to bring the administration's IT department together with those who might be able to contribute to Munich's Linux migration project. The political decision to switch from Microsoft's products to open-source solutions had already been made (Microsoft CEO Steve Ballmer had interrupted his skiing vacation in vain). Now the city administration had to make the ambitious plan work.

Originally, the kick-off was scheduled for late May, but apparently Jens had moved too fast and then had to postpone it. First, he had to ensure that the city administration was fully involved. An alderman, especially one from the majority coalition, is in a very good position to talk to the administration, but he's not formally the boss of the public servants. The meeting eventually took place on Friday, July 23, 2004, at a cultural center ("Kulturzentrum") named "g34" after its address, Goethestrasse 34. It was scheduled to begin at 3 pm and end around 6 pm.

The day before the meeting, it occurred to me that this could also be of interest to some of the FFII activists in the area, and I forwarded the open invitation to the FFII's "muenchen-parl" mailing list. Jan Wildeboer was initially uncertain whether he could make it on such short notice, but he mentioned that he'd recently been in contact with an IT consultant named Michael Fritsch, who knew the alderman very well and understood the issue of software patents.

I hadn't been to g34 before. It's in the part of Goethestrasse that is close to the central railroad station. For a long time, that was the place to find pawn shops, cheap brothels, and drug traffickers (these are not as visible in Munich as in other cities, but everyone knew they were there). Nowadays, that area has a predominantly Turkish population. Every second shop sells vegetables and fruit – certainly an improvement over the old days. I'm not prejudiced against Turks. In fact, I played soccer in Munich with many Turkish friends. But outside of an event like the LiMux meeting, I wouldn't have a reason to go to that part of town, since I'm not part of that community.

Although Munich is the capital of the conservative state of Bavaria, the city itself has for a long time had a social democratic mayor, whose party forms a majority coalition with the Greens in the city council. Under left-wing municipal administrations, joints like g34 tend to spring up like mushrooms. They are created as meeting places for young people, and those who go there tend to have a multicultural ideology. Most of the performances there are related to third-world and minority issues. Again, I'm not opposed to any of that, but I normally wouldn't go there. I'm glad I did on this occasion.

Diverse Group and Some Acquaintances

I was one of the first to arrive. At the registration desk, I recognized Jens Mühlhaus from a picture on his Web page. He was wearing blue jeans and a T-shirt. Wouldn't an alderman be dressed more formally? Not when he's a Green. Not at an open source gathering.

As I introduced myself to him, I mentioned my previous contacts with other Greens on this subject. Laurence van de Walle of the Greens/EFA group in the European Parliament had told me she knew Jens, and name-dropping does help. Jens concurred that it might make sense to talk about software patents after the official part of the event had concluded.

The room began to fill up quickly. Most of the people there were self-employed IT consultants or from small companies, and most were interested in the possibility of being signed to a contract by the city administration. It was obvious to everyone that the LiMux project was going to be very labor-intensive – an opportunity for service providers. It was known that the city administration favored using the services of small businesses from the area within the framework of its procurement regulations.

When Jens opened the meeting, there were roughly 60 to 70 people in the room. Some were businessmen, others looked more like geeks. About half of us weren't even sitting at a table, just on moderately comfortable chairs that were brought in. Everything was makeshift, and it's typical that Jens personally had to do some wiring for the loudspeaker system or overhead projector.

I spotted several familiar faces. Jan Wildeboer made it in time. Holger Blasum, the FFII's Munich-based treasurer, arrived a little later. Holger, a student of mathematics, has over the years done enormous work for the FFII. He always had a tendency to downplay the importance of his efforts, but without his dedication a

number of FFII activities wouldn't have happened, or if they had they wouldn't have been as successful.

The first part of the meeting was made up of a few presentations, and followed by question-and-answer sessions. The third or fourth speaker was Wilhelm Hoegner, the head of the data processing office of the city administration of Munich. If the city administration were a company, he would be the chief information officer.

Hoegner's Outlook

Munich's robust economy and high standard of living have attracted people from all over Germany to the city during the last few decades. Still, there are families who have been there for generations. That core population has a unique style all its own, not just the regional Bavarian style, but specific to Munich's traditional inhabitants. It's something in the way they look and talk. I can't describe it, but I can recognize it.

Wilhelm Hoegner was wearing a business suit, obviously not the leather trousers Oktoberfest has associated with Munich, and yet he's one of those people I'd quickly identify as being from Munich even if I saw them on a flight from Los Angeles to Honolulu.

Hoegner is the offspring of a political family. His grandfather (who had the same first name) was the only post-war prime minister of Bavaria who wasn't from the conservative Christian Social Union. He lived in exile in Switzerland during the Third Reich. After the war, the American military government appointed him prime minister and entrusted him with the task of devising a new, democratic constitution for the state of Bavaria. He had seats in a couple of post-war cabinets, and from 1954 to 1957 he led a four-party coalition.

In the introductions that kicked off the meeting, a disproportionate number of participants announced they were affiliated with the Greens, and Hoegner proudly stressed his membership in the social democratic party. He didn't mention his political heritage, and I doubt that more than a handful of people in the room even knew about it.

The next generation also seems to keep up the social democratic tradition. Only a few weeks before that LiMux meeting, Holger and I had communicated with Ludwig Hoegner, Wilhelm Hoegner's son. The young Hoegner is a leader of the youth organization of the Social Democratic Party, and succeeded in getting the

Munich chapter of the party to pass a resolution opposing the EU Council's proposed software patent directive.

After Hoegner's presentation on LiMux, someone asked him about software patents and how they would relate to that project. The question was critical: "If Europe legalizes software patents, do you still think your plan to switch from Microsoft's products to open-source solutions is going to work out?"

Hoegner's uneasiness over software patents was visible even before the questioner finished speaking. First, Hoegner pointed out that he didn't have a profound understanding of the legal issue itself. Then he confirmed that it would be "indispensable" to analyze the possible effect of the proposed EU software patent directive on open source, and he said that any related "mistake" would be "a catastrophe for Munich's Linux migration project, and for open source in general".

The After-Party

From a software patent perspective, the most interesting part came after the official meeting. Most people were leaving, and a few small, private groups formed in the area outside the meeting room.

Jan introduced Michael and me. Michael said that until recently he had not been very aware of the EU software patent directive and the problems it might cause his profession. He told us he was a member of the Green party and its Munich chapter, and that he was also active in "Green City", an environmentalist organization in which Jens played a key role.

In particular, Green City wanted to impose tolls on the roads leading into downtown Munich, similar to the Congestion Charge London introduced in 2003 to reduce traffic in the city's central zone. Just mentioning that almost derailed the debate onto a completely different topic. Fortunately, we managed to refocus on software patents.

When I pointed out that the Greens were part of the German coalition government that supported the EU Council's proposed directive, Michael vigorously defended his party: "With the greatest respect, you can't expect the Greens to break up the coalition over such a special issue as software patents?" That's not what I had implied, so we moved on to discussing what would have to be done. I absolutely concurred with Michael when he suggested creating a direct

connection between the LiMux project, which had already received a huge amount of media attention, and software patents.

The city of Munich's decision to switch to Linux had even made it onto German television news. Michael said that we'd have to aim for a comparable level of media coverage. He was absolutely right.

Michael convinced me so quickly because I had previously attempted to make contact with a key city administrator, through a mutual acquaintance at a leading law firm. Unfortunately, that never went anywhere. Perhaps I hadn't pursued that path as aggressively as I should have. I had just thought that it would be nice to get some kind of a statement from the administration on software patents. Michael's plan was a lot more aggressive and specific than anything I had thought of up to that point.

Michael suggested that the Greens in the city council should formally pose a written question or two to the mayor about software patents and their potential impact on LiMux, thereby forcing an official statement. He would draft the necessary document if Jens would support this course of action.

While we were standing there, Jens joined us, and it seemed as though they had discussed this idea before. Jens told us that he couldn't make that decision by himself, but that he'd be more than willing to propose it to the Green group. He seemed reasonably confident that his colleagues would support the idea of raising this issue, and that it could be done in a way that wouldn't call into question the Greens' commitment to the LiMux project. I couldn't figure out, however, whether he really believed we could draw a lot of media attention. Maybe he was just too polite to tell us that we were dreamers, or maybe he had no firm opinion.

Homework Assignment

Michael insisted we make a list of existing European patents that could, at least potentially, be enforced against the city of Munich for using Linux. He wanted to lay the emphasis on tens of thousands of *existing* European software patents that the directive in question would legalize. If the directive provided a strong legal basis for those patents, the patent holders might decide to instigate a flood of lawsuits in order to derive economic value from their rights.

In the strictest sense, the proposed directive laid down the criteria for patentability, and a very narrow interpretation would thus consider the legislation to affect only the *future* issuance of *new* patents. The word "retroactive" didn't

expressly appear anywhere in the proposed text. However, the directive was meant to establish uniform criteria throughout the European Union for interpreting that old Article 52 of the EPC, which excludes software "as such" from patentability. Courts would then apply the new set of criteria to *all* patent cases, regardless of the date of grant.

The European Commission's initial proposal basically said that the goal was to legalize existing software patents whose validity was hanging in the balance. The Commission described it as a tragedy that "patentees and the public at large who may be users of patentable matter currently lack certainty as to whether in the event of litigation patents which have been granted in this field will be upheld". While the Commission was right about the lack of certainty, it's still better to have uncertainty that discourages patent holders from legal disputes than certainty that provides them with a legal foundation for a thieving spree of major proportions.

For our purpose of shaking people up, it definitely made sense to demonstrate the threat from already issued patents, tens of thousands of which would be legalized overnight. That made the threat an immediate one. If the issue had only been future patents, the danger would have been distant, since the directive would first have to take effect and then it would take the patent examiners years to grant the first patents.

Holger and Jan promised Michael that they would, within a matter of days, put together a list of European software patents that at first glance could affect Linux users and the Linux-based software the city administration planned to install. However, at that point the city had not yet made a final decision about the exact software configuration. There are different flavors of Linux and many thousands of Linux-based programs.

We all agreed that the best software configuration against which to perform the patent check was the "test client", that is, the combination of Linux and Linux-based applications the city administration used to establish that migrating to open-source software was feasible. That was only a preliminary configuration, but it was highly likely that it would be very close to the final selection, and even if a few components were different, they'd be similar enough that they would have to "infringe" upon the same list of patents.

Division of Labor

Because this whole game plan developed so quickly, we hadn't done any research before that LiMux meeting. We didn't know how difficult it might be to find out what the "test client" was, but we saw Hoegner walking out, and politely stopped him to talk.

Since he had been so outspoken about his views, we confided pretty openly what we had in mind, and he perfectly understood that we didn't intend to harm the LiMux project itself. We only wanted to show politicians how such a much-acclaimed initiative could be endangered by a looming, really bad piece of legislation.

Hoegner said the set of programs that made up the "test client" was no secret. He gave Holger and Jan some information on the spot, and handed around his business cards so we could contact him if we needed. I guess even Hoegner didn't foresee at that juncture how much noise we were going to make.

After thanking Hoegner, all except Jan went to another table. Jan couldn't help giving Hoegner an extensive explanation of the whole situation concerning software patents. Michael and I were worried that Hoegner might view further discussion at this point as an imposition. It was well past 6 PM on a Friday, and it was very unusual for a public servant to still be at work. Also, I figured that a number of IT consultants and companies that wanted to build a relationship might already have "pitched" him their services. However, the fact that Hoegner didn't mind having a further conversation with Jan shows that this LiMux project was really his baby, not just his job.

Shortly after Hoegner went, I decided to leave as well. We had a plan. Jens, Michael, Jan and a few other participants in the LiMux project had a few beers in a bar nearby, and talked about software patents in more detail.

Over the weekend, Michael drafted two written questions for the Greens to send to the mayor. I sent Jens and Michael a few paragraphs I thought they could use as a basis for a brief description of the software patent issue. It's nothing unusual for outsiders to be sent draft documents for review or to be able to make contributions to them. While it's problematic that the Commission's proposed directive was written or at least edited by the Business Software Alliance, it's routine for political parties to receive input from those who are closely involved with a subject.

Throughout this political process, I was sent really sensitive documents, and passages I had written appeared in fairly official documents or were quoted in critical situations inside parties. I can't go into those delicate details in this book, but my involvement with the Munich Greens was no secret anyway: I offered to handle the publicity for this effort, and they accepted.

Spokesman for the Greens

It simply made practical sense for me to be the primary point of contact for the press on this Green initiative.

The Green group in the city council of Munich has many matters to deal with, and they're all in areas that are completely different from patent policy. Their regular press contacts would have received many calls from journalists, and it wouldn't have been possible to provide them with answers to all of the question that the press would ask. What's the current legal status of software patents in Europe? What's the road map for the process on the EU directive? Aren't computer programmers left without protection for their creations if they can't take out patents? How can one obtain a patent on a computer-controlled car brake if software is excluded from patentability? What's wrong with articles 2, 3 and 4 of the proposed EU directive?

Time was of the essence because written questions from a group in the city council to the mayor are published every day around noon in the city's daily press bulletin. Even if only one reporter spots the item, the news spreads like wildfire among the journalists who report on such topics. In order to make our press release the primary source of information, it had to go out before the official bulletin.

That week was the last week of the Bavarian school year, and thereafter many local people would be away on vacation. Jens said that the Green group in the city council was small enough that he could quickly get our plan approved in a conference call, but if it didn't happen that week, it might have to wait until after the vacation season.

Another logistical question was how to distribute the press release. Since media all over the world had reported Munich's decision to migrate to open-source software, I looked at this as an international PR opportunity. Therefore, I wanted to distribute the press release in both English and German, and I paid to use a fulfillment service that delivers press releases to journalists. Ingrid Vos, who had

been successfully handling publicity for MySQL AB through her boutique PR firm, Marketing Communications, helped me via her customer account with such a news wire. Like me, Ingrid believed the time had come for software patents to receive significant media coverage.

The Bomb Didn't Go Off Properly

This is the text of the press release that went out on Friday, July 30, 2004, around 10 AM:

> EU Software Patents Jeopardize Munich's Linux Migration
>
> Munich, 07/30/2004 -- When the city administration of Munich decided to migrate its IT infrastructure to the Linux operating system, it made headline news around the world. That project is now being threatened by a proposed European Union directive on software patents. The directive is pushed for by the governments of Germany, the UK, France, and other countries on the EU Council.
>
> Software patents are considered the greatest danger to the usage and development of Linux and other Free Software. A cursory search by FFII revealed that the Linux "base client", which the city of Munich plans to install on the desktop computers of approximately 14,000 employees, is in conflict with more than 50 European software patents.
>
> Today Jens Muehlhaus, an alderman from the Green Party, filed two motions in which he calls on the mayor of Munich, the Social Democrat Christian Ude, to contact the federal government of Germany on this matter and to analyze how the EU software patent directive affects Munich's Linux project. The politician, a supporter of open source, warns that patent infringement assertions could take entire departments of the city administration out of operation. He attached the preliminary result of FFII's patent search to his motions. Mr. Muehlhaus expresses concern over the future ability of open source software to meet the needs of the city administration if software patents massively hinder its development. Related caveats have been voiced by the SME association CEA-PME and by Deutsche Bank Research.

> A week earlier, the chief information officer of Munich, Wilhelm Hoegner, said it is "indispensable" to check on the consequences of the software patent directive to open-source software. Any such oversight would be a "catastrophe for Munich's Linux migration project, and for open source in general".
>
> Florian Mueller, an active participant in the software patent debate, sees the EU Council on the wrong track: "Open source is a historic opportunity for Europe to save costs and create jobs. Schroeder, Blair and Chirac should demonstrate leadership and stop their civil servants from sacrificing the open-source opportunity to the insatiable patent bureaucracy, lest some large corporations will shut down open source and many SMEs." Mr. Mueller is a software entrepreneur, and an adviser to Europe's largest open-source software company MySQL.

I hadn't asked Hoegner whether I could quote the statement he made at the LiMux meeting. It was a well-attended event. Moreover, when Hoegner made the statement, he knew from the initial round of introductions that at least one journalist was present.

The big disappointment was that I didn't get much of a response from journalists. A few articles appeared on English-language Web sites, and about a dozen in Germany. For the first time in this context, I was interviewed by an American journalist. However, all the interest was limited to the IT-focused press, which is not the way to you reach a broader audience and potentially influence politics. I had hoped this announcement would have a meteoric impact, and the response was closer to a firecracker than a meteor.

It seemed that a theoretical threat to the LiMux project, contained in questions posed to the mayor by a small party, just wasn't a big deal.

Step By Step

I had already suffered other frustrations when trying to generate publicity for the software patent issue. My big hope was that after the vacation season ended, the mayor would give us a reply that we could use to generate more publicity. But things took a positive turn much more quickly and decisively than I expected.

At first there were little steps. Over the weekend, the story of the Green questions made it into some more media reports, and was posted on *Slashdot.org*, a large Internet discussion forum for the IT sector. That led to my being contacted by an independent British film producer, Gavin Hill. He wanted to produce a short documentary on the subject of software patents. Gavin visited Munich the following month, when he interviewed Hartmut (the FFII president) and me in front of the European Patent Office. Later, he started working for the UK chapter of the FFII as a full-time coordinator.

On August 2, the Monday after I issued the press release, the American media started to report on a study by the notable American patent attorney Dan Ravicher. On behalf of an insurance company, he identified 283 US patents that the Linux kernel might infringe.

Since American patents aren't valid in Europe, we couldn't use that study to buttress the concerns raised by the Greens. However, that story did draw some attention, and it's an amusing coincidence that on a Friday the FFII would list 50 European patents of concern to Linux users and the very next Monday another entity would do something similar in the United States. There is no way that the two organizations could have known of each other's effort before the results were published.

I got more requests for interviews from American IT journalists that Monday, and Dan Ravicher's Linux patent study may have been part of why.

The Bigger Bomb

The big breakthrough came like lightning out of the blue on Tuesday, August 3, 2004.

Earlier that day, I traveled to Karlsruhe in the southwest of Germany. It's about a three-hour train ride, and I had an afternoon meeting with Achim Weiß, the chief technology officer of 1&1, Europe's (if not the world's) largest Web hosting company. The meeting was critical because 1&1 was the largest of the companies that were considering supporting my NoSoftwarePatents campaign. Had the conversation gone badly, I might have had to give up my campaign plans, but fortunately the discussion was very productive.

During the last part of the return trip, I received a few phone calls from Jan Wildeboer. There are extensive areas of poor cell phone coverage between Munich and Karlsruhe. so I could barely understand what he said. But I realized

something very important was happening. I told Jan I'd have to call him back upon my return.

At nearly 10:30 PM, I got home to find an email that Jan had forwarded from a LiMux project mailing list. Here's a translation:

> Subject: [LiMux] Motion/question of Greens in city council concerning patent law
> Date: Tue, 3 Aug 2004 19:26:42 UT
> From: Wilhelm Hoegner
> To: talk@limux.dhcp42.de
>
> Hello, dear participants in this project,
>
> You have certainly read in the specialized Internet media that the Greens of Munich have introduced a motion and a question in the city council with respect to software patents.
>
> Due to the questions that have to be checked into, the bidding process for the LiMux base client, which had originally been slated for late July, has been stopped. The [city] administration will first try to estimate the legal and financial risks involved before this can continue.
>
> Rgds,
>
> Wilhelm Hoegner

Bang! That was an explosive email, and I called Jan even though it was almost too late at night to call a family man. Since I was very tired, after the trip to Karlsruhe and back, I wasn't able to talk for long, let alone to make any particular decision. I told Jan I'd have to sleep on it. I also said that the email would have repercussions one way or the other, and the question was what our best course of action would be.

Taking the Bull by the Horns

After a good night's sleep, I felt that there was no alternative to taking swift action.

The LiMux project mailing list, on which Hoegner published the decision, was not widely known, but anyone who knew of its existence could subscribe to it. I

had tried it myself the previous evening. "Three people can keep a secret if two of them are dead", says the proverb (sometimes attributed to Benjamin Franklin or Mark Twain). In this case, dozens of people, all of them alive and well, had received the information. The journalist who participated in the LiMux meeting might have subscribed to the list, or someone on the list might tell a journalist, or someone who knows a journalist. This situation was bound to get out of hand. Maybe it already had.

I also had a gut feeling that Hoegner had leaked that information on purpose. By a few weeks later, I had begun to doubt this assumption, but when I decided to distribute this information to the media, I considered it a forward pass. As I said before, Hoegner seemed to me a typical *Muenchner* (inhabitant of Munich). Many of them are subtly crafty, and they are cunning even if they don't seem it.

At the LiMux meeting, Hoegner was the embodiment of correctness. He wore a suit and tie, yet referred to Jens, in blue jeans and a T-shirt and young enough to be Hoegner's son, as "Mr. City Councillor Muehlhaus". I would have bet money that he never misappropriated as much as a paper clip. However, he had this whole software patent problem figured out pretty well.

After the moderate outcome of all effort I had put into the initial announcement, I didn't want to leave to chance what would become of this silver bullet. In public relations, you usually get only a single shot. You hit or you miss, or worse, you hit the wrong target. Unlike in a computer game, you can't just retry. If the media have reported once on a subject, they only report again if there are further developments.

Three things could have gone wrong with this story: the message could have been too weak; the positioning could have differed from what's politically beneficial to our cause; or it could have landed in irrelevant media. If, say, someone who got Hoegner's email knew someone at a small publication and the story appeared there first, the more important publications would have had to choose between quoting a smaller competitor or remaining silent. Journalists are also discouraged from reporting a story if they become aware of it a day late. One must get maximum mileage out of the first day. For all those reasons, initial forcefulness can make all the difference to the total impact of such PR.

In order to avoid missing out on this splendid opportunity, I decided to write, and widely distribute, a press release that I thought would maximize our chances of gaining widespread attention for the message we wanted to send.

The first and most important decision was to choose the most aggressive justifiable headline. Hoegner's email used the word "stopped", but didn't apply it definitively to the entire LiMux project. He wrote of risks that had to be assessed, and thereby implied that the risk might be deemed too high, in which case the project wouldn't be able to continue. I concluded that these were sufficient grounds for saying that the project was "put on ice", which doesn't exclude the possibility that it would continue later. Ice can melt.

Here's an English translation of the press release that I sent out via a German-language news wire service at 8:32 AM on the morning of August 4, 2004:

> EU software patents: Munich puts Linux project on ice for now, EU-level politics of federal government share responsibility
>
> Munich - The city of Munich has put the noted Linux migration project of its administration on ice. Responsibility in this is shared by the German federal government, which supports the controversial patentability of software at the level of the EU and thereby acts against open-source software as well as small and medium-sized businesses.
>
> Yesterday evening, the chief information officer of the city of Munich, Wihelm Hoegner, announced on a mailing list that the bidding process for the "LiMux Base Client", which had originally been slated for late July, cannot commence for the time being. After an advisory from the Greens, the city administration firstly has to analyze the legal and financial risk.
>
> Software patents are considered to be the greatest threat to the adoption and further development of Linux and other Free Software. According to a first analysis, the "Base client", based on which the city of Munich conducted a feasibility study and which would be installed in this form or a similar one on the computers of 14,000 employees, is in conflict with 50 European software patents. Any single one of those patents could take the entire city administration out of operation.
>
> Software is already protected by copyright law, but large corporations additionally demand patents in order to drive

smaller vendors and open-source projects out of the market. Warnings against software patents have been given by Deutsche Bank Research, the governmental Commission on Monopolies, the Kiel Institute for World Economics, and the Federal Association of Medium-Sized Enterprises. Software patents do not only endanger open-source software, but especially small and medium-sized companies. As software patents make the market less competitive, they result in less innovation, but increase costs to public administrations, companies, and private households.

A clear strategic decision is what Florian Mueller, an active participant in the software patent debate, demands: "The decision by the city of Munich should set off the alarm in the federal government. The Federal Ministry of the Interior recommends to all public administrations that they migrate to Linux, and the Federal Ministry of Justice turns that into a wrong choice that can cost billions of euros."

Mueller is a software developer and entrepreneur. He is an adviser to Europe's largest open-source software company MySQL AB. In his opinion, open-source software constitutes "a historic opportunity for cost-savings and growth, especially in Germany, and that chance must not be sacrificed to a 'comrade-of-the-CEOs' policy."

The term "comrade of the CEOs" relates to a nickname given to German Chancellor Schröder reflecting his inclination to pander to big industry and to maintain unusually close relationships, particularly for a social democrat, with senior executives of large corporations.

The Day of the Ringing Phone

Since Ingrid was on vacation, I had to sign up with a news wire service myself. I started writing my press release around 6:30 AM, and at 8:32 AM, the text was distributed. I then sent it to Hartmut and Jan, and in the accompanying email voiced my hope that this decision by the city administration would draw more attention. It did, quickly and overwhelmingly.

Only 25 minutes later, the first report appeared on a large Web site. I received various phone calls and emails. In the late morning, a reporter from Deutsche

Presse-Agentur, the largest German news agency, called me. That was a major breakthrough: news agencies are much less likely than individual publications to pick up a story, but if they do, they generate coverage in numerous media, including high-profile publications that are hard to reach otherwise. The reporter asked me to send him Hoegner's email, and quickly hung up because he needed to talk to the city administration.

What I did like about his story, despite everything else was the headline: It used the term "put on ice" just like my press release. Almost every other article did, too. This shows how important it was to think really hard about the headline. That one heavily influenced the perspective that everyone took.

I wish the reporter had accepted my offer to help him understand the issue. His article got several facts wrong because he quite obviously wasn't very well informed about the software patent issue. Other journalists also called the city administration (where the phones reportedly didn't stop ringing), yet were able to spend some time with me.

In mid-afternoon, Christian Ude, the mayor of Munich, made his official statement. His reaction was the big question mark. To him, the Linux migration was really a prestige project. Except for the annual Oktoberfest opening ceremony, no other decision made by his administration had ever drawn so much attention from around the globe. The story of his meeting with Microsoft CEO Ballmer had become a running gag worldwide in the IT industry.

Ude could have decided to downplay the software patent issue completely in order to defend having chosen Linux. Fortunately, he walked a fine line and decried the software patent directive, yet made it clear that the city administration would stand by its strategic decision in favor of Linux despite the patent concerns, and continue the project after an assessment of the risk.

In his statement's final paragraph, Ude called on all European municipalities with an interest in open source to use their influence over the EU and over national governments to push to block the present proposal. He stressed that his position was "consistent with a decision by the European Parliament, a decision that would once again be changed to the reverse by small European working groups that act in the interest of large corporations".

The timing of his announcement was also helpful. It was early enough in the day to sound the all-clear for the Linux project itself, yet late enough to give the put-on-ice message time to propagate while it was the only information available.

With everything that was going on that day, I never managed to issue an English-language press release. The English translation in this book was created more than a year after the event. At about the time of Ude's statement, I started receiving telephone calls from British and American journalists. Those English-speaking journalists had a reading knowledge of German and found the story on German Web sites, or in a news agency report. The Associated Press had translated a report from its German subsidiary. When journalists saw it and went into the archives of the news agencies and news wire services, they found my English-language press release on the Green motion, and therefore also my contact information.

At that juncture, the news had already spread so widely that it was pointless to issue my own press release in English.

Can't Please Everyone

In the following days and weeks, it became clearer than ever that the LiMux incident had put the software patent topic on the map. The German newsweekly *Der Spiegel* commented that the EU Council was "rushing to the aid" of Microsoft. A Reuters correspondent called me as her agency had reported on some software patent litigation in the United States only days earlier. Now the media began doing some research, and the topic stayed on the radar screen from there on out.

In mid-August, the mayor of Munich held a special press conference on software patents, and presented a position paper. In it, he demanded that the EU Council renegotiate its proposal. A Munich radio station even mentioned that in the news. It was a whole new feeling. For months, I had been thinking that the FFII and I were about the only ones to make that particular demand, and now it even made it into the general radio news. What a change!

However, whenever you do anything meaningful in politics, no matter what it is, you always infuriate some people. The first critical comments came out only hours after the press started reporting on the LiMux crisis. While I had expected that the proponents of software patents would continue to deny there was a problem, the open-source community also made comments that downplayed the threat posed to open-source software by patents.

A few days later, I was made aware of a mailing list discussion in which some high-profile individuals from the European free and open-source software

community condemned my strategy. They said I had caused serious damage to open source and to the companies whose businesses are based on or relate to open source. They implied that I had endangered a major reference installation of Linux, and had raised concerns among customers that using open-source software was a risky choice. I was accused of sensationalism, and of acting irresponsibly. Some even insinuated that I did it on Microsoft's behalf, as it was known that my own computer game project is based on Microsoft's .NET platform.

The only person to side with me in the discussion was Hartmut Pilch, the president of the FFII. I unwaveringly defended my strategy in emails and telephone conversations. I knew that those accusations were an unpleasantness that I just had to go through. Internal opposition is inevitable.

One strategic question in the debate was whether software patents should be positioned as a particular problem for open source. My position was that open source is indeed more endangered than other software, and while my press release highlighted the negative implications of software patents to small and medium-sized companies, it was obviously impossible to describe temporarily freezing a Linux project as a Windows issue.

Some open-source activists wanted to have their cake and eat it, too. They wanted to avoid any impression that there was a threat to open source because it might hurt its near-term prospects, yet they expected politicians to protect open source from the threat of software patents. I told them that the pro-patent forces made it sound to politicians as though they would go out of business unless they got an EU software patent directive they liked. Our opponents didn't really care what financial analysts, investors, partners and employees might think. If we didn't speak out clearly on the various threats posed by software patents, we would be limiting ourselves.

I understood the concerns that others had, but to me it was obvious that open source would suffer more from the legalization of software patents than from the LiMux fallout. It seemed better to draw attention to the issue while it could still be fixed than to remain silent and face the consequences later.

The strongest point I could make in my defense was that none of the other approaches had generated anything like a comparable level of press coverage in 30 months of trying (counting from the first presentation of the EU Commission's proposed directive until the LiMux stunt). The political situation was grave. We couldn't afford to be too selective.

In that discussion with key open-source players I didn't take Hartmut's support for granted. Few in his position would have acted as he did, especially considering that he had not even been informed of the LiMux initiative before the first press release went out. I must accept partial responsibility for that because I had asked Holger and Jan to not tell anyone what we were up to. Maybe Holger should have told Hartmut anyway. He lived in the same building where Hartmut had his office. Really, I should have either talked to Hartmut myself or should have double-checked whether Holger had done so.

It's probably a bit bewildering for a president to see an official announcement that involves his organization, and that has apparently taken several days of preparation without his being informed. However, Hartmut proved a lot of people wrong. Behind his back, some people had been bad-mouthing him, alleging that his style was authoritarian, and that his primary motivation was to have power and be center stage. One person said: "For once in his life, he's in control of something, and before he founded the FFII, he never received so many emails."

I would venture to guess that everyone who runs a political campaign is accused of being a control freak and neurotic about his image. It has happened to me, and even as I'm writing this book, I know that some will accuse me of self-adulation. The moment you let those fears get in the way of taking action, you've probably lost. You can't be an opinion leader without special status and some level of notoriety.

Human beings have an innate longing for recognition. However, there are some for whom it's only a by-product of political involvement, while to others it's the primary objective. I haven't seen a single situation in which Hartmut put his personal status above the cause. There are stories that he was derided when he walked from booth to booth at trade shows and distributed self-printed leaflets that explained the threat from unfavorable software patent legislation. Over time, ridicule turned into respect for a visionary.

People tend to misunderstand Hartmut if they think in stereotypes and speak in clichés. He has his own style and character that don't match the usual pattern for a political activist. At times his different way of looking at things nearly drove me to despair, but most of the time we arrived at the same strategic conclusions, albeit via different paths.

Some of Hartmut's political opponents have made nasty accusations against him, and maybe that's the sincerest form of flattery. People tried to call his credibility into question because they couldn't beat his arguments. For instance, a patent attorney who participated in the software patent debate called him a "linguist-turned-lobbyist".

It's true that Hartmut is a professional simultaneous interpreter for three Chinese dialects and Japanese, usually between those Asian languages and either English or German. At an FFII conference in the European Parliament, he once helped out simultaneously translating French into English, and vice versa. He speaks a total of about ten languages. However, his amazing talent in that area doesn't prove he lacks competence in any other. A high-ranking judge told me privately: "Mr. Pilch has it [the topic of patent legislation] all figured out."

Hartmut first learned about patent law when he translated patent applications and interpreted for patent office meetings. At some point, he also developed a linguistic computer program, and that was when he realized that some European patents had already been granted in that field even though the law expressly forbids it. Hartmut recognized this issue a number of years before I and many others did. I never claimed to have as deep an understanding of the topic. There were other things I brought to the table, such as the ability to seize an opportunity like LiMux to advance our common cause.

The Lasting Effect of LiMux

In a way, the LiMux excitement turned out to be a tempest in a teapot because the city of Munich wound up forging ahead with the project, but it was a publicity breakthrough with lasting effects on the software patent debate.

In order to fulfill the duty of properly responding to the Green questions, the city administration hired a patent attorney to write a study for them, which basically said that there may be a risk of software patent litigation, but they wouldn't eliminate that risk by choosing other software. I don't believe the study properly described the strategic relevance of patents to the future proliferation and development of open source. However, I had no intention of criticizing the decision to carry on with LiMux.

I was actually glad that the open-source movement got both a continuation of that reference project and an increased awareness of the issue of software patents. The breakthrough that the LiMux stunt had been would become obvious to me on

several occasions in the following months. I've picked three to talk about before continuing chronologically.

About a month after the LiMux crisis, I started lobbying members of the Bundestag, the German parliament. To every one of those meetings, I brought photocopies of the *Der Spiegel* article on software patents (the one that talked about the EU Council rushing to the aid of Microsoft and jeopardizing open source). It was really interesting to watch how politicians reacted when I pulled out that article during those lobbying talks.

Basically every politician in Germany reads *Der Spiegel*, but that article had appeared at the peak of the vacation season, and some people may have simply flipped pages as they weren't too interested in software patents at the time. However, when I handed them a copy of the article, most immediately started reading parts of it. Some couldn't take their eyes off it for several minutes, although they usually are too polite not to maintain eye contact during a conversation.

Later that month, toward the end of September of 2004, I shared a flight from Munich to Brussels with Leopold Stiefel, the chief executive officer of the MediaMarkt electronics retail group. We were sitting in the same row in business class, and while we didn't talk across the aisle during the flight, we recognized each other again in the long line at the taxi stand. So we had a chance to talk, and he told me he was going to visit a new store they had just opened in Brussels, and that soon they'd open their 500th outlet. Of the three MediaMarkt founders, he was the last to be still involved in management.

MediaMarkt is a highly profitable company that knows its business. However, even competent retailers don't really have to know the details of their products, especially not at CEO level in such a large company. When I told Stiefel why I was visiting Brussels, he first confused the issue of software patents with the money collecting societies charge in Germany and some other European countries for IT products such as blank CDs that can be used for recording and playing media content. I started to explain to him what a patent basically is, and after about two sentences, it dawned on him: "Isn't that the problem that caused the city of Munich to put an important project on hold?"

Another three to four weeks later, the German ministry of justice and the German patent office hosted a public panel discussion in Munich. In his opening speech, Professor Hansjörg Geiger, the state secretary who had cast the infamous German

vote in favor of the EU Council's May 18 proposal, started by referring to the LiMux story. A state secretary is just below the level of a minister. They had also invited Hoegner and at some point asked him to make a statement, and Hoegner seized that opportunity to reiterate his concern over the long-term implications of software patents for the development of open-source software.

Home Game

Tabloid Style

Encouraged by the success of the LiMux PR stunt and a good meeting with 1&1, I started writing up the pages for the planned *NoSoftwarePatents.com* campaign site even before having reached an agreement with corporate sponsors. I didn't know exactly what I would do with the pages if I didn't get the support from companies I was hoping for, but I felt I could always find some solution later if I had to.

The FFII already had a Web site with literally hundreds of thousands of pages, but it was more a knowledge base for the insider than an introductory site for the masses: perfect for the initiate, not for initiating novices. In the aftermath of the LiMux announcement, I told Hartmut after a joint meeting with a radio reporter: "We must mobilize more people. We need populism, polemics, and simple slogans."

In fact, the PR meeting we had just concluded was a good example of how we complemented each other's efforts. Hartmut was the authoritative source on patent legislation and on the evolution of case law, while I gave the reporter comments that were easier to understand by simplifying the story and using analogies.

Hartmut initially tried to convince me to run my campaign under the FFII umbrella. He wanted to avoid creating any impression that there was a rift in our camp. However, I was old enough (34) to know my strengths and weaknesses. Over the 19 years that I had spent in the industry by then, there was no doubt that I the more independence I enjoyed, the more effective I was. I can work with others temporarily on a team, or case by case, but I don't like to integrate myself into a larger group for the long haul.

I wrote the pages in a simple layout so I could upload them to an unpublished location on the Internet and show them to a very few people as a test. After I had the start page ready, I asked some people who were less familiar with the software patent topic to look at it, as I wanted to know whether they found it comprehensible. The response was generally positive, and Marc Weigand, himself a programmer and former user of an online gaming service that I had co-founded, spontaneously said: "Wow, is that going to appear in *Bild*?"

Bild has by far and away the highest circulation of all German newspapers, and one of the three or four largest in the world. It's a sensationalist tabloid, famous for its linguistic approach: short sentences. Very short indeed. Not grammatically complete. Just like this. Well, some sentences may be more like this. But not much more.

Comparing someone's writing style to that of *Bild* is usually an insult, but when Marc said that, he gave me all the reaffirmation I could have hoped for. I wanted to take the topic of software patents as close to the *Bild* level as possible. I intended to address people at the lowest common denominator, which is still not low in absolute terms when a topic is as specialized and abstract as software patents. That way, you maximize the size of the audience. Think of a pyramid: it's broadest at the bottom.

In many articles, *Bild* styles the first few words of each paragraph in bold face. That was something else I copied, except that I highlighted the whole first sentence of each paragraph. From the outset, *Bild* was a role model for me. They don't write like that because they lack the skill to write in a more sophisticated way. They do it on purpose.

High Time

In late August, I felt I couldn't wait much longer or else I'd have to cancel the campaign plans. Patience is a virtue, but not in that kind of situation. Two months had passed since the first conference call with representatives of companies that oppose software patents.

The envisioned campaign had three political objectives:

1) Try to prevent the EU Council from formally adopting its 18 May 2004 position.

2) Try to convince a majority of the European Parliament to restart the legislative process, as another way of doing away with the Council's proposed text.

3) If the first two options fail, try to gain majority support in the parliament to either reject the Council's position or to amend it substantially.

Any one of those three possibilities would serve to prevent the legalization of software patents in the EU. The first two had to be pursued independently from

each other, as we couldn't assume any particular avenue would successfully lead us to our goal. The third one was the bread-and-butter plan, as according to standard procedures a second reading in the European Parliament was the next step.

For all three goals, it was key to take action right after the summer break ended. When the newly elected parliament first convened toward the end of July of 2004, a parliamentary insider the FFII's Erik Josefsson that leaders of the political groups would decide "very soon" which legislative processes the new parliament would pick up from the old one, and whether to ask for a fresh start on any of them. We had no exact date, nor could we find any statute of limitation in the Rules of Procedure of the European Parliament, but based on the information that Erik had received, we had to presume that we should build some momentum for that procedural move.

As early as the first week of the new legislative term, Erik also reported that the streets of Strasbourg were crowded with lobbyists. Our adversaries were already in full gear.

We were also watching with anxiety how the linguistic services of the EU were progressing with the translations of the Council's proposed text. We knew the Council couldn't formally adopt its common position until the text was available in all of the EU's official languages. Someone even found a rule according to which those translations had to be ready six weeks before a Council meeting, but we couldn't exactly verify it.

The EU Web sites are difficult to navigate if one isn't familiar with the language and procedures, but some FFII activists knew how to search for documents. Actually, it's quite easy – as long as you have the right file number for the legislative project you're interested in. By mid-August, we saw that the number of translations was increasing. On August 18, 2004, the set of twenty was complete, with the last seven or eight all becoming available on the same day.

We had hoped that they'd need more time. The media had reported that ever since the EU's extension May 1, 2004 expansion, the language services had been overburdened, and that the most severe bottlenecks related to some tiny countries' languages such as Maltese. There was even a memorandum asking all EU institutions to shorten their documents by about one third.

The next EU Competitiveness Council meeting was scheduled for September 24, 2004, exactly a year after the European Parliament's first-reading vote on the

software patent directive. The FFII wanted to commemorate that day as "EU Democracy Day", but it now seemed that it might also become the day of the Council's decision that effectively ignored the parliament's will.

Dr. Joachim Wuermeling, a German conservative MEP, told a conservative German newspaper that everything was set for a formal Council decision in late September, and that the European Parliament might even conclude its second reading before the end of the year. That would have been a much more compressed timeline than expected.

So, in their own best interests, I had to give my potential campaign sponsors an ultimatum. There was no point in spending their money and my time on just a second reading in the parliament. We would have to pursue all three political objectives and thereby increase our chances of having a breakthrough somewhere. I wanted three bites at the apple or none at all.

Agreement at the Eleventh Hour

I told my prospective sponsors that we had to have an agreement in place by September 1, or I'd return to my game development project. The date wasn't arbitrary. The parliament would have returned from its summer break about a week before, and I had scheduled some meetings in Brussels for September 2. There's no general rule as to whether such an ultimatum helps or not. You can find examples of success and of failure.

1&1 and I had agreed on a certain level of commitment before Achim Weiss, 1&1's chief technology officer, left for a sailing trip during which he was going to be unreachable. He signed a preliminary agreement which would become legally binding if the other campaign sponsors met specified criteria. MySQL AB was the smallest of the three sponsors, but I knew its management would be able to take quick decisions. The remaining challenge, therefore, was to firm up the commitment of leading Linux vendor Red Hat. We had received a positive signal a week earlier, but we were still awaiting a specific, reliable commitment.

It is always harder for companies to make decisions based on long-term strategic considerations rather than immediate business interests. There were really two ways for Red Hat to look at this. Europe was not then a major target market for the company. On the other hand, the EU had to have long-term strategic importance: 450 million inhabitants, 18 percent of world trade, 25 percent of Gross Global Product. The EU decision on software patents could either pave the

way for establishing a US-style software patent regime worldwide, or mark a turning point for intellectual property policy.

I owe it to Kaj Arnö, a vice president of MySQL AB who had lived in Munich for two years and strongly supported my efforts, that a solution was found. By 10 PM, I had already given up, canceled my flights to Brussels, and sent out email calling off my appointments. In that email, I told people that I had decided to withdraw from the software patent debate to focus on my own project. However, Kaj exchanged email with Red Hat's Mark Webbink. Very early the next morning, I contacted Kaj via instant messaging to get final confirmation. I emailed everyone asking them to ignore my previous message: the meetings would indeed take place, and the campaign was going to take off.

Touching Base

On that Thursday, September 2, 2004, I met with key allies in Brussels in order to get first-hand information on the state of affairs and exchange ideas about what to do next.

I had lunch with Alexander Ruoff of the Confédération Européenne des Associations de Petites et Moyennes Entreprises (CEA-PME), a European umbrella organization of national associations of small and medium-sized businesses. Alex participated in some FFII mailing list discussions, and his contributions had made a professional impression.

While we were talking about how to best complement the FFII's activities, Alex told me that the unorthodox style and appearance of the FFII had charm in the eyes of MEPs. At the first reading, it must have been quite a new experience for people in the parliament to see swarms of mostly young people who didn't really know their way around, but who clearly had a major concern, given that it motivated them to come to Brussels or Strasbourg. Nevertheless, we both agreed that the resistance movement as a whole could benefit from the complementary NoSoftwarePatents campaign.

After lunch, I visited Laurence van de Walle, an aide to the Greens/EFA group in the European Parliament. She had organized one of the two days of the software patent conference in April of that year, and we had talked there. In the succeeding months, we had exchanged information by email and telephone, and coordinated some smaller activities.

I knew that she had been a key figure in the fight against software patents during the parliament's first reading on the proposed directive. She told me that the outcome of that first reading – a clear vote against the patentability of software – was an unprecedented event: "Those big industry lobbyists usually get what they want, and in that case they lost. They even felt humiliated." Laurence predicted that the lobbying efforts of the pro-patent forces would be far more intense in the months ahead, and she was definitely right.

I brought up the idea of an initiative to work toward a parliamentary request to restart the legislative process on the directive, in order to thereby invalidate the Council's common position. However, Laurence explained to me that she didn't consider that a feasible plan, at least then. That was disappointing news for me, as I personally believed that we had more to gain and less to lose than our adversaries. However, I trusted Laurence's assessment.

Different Degrees of Idealism

In the evening, I visited the CEA-PME office, where I got to know Stefan Zickgraf, the organization's managing director and thus Alex Ruoff's boss. Since CEA-PME hosted the FFII's Brussels office (basically, a desk and a phone), Erik Josefsson joined our discussion.

Erik and I represented two extremes: Erik working full-time on the software patent fight without adequate compensation by Brussels standards, and me insisting that my time be paid for by corporate sponsors in the form of a consulting fee.

I don't think any one approach is right. It's absolutely understandable to me that someone might be as dedicated to the cause as Erik. It depends on one's mentality and situation in life. Everyone has to pursue happiness his own way. To me, it was always imperative that companies attach a commercial value to my political action against software patents. To Erik, the only thing that really mattered was to stay involved.

Various other FFII activists were so gung ho that they worked on this full-time for a number of months without being paid any noteworthy amount, but Erik did it longer than any of the others. He didn't plan it. It just happened as he kept going on for another month, or three more months, when the political situation necessitated it (and provided that the next sponsorship became available).

By the time of our meeting in Brussels, Erik was 40, and had appeared on the Swedish magazine *Ny Teknik*'s list of the 50 most important figures in the Swedish IT and telecommunications industry. He has a Master of Fine Arts degree and has held various jobs related to music, but he also studied mathematics and physics, and worked as a programmer for three years at a company that developed electricity billing software for mainframe computers.

He became involved in the fight against software patents during his tenure as a member of the board of the South Swedish Linux User Group (SSLUG) from 2002 to 2004. Initially, his full-time focus on lobbying was made possible with funding from Laura Creighton. Later, he was paid by the FFII some of the time, and he had brief sponsorship by a couple of Scandinavian companies, such as the Norwegian company Opera ASA, which paid him for a month in the fall of 2004, or Björn Stenberg Data in early 2005.

Erik landed Opera's sponsorship through his own work, but he told me that his success there was partially a by-product of my parallel efforts. During the summer of 2004, I conveyed to prospective sponsors, including Opera, the exceptional urgency of the situation.

First We Take Berlin

After my return from Brussels, I spent most of my time preparing the launch of the *NoSoftwarePatents.com* Web site. I still had to finish the English version, and then I had to translate everything into German while looking for people who could translate my text into other languages. Originally, the plan was to launch the site in at least a few languages around the 20th of the month, ahead of the forthcoming EU Competitiveness Council meeting.

Then I saw an email on an FFII mailing list from Marco Schulze, an entrepreneur from the southwestern German city of Freiburg, asking questions about the situation in the German parliament, the Bundestag. I had met Marco before, at LinuxTag in Karlsruhe.

I had information relevant to Marco's plan to lobby the German parliament, but it was too confidential to send by email. When I called him, we compared notes. There was no doubt that the political groups in the German parliament were looking seriously at passing a resolution on software patents.

An aide to one of the government parties had told Marco that the German resolution would be "in the spirit of the resolution by the Dutch parliament",

Even so, I had seen an early draft of the German motion, and I knew its demands didn't go nearly as far. Unlike the Dutch parliament, the German parliament wasn't going to order its government how to vote in the EU Council.

A single phone call to a Bundestag insider was enough to get that confirmed. My source said: "Dictating a decision that the government has to take in the EU would fly in the face of how we do things here. What we can do is point out what kind of legislation we'd like to see, and that's where my position is not dissimilar to that of the European Parliament. But it will take quite some internal persuasive effort for us to succeed. We'll try our best to get this done before the Council meeting on the 24th."

On that basis, I had to decide whether to join Marco in meeting members of the German parliament, or whether to forge ahead with my Web campaign and meet MEPs to talk about restarting the political process. I went for the home game in Germany because I felt that a parliamentary resolution could be very helpful even though it wouldn't be legally binding. Support from the parliament of the largest EU member state to our central demands would be a boost, and it might encourage other countries to reconsider their stance.

Fortunately, my campaign sponsors trusted me to set the right priorities.

Parliamentary Division of Labor

No single MP (member of parliament) can possibly know every policy area in detail: there are just too many. Therefore, parliaments apply the principle of division of labor. How that works in practice is pertinent to how parliamentary decisions are shaped and influenced.

First, almost every parliamentarian is a member of one or more parliamentary committees. These specialize in certain topics, such as legal affairs or foreign policy. MPs choose at the beginning of each legislative term which committee(s) they want to join. The number of members per committee varies, but it's rarely below 10 or above 50.

On any committee, each political group – which is made up of MPs from either a single party or multiple parties that have joined forces – is allocated a number of seats that is proportional to its number of plenary seats. Hence, some MPs end up on committees that weren't their first choice.

The committees prepare the decisions that are actually taken by the plenary (that is, the full complement of all MPs). There are some exceptions for procedural and administrative matters that don't go to the plenary, but in general a committee can never pass a law. The committee's legislative proposals are, however, very likely to be adopted by the all-decisive plenary.

In many parliaments (including the German Bundestag), one or more other committees may additionally be involved on a consultative basis. The Bundestag primarily assigned the topic of software patents to the Legal Affairs Committee. However, software patents are also a matter of economic policy, of innovation policy, and of media policy. And, since the Bundestag was going to pass a resolution related to an EU directive, this was an EU affair as well. All in all, four committees had consultative roles.

Parliamentary groups coordinate the work of their committee members. In national parliaments, the term "parliamentary group" is usually synonymous with "political party". However, there are cases in which two or more political parties form a parliamentary group, and in such cases it's more accurate to talk about groups than parties. In the German Bundestag, the conservative group is traditionally made up of the CDU, which is active in all parts of Germany except for the southern state of Bavaria, and the CSU, which only operates in Bavaria.

Each group's MPs on a particular committee are always coordinated by, and usually led by, the group's spokesperson for that area of policy.

Decision-Shaping Within Groups

Within parliamentary groups, one MP is assigned to each piece of legislation as the group's rapporteur. While the role sounds passive, it's actually very influential. The rapporteur represents the group in negotiations with other groups, and makes internal recommendations that the group is predisposed to adopt. However, rapporteurs depend on approval, and sometimes have to negotiate among different positions within a group in order to secure support.

In theory, MPs are accountable only to their conscience and are therefore free to vote whichever way they deem right. In practice, dissidents risk negative consequences, such as not being nominated by their party in future elections. A group with strong discipline is generally more powerful in the political process. An MP may enjoy the liberty of crossing party lines on a particular issue, but he may pay the price the next time he needs the group's undivided support.

The strength of parliamentarians' allegiances to their official group line varies from parliament to parliament. In the US Congress, proposals from the Democrats may get supported by Republicans, and vice versa. In the European Parliament, MEPs sometimes vote with their group, sometimes with their countrymen, and sometimes simply any way they like. By comparison, party discipline is marked in the German Bundestag. Very rarely, a few may abstain in order to dissociate themselves from a particular decision, but dissident MPs of a party in power wouldn't change the balance in favor of proposals from the opposition.

Each group determines its official line before every important parliament session or vote. There is no simple formula for how that works; it's a complex process that takes into account multiple considerations. The formal decision is usually based on a vote taken at a group meeting. On a specialized topic like software patents, the group leadership and the rapporteur are very likely to be supported, but they would never leave it to chance. There is always some informal communication between the internal opinion leaders.

If you are in a position to influence an internal decision, you will of course have a personal view on what the right decision would be, but your decision has implications that go beyond that single issue. Is a certain position in line with your party's values and campaign promises? What do the affected elements of your party's electorate want? How will your constituents react? What will the media say? If you're in opposition, how can you best attack the government? If your party is in power, how can it position itself for reelection and avoid giving ammunition to the opposition? Are there influential people in the party who may be upset? Do you owe support (or at least neutrality) to previous supporters? Those are just a few examples. There is no such thing as a complete checklist.

As part of the democratic process, lobbyists also try to influence opinions and decisions. Of course, every politician knows that the lobbyist across the table is there to present the viewpoint of a special interest group. However, all those special interests are important, and ultimately a politician has to decide which of those special interests is closest to the public interest.

Touring the Bundestag

Marco's and my starting point was to call Nermin Fazlic, an aide to the Social Democratic Party's parliamentary group with a special focus on new media policy. His boss, the MP Jörg Tauss, had harshly criticized the minister of justice,

even though she is from his own party, for Germany's support of the EU Council's May 18 proposal. The question was therefore: how successful would Tauss and Fazlic be at getting their group behind a resolution that essentially contradicted their own government?

For us, the SPD was crucial. The SPD and the Greens formed a government coalition and held a parliamentary majority. Would they manage to walk a fine line and send an unambiguous signal on the issue itself while steering clear of anything that might remotely destabilize the government? That was going to depend upon how sympathetic some key players would be to our cause.

Fazlic dismissed the motion that the Free Democratic Party (FDP) had introduced shortly after the EU Council decision as a "motion to make a fuss" because it was so hostile toward the government that the SPD and the Greens couldn't possibly support it. However, even though he didn't say so, I'm sure he was actually glad that the FDP's motion forced all the parliamentary groups to formulate their position on the issue.

On September 9, 2004, Marco and I met at the Bundestag buildings in Berlin, and went in to see Hubertus Heil, MP. His focus was on economic policy, and he was especially concerned about the needs of small and medium-sized enterprises. Marco and I together represented companies with from 20 up to almost 2,000 employees, which was a good fit. The meeting lasted only about 20 minutes, but it was focused and mutually informative.

We realized that we were lobbying against a mighty opponent: the ministry of justice, which purposely misinformed parliamentarians, especially those of the government coalition parties. The point at which a largely untruthful statement becomes an absolutely contemptible lie is a matter of definition. Take, for example, the civil servants who wrote to the members of the Bundestag to say that the Council's proposed directive wouldn't allow patents on "software as such".

Within the semantics of the patent system that may be true because patent proponents' definition of "software as such" is something no one would even want to patent, but it's not what anyone outside of the patent system considers to be software as such. The exclusion of "software as such" from patentability doesn't prevent patent offices from issuing patents on functions performed by software. Neither the people who work in the IT industry nor 99.9 percent of the

people you talk to on the street would attach the patent proponents' bizarre meaning to the phrase.

The ministry of justice purposely phrased its declarations in such a way that the only reasonable interpretation was: "Don't worry, there won't be patents on computer programs." However, the opposite was true; they knew it and we knew it. I believe that such intentional misinformation is a lie if the recipients are bound to understand the text in a way that doesn't reflect the truth, even if there is a parallel universe in which that type of language might be understood more correctly.

Elevator Encounter

Later in the morning, we visited Bundesverband mittelständische Wirtschaft (BVMW), Germany's leading organization of small and medium-sized businesses. The visit was just a case of stopping by and saying hello to friends with whom I had already worked on that open letter in early July, and who were part of the CEA-PME network.

Given that BVMW represents about 150,000 companies with a total of more than 4 million employees, I thought its headquarters would be quite large. I was surprised to find that wasn't the case. Eberhard Vogt, the BVMW official we met, was single-handedly in charge of media relations and public policy. At the big-industry lobbying organizations, each of those functions would be handled by an entire department.

That's the problem: it's always easier for large corporations to fund lobbying. Owners of smaller companies outside of a very few sectors (such as the chemical industry) tend to be less aware of the need for it.

My first day of Bundestag lobbying ended in an exhilarating fashion. After a meeting with Dr. Peter Fäßler, an aide to a vice president of the SPD group, Marco and I got on the elevator on the fifth floor of one of the Bundestag buildings to go down to the ground floor and leave. One floor down, the elevator stopped and a very tall gray-haired man entered. Marco and I immediately recognized him as Rudolf Scharping, one of Germany's most prominent politicians and a figure of fun in various media for various reasons, particularly his slow way of speaking. We greeted him, and he politely replied. Behind his back, we both had to smile.

In 1994, Scharping lost the election to long-time chancellor Helmut Kohl. For a time, he was chairman of the SPD, and from 1998 to 2002 he was the German minister of defense. He was ousted when he was accused of having close ties to a lobbyist. That same summer he became a laughing stock as well as a target of animosity when a magazine published an exclusive story on his summer vacation with his girlfriend on the Spanish island of Mallorca. At the time, some of "his" soldiers were on dangerous missions in Afghanistan and the Kosovo. It was also revealed that he used a governmental airplane to make a one-night stop-over in Mallorca (when he briefly had to go back to Berlin).

After we had left the building, Marco told me he had briefly considered approaching Scharping, who at the time was a member of the Bundestag, to see if he could get him interested in the software patent issue. I'm glad that Marco ultimately refrained from making an "elevator pitch". He has proved over and over that he knows how to open doors and start dialogues with politicians, and that's one his strengths. However, "chatting up" someone in a situation like this, when a politician is not expecting to talk to lobbyists and may have completely different things on his mind, would be highly impolite. It's a last resort, done only by those who have no other way of getting into a conversation with a politician than by coincidentally running into one.

At a meeting on another day with other SPD people, I mentioned that we had seen Scharping. 1&1 Internet AG, one of my campaign sponsors, is headquartered in Scharping's constituency, which would have been a basis for contacting him. Knowing that Scharping was a lame duck, I asked, as diplomatically as I could: "Do you think it makes sense for me to approach him or is this particular area of policy possibly too remote from his area of specialization?"

My SPD counterparts laughed loudly: "Anything political is remote from Scharping these days." Then one of them added: "Before you talk to him, you might as well talk to a dog. That would have about as much of a political effect. Actually, it's probably even counterproductive if you convince that guy to do something for your cause." A second person was more pragmatic and said, "I haven't seen him at our group meetings in at least six months. He's history."

That kind of information certainly saved me some time, and it showed that power is temporary.

Cross-Country Lobbying

Parliamentarians spend most of their time at their parliamentary seat, and much less back home in their constituency. It's therefore generally easier for a lobbyist to get an appointment in the parliament itself, but there are exceptions. After our first conversation with Dr. Peter Fäßler, an aide to Gernot Erler MP, Marco and I were invited to meet Erler at his office in the southwestern town of Freiburg.

If it weren't for the fact that Marco was based in Erler's constituency, our chance of getting to meet one of the highest-ranking SPD politicians would have been next to nil. Another MP told us that his office receives literally hundreds of letters and emails every day, and they have a simple approach to filtering: if it's not from his own constituency or related to one of the topic areas on which the MP focuses, the message gets thrown out.

Erler wouldn't have been an obvious person to contact about software patents, given that his area of specialization was foreign policy (which, as we were told, didn't exactly include the EU in his case). However, he was the highest-ranking SPD parliamentarian to whom we could gain access, and his background suggested that he might have a very good understanding of the situation of smaller companies in our industry. Before he became a full-time politician, his Web site informed us, he had managed a small book publishing company. As I also had some experience in working with book publishers, I was confident that I could draw some analogies between book and software publishing industries to help explain our problem.

Our audience with Erler was scheduled for about 30 minutes. For me, that meant a five-hour train ride each way, with no time savings available by flying. So I spent a long day on the road just to join Marco for a 30-minute meeting, in which I ended up with less than 10 minutes of actual speaking time. However, it was worth it for the chance to meet a vice president of the parliamentary group of the larger government coalition party.

Without even an informal agreement, Marco and I had a division of labor in place. Marco brought to the table his talent for opening doors, his current entrepreneurial activity (running a ticketing software company), and his detailed knowledge of the legislative proposal in question. I added my long-standing involvement in the industry and my background, having gone through the whole entrepreneurial cycle from the founding of a company to its eventual acquisition,

as well as experience in transatlantic deal-making and familiarity with the US market.

Before the meetings, I did some research to find out more about the politicians we were going to meet, and I handled most of the follow-up, partly because I had chosen to act temporarily as a full-time campaigner, while Marco had a company to run.

The meeting with Erler was particularly successful. We managed to bring our problem to the attention of that political heavyweight. He went on to inform himself a little more by talking to people in his party who were already on our side. Marco used "my" publishing analogy even before I did, and Erler told us of his publishing industry background.

A week or two later, one of our other SPD contacts told us that making Erler aware of the software patent problem had been "right on". He said passionately: "This is what we need. If someone like Gernot Erler, our spokesman on foreign policy, one of our vice presidents, stands up in a group meeting and says that he doesn't know the details, but he's aware of some problem there, that can make all the difference."

Contemporary Conservatism

At short notice, Marco managed to set up a meeting with the conservative MP Dr. Günter Krings and his aide Jörn Henkel, for September 22. I had a lunch appointment in Berlin that day, but I thought the meeting wouldn't last more than an hour, so on that basis I agreed to participate.

Wolf Dieter Eggert, a long-time colleague of mine who once chaired the German education and schoolbook publishers association had told me about Krings two months earlier, noting that Krings had been a positive force behind an amendment to an important copyright law. I just hadn't followed up on the recommendation before, mostly because the German conservatives' conduct in the European Parliament had been greatly discouraging.

Krings looked stern when he stated his utmost commitment to the concept of intellectual property rights: "There are areas in which patents are critical. I can see why software patents may be undesirable, but there's no way that I'd support anything which wreaks havoc to the patent system as a whole. It might be the more populist approach to be against intellectual property, but that's where the rule of law comes first."

The way he said it indicated that others might previously have told him that all software patent critics were anti-commercial radicals. Given the business background that Marco and I brought to the table, that misconception, if it existed, was easily addressed.

Until about the time of our meeting, Krings and Henkel hadn't looked at the EU software patent directive in detail. It wasn't on the Bundestag agenda until the liberal democrats' motion forced all parliamentary groups to define their position. Krings and Henkel had more or less relied on the information that came from their party colleagues in the European Parliament – and those informants denied there was a problem to their colleagues in Berlin the same way they did to the public.

Marco and I didn't really have to convince Krings and Henkel of the issues concerning software patents. We gave them some information, but there was a common understanding anyway. Where we helped was in pointing out the loopholes in the EU Council's proposed legislation that would have allowed software patents.

The most important task of a lobbyist is to provide factual information. There's a limit to how far one can get on that basis, and in some situations, aggressive campaigning and engaging the emotions are additionally required. However, what politicians and their aides want most is specialized input.

After more than an hour of really interesting and constructive conversation, I had to leave to make the previously scheduled lunch meeting, although Marco was able to stay much longer. It was unusual because typically it's the politicians who have to wrap up first, not the lobbyists, and I alluded to that fact. Krings understood and took no offense.

At first Marco was Krings' and Henkel's primary point of contact, but I did most of the follow-up work by email and telephone, and after a while this became a great working relationship. The German conservatives in the European Parliament had effectively disenfranchised me by denying even the most obvious truths and visibly pandering to a few large corporations. Thanks to Krings and Henkel, I felt a little bit better about having voted for the conservatives in two or three Bundestag elections. These two represented a mix of a modern perspective and the conservative value system I grew up with.

The Tower of High Finance

Two days after our meeting with Krings and Henkel, the EU Competitiveness Council met again. By then, we already knew that the software patent directive would not be on its agenda. A month earlier, however, it had looked like September 24 was going to be doomsday. The complete set of translations had appeared on the Web, and the German conservative MEP Dr. Joachim Wuermeling had told the *Frankfurter Allgemeine* newspaper that the Council's decision was imminent. Fortunately for us, Wuermeling's prediction was no more accurate than most of the other things he said about the software patent directive.

Earlier in the month, it was still unclear how fast the Council could proceed. I once told MySQL AB's Kaj Arnö of that uncertainty, and said it seemed too late to do anything to prevent a Council decision. "Let's be fatalistic", I told Kaj. I'm not sure he liked that notion initially, but he trusted me anyhow, and it was indeed the way to go.

On September 27, I met Dr. Richard Stallman in the Deutsche Bank skyscraper in Frankfurt, the building that is arguably the epicenter of economic power in Germany. Richard, who is often referred to by his initials as RMS, is the legendary programmer who founded the GNU project, set up to create a complete suite of free software. While most people think of Linus Torvalds as the creator of Linux, it is historically more accurate to say that what is now known as Linux is made up of the Linux kernel (which Torvalds wrote) and a lot of GNU software that had already been written when Torvalds came along (although the percentage that is Linux has increased steadily ever since). If one wanted to be precise, one would call the entire system GNU/Linux.

This question of the fatherhood of Linux is reminiscent of that of who was the first president of the United States of America. Everyone says George Washington because he was the first president of the United States under the US Constitution as we know it today. He served from 1789 to 1797. Some historians, however, would point out that George Washington was preceded by John Hanson, who from 1781 to 1782 served as the first president of the United States under the Articles of Confederation, a precursor to the Constitution. Some would go back even further to Samuel Huntington, the first President of the "United States in Congress Assembled" a few months before Hanson. But to the general public, George Washington was the first president – and Linus Torvalds created Linux, while Richard is far more famous than any of the presidents who preceded George Washington.

RMS is much more than a former programmer. He was the visionary who first came up with the concept of "Free Software"; he set up the Free Software Foundation in 1985. While Free Software can be used free of charge for various purposes, Richard always underlines that the word "free" is primarily "free" as in "free speech", not "free" as in "free beer". RMS developed and formulated a vision of software that is freely accessible, that is shared among developers, and that everyone can modify as needed. He dislikes the term "open source", which sprang up later, but to most people the two are synonymous.

Opposites Attract

I arrived for the meeting just in time after taking an early-morning express train from Munich. Most of the others were already in the meeting room. The meeting itself had been organized by the FFII's Holger Blasum. Deutsche Bank Research, the bank's economic research division, had published a study in which it made several statements that were a real boost to our movement, such as:

> One could be tempted to consider ever stricter IP protection regimes to provide ever more stimuli for innovation. This conclusion is wrong, however. A prime example is patents on software, which might at first sight be seen as a logical expansion of the classic technology patent. But creating software differs markedly from creating machinery and the like. Chances are that patents on software, common practice in the US and on the brink of being legalised in Europe, in fact stifle innovation. Europe could still alter course.

Since Deutsche Bank is clearly free from any suspicion of anti-commercialism, those conclusions were particularly valuable ammunition for our own discussions with politicians and the media. So Holger had the brilliant idea of setting up a meeting between RMS and the economists who conducted that study. RMS toured Europe frequently to speak out against software patents, and most of his trips were funded and organized by the FFII (where Holger did most of the relevant work). In a way, because he was world-famous, RMS opened the door for all of us, and that was part of Holger's plan.

Several participants were internal software developers at Deutsche Bank, and they also expressed their dislike for software patents. To them, software patents might create monopolies on key features that could limit their ability to fulfill the information technology needs of Deutsche Bank's various departments. Also,

large organizations like Deutsche Bank are among the favorite targets of "patent trolls" who could threaten the bank with enforcing a patent that could take an entire business area out of operation, and then try to cash in with the promise of removing the threat. These operators are attracted by money like moths to light.

After I returned from the meeting that evening, Jan Wildeboer called me and he couldn't stop chortling: "I can't believe it. You went straight to the center of capitalism with the devil, with Mr. Anti-Capitalism himself." Certainly this was a humorous exaggeration. Richard's views are ideologically non-commercial, and while he may not condemn the profit motive altogether, he doesn't support it.

It was interesting to see how RMS was the odd man out in that meeting room. The Deutsche Bank guys were dressed formally, as expected. Richard, however, was dressed completely casually, and he took off his shoes, which in any case were just some informal slippers, like shoes most people would only wear at home.

Productivity Considerations

There's no doubt that Richard has an aura. He is soft-spoken, but his positions are firm and his vision is interesting. He travels the world untiringly in his effort to preach his idea of Free Software, and few people of such worldwide fame would be so undemanding when it comes to transportation and accommodation.

This was the first time I'd heard RMS explain his theories on software patents. Holger later told me that the presentation Richard gave the Deutsche Bank folks was pretty much the same as his public speeches on the issue.

RMS focused on the respects in which software development is different from traditional engineering. He gave some good examples of external factors that traditional inventors have to consider and experiment with, whereas computer programmers are dealing with an abstract form of mathematical and verbal expression. There are no materials that are subject to wear and tear, electrical energy that emits heat, or chemical processes that lead to unforeseen reactions. Consequently, Richard argues, software development is much more similar to writing than to inventing, and shouldn't fall under the patent regime.

Another of his favorite metaphors is that of the minefield: developing software when others have patented countless elements is like walking through a park with tens or hundreds of thousands of mines. You inevitably step on some, and even if

a few are removed from time to time, the park won't be safe until all of them are gone.

Since RMS is such a gifted speaker and impressive person, people don't contradict him. Instead, they are captivated by his rhetoric. Everything he says seems highly plausible. However, persuasiveness in politics is measured by the extent to which politicians base their decisions on the case you've made.

During my year in politics, I only met one parliamentarian with hands-on expertise in software development: Ulrich Kelber, a social democratic member of the German Bundestag who holds a degree in computer science. After our lobbying at the Bundestag, he showed Marco and me the way to the elevator, and the three of us stood in the corridor of the Bundestag building, chatting about computer topics like programming languages. For someone with that background, Richard's explanations make perfect sense, and people like us tend to think that the same approach to explaining the issue will work just as well with those who have never written a single line of program code. But it really doesn't.

Richard's perspective is great for mobilizing the converted. I'm quite sure that a number of people decided to take action against software patents, such as joining the FFII or writing letters to politicians, because RMS made them realize the issue's importance and hardened their belief that opposing software patents is one of the most honorable things to do on Earth.

Everyone else (and that means 99 percent or more of politicians) might not even want to argue because the story seems quite strong, and they lack the knowledge to contradict. However, when they later have to decide which way to vote in a parliament or which position to fight for within a parliamentary group, they won't stand firm.

While I was gathering support for my campaign, I said we'd have to focus on the whats, not the whys. We can't make too many people understand *why* software patents are much worse than other patents, but we can point out *what* negative effects they cause, and make the case that the world would consequently be a better place without them. Simply put, it's the black-box approach, similar to looking at what machine produces without even knowing what happens inside it.

That was also the angle I took in my address to the minister of justice. During one of the breaks at that roundtable, Robert Gehring, a researcher from the Technical University of Berlin, expressed to me his own perspective on what's right and what's productive: "From the perspective of an economist, the question is whether

patents stimulate innovation. That's not a moralistic angle, but let's look at it this way: if there's a system like the patent regime and it doesn't work well for the economy, then it will be inequitable at the end of the day."

Logistics over Lunch

RMS and Holger left the Deutsche Bank building about twenty to thirty minutes before the meeting ended. Richard had to catch a train to Luxembourg, and Holger accompanied him to talk about travel logistics. I was already in a taxi, approaching Frankfurt's central railroad station, when I reached Holger by telephone and learned that he was at another railroad station, the one next to the airport. We had some organizational items to discuss, so I told the taxi driver: "Sorry, change of plan! Airport, please. Guess you don't mind the extra income." He certainly didn't.

Both of us had planned to take the train back to Munich. However, once I was at the airport, I couldn't help taking one of the frequent flights. I persuaded Holger to delay his departure for just an hour, and I invited him to lunch at the Airport Sheraton hotel. It was a practical choice, but it was also intended as a gesture of gratitude toward Holger for his hard work on behalf of the FFII.

I have mentioned before that Holger contributed immeasurably to the FFII. He was officially the treasurer, and practically the chief operating officer. All the activists like Erik Josefsson were always able to rely on Holger to arrange payments and travel logistics.

In almost every conversation I had with Holger, he stressed that he didn't consider himself qualified to take strategic decisions. That was an underestimate. It's true that he rarely interfaced with politicians, and also that no one could expect a math student to behave like a businessman. However, Holger often gave valuable input.

Holger spent so much time on FFII matters that it probably cost him two years in finishing his degree. Many times when I saw Holger, I had to remind myself that this incredibly committed activist, this unpretentious and seemingly apolitical student, was actually playing a key role in one of the most important areas of economic policy.

An interesting anecdote: in the postscript to Holger's follow-up email after our conversation in Frankfurt, he thanked me for having given him the chance to eat his first oyster. I hadn't even noticed that he had gotten himself an oyster at the

buffet in the Sheraton, and I hadn't invited him there to show off a lavish lifestyle, but simply because it was a practical choice and modest compared to the gratitude I felt. It is, however, an odd example of how my involvement in the fight against software patents brought some of the mundane aspects of traditional lobbying to this sphere of idealism. Our opponents must have eaten innumerable oysters before Holger had his first. And he deserved it a lot more.

Playing Our Cards Close to Our Chest

We talked about various action plans, and particularly about the situation in the German parliament. At that stage, we had no guarantees, but there were reasons to be optimistic. It looked like we might get all four parliamentary groups in the Bundestag to speak out against the Council's proposed directive.

Holger had previously brought up the idea of sending out a mass email to the FFII's registered supporters calling on them to contact parliamentarians from their respective constituencies. That was really a tough decision. On the one hand, the FFII has a list of tens of thousands of email addresses in Germany alone, and a number of their correspondents are indeed prepared to take political action. We knew that parliamentarians are responsive to their constituents. On the other hand, we also knew that a number of our opponents were "lurking" on the FFII's mailing lists. For instance, someone once reported a spelling error on an EICTA campaign site on the FFII's Brussels mailing list, and within thirty minutes that typo was suddenly fixed.

We didn't know whether our opponents were aware of our Bundestag lobbying or not. We did know that the lobbyists employed by large corporations maintain political contacts on an ongoing basis. We also knew that Fritz Teufel, a senior IBM patent attorney, regularly placed phone calls to people in the parliament just for the purpose of inquiring about the latest news concerning software patents. So, if our opponents wanted to know what we were up to, they could.

However, I had a strong feeling that the pro-patent lobbyists were absolutely focused on the European Parliament. Maybe we were making a mistake by spending so much time in Germany instead of Brussels. Maybe we were defying reality by trying to overturn the Council's formal decision rather than working on that 732-member European Parliament, which realistically would have to hold a second reading on the Council's proposal within a very few months, if not weeks.

By sending out an email to mobilize our supporters, we might trigger a flurry of counter-lobbying activity by our opponents. What if a company like Siemens started making phone calls to the treasurers of the political parties to which they donate money? They'd have access to high-level decision makers that we'd never get. As long as the envisioned resolution had a reasonably low profile, the specialists in the parliamentary groups would be in charge. I wanted to keep it that way for as long as possible.

There was some "fog of war" here: we had to take strategic decisions without having a complete picture of the battlefield. The fact that we never ran into a pro-patent lobbyist in the Bundestag meant nothing. German MPs' offices are spread across three different buildings that are not even next to each other. Unlike in the European Parliament, people don't spend much time in the lobby or in other meeting places. So our opponents could have been there lobbying without our ever seeing even one of them, and if that was the case it would be even more urgent to mobilize our camp.

However, none of the people we met ever hinted at any lobbying activity by our adversaries with respect to the forthcoming Bundestag resolution. In every strategy game, the mistake people fear most is underestimating their opponents. What's often overlooked is that it can be an even worse mistake to overrate an opponent. If a highly skilled chess player goes up against someone of unknown skill, the better player may see all sorts of complex strategies in the simple moves made by the opponent. That is a waste of time and energy. Worse than that, it can lead the skilled player into making bad decisions.

I didn't know for sure whether our Bundestag lobbying was a covert operation, but when I put myself in the shoes of my opponents, I thought I'd probably focus on the European Parliament as well. That's where they lost in the first reading. That's where they needed a better outcome in a second reading. The Council's decision was a formality by EU standards. And that motion the liberal democrats had introduced in the Bundestag looked like a pathetic attempt at government bashing. Besides, the Bundestag had no formal authority over an EU directive. It would only be to incorporate the final directive into national law, with hardly any wiggle room.

But I knew there could be a breakthrough of major proportions in the German parliament. I urged the FFII to base every decision on the assumption that our opponents didn't know this, or didn't care for the time being. Fortunately, the FFII followed my advice: we found out later this assumption was correct.

Difficult Cases

My description of our lobbying talks may have given you the impression that every such conversation yielded at least some progress, even if it was only to draw some attention to our concerns. Generally, that's right. Politicians tend to be receptive to input from citizens who may be affected by a new law. They usually listen politely, even if they disagree.

There are a very few exceptions to that rule. During my involvement in politics, I only dealt with one parliamentarian who was a waste of time to talk to. Without providing any identifying details, let me just say that our initial one-hour telephone conversation went so terribly badly that it would be better if we'd better never had it.

That guy was just impossible, and the dislike may very well be mutual. I talked to many who knew him and never heard anyone say anything remotely positive about either his intellect or his style. Ultimately he supported, *nolens volens*, key elements of our position, though I can't take any credit for it. My talks with him may even have been counterproductive. However, if destiny ever forced us to work together again, I'm sure we'd both try to bite the bullet and be professionals.

The day after the Deutsche Bank meeting, I faced one of my biggest lobbying challenges: an appointment with Dr. Angelika Niebler, a conservative MEP from the greater Munich area. In 1998, when she practiced law in Munich with a specialization in media law, I was a client of hers on three occasions. I really considered her very good to work with. About a year later, I was driving home, and somewhere southwest of Munich I spotted a campaign poster: Niebler was running for a seat in the European Parliament, on the conservative ticket. And she was indeed voted in.

At that point we lost contact. As an MEP she was, quite unfortunately I must say, no longer available to give legal advice. After she was reelected in the spring of 2004, I wrote her a letter congratulating her and asking whether we could talk about the issue of software patents at some point. In one of my conversations with Hartmut and other FFII activists in Brussels during that April 2004 conference, I mentioned that I knew Niebler. The feedback was that she had been a staunch proponent of software patents during the parliament's first reading the previous year.

In late August, she called me back in response to the letter I had sent, and suggested we meet in Brussels. Like many MEPs, she found it easier to find time there than during her short stays in Munich.

In Love With a Law

At the beginning of the meeting, Niebler pulled out a printout of the Council's proposed directive. That's typical of lobbying talks. Politicians, many of whom have a legal background, always try to keep the discussion very close to the legislation in question. They want to discuss the specific wording.

Niebler treated the Council text as if she thought it was a piece of art that would be marred, if even desecrated, by the slightest modification. "Isn't this a really decent solution?", she said. I disagreed diplomatically. Actually, I held the text in such abhorrence that I'd have welcomed the disbanding of the European Union sooner than the irreversible ratification of that legislation.

Our positions couldn't have been further apart. However, both of us made a supreme effort to state our positions clearly and firmly while maintaining a constructive and respectful tone. Before the meeting, I had read some of Niebler's former statements on the directive, and I considered them to be gross misrepresentations of the facts. During that year's electoral campaign, she had made a statement that was still largely misleading, but departed from her party colleague Wuermeling's official position on a couple of items.

Since it was a face-to-face situation with someone she already knew, she didn't make an attempt to deceive me. Some of what she said was the usual propaganda, although within the acceptable range.

She pointed at the particularly fallacious Article 4a(2) of the Council's proposal. That article was the right context for me to strongly criticize the guile of that legislative proposal: "There's this double negative here, saying that something *isn't* patentable if some condition *isn't* met. That's just a less honest way of stipulating that something *is* potentially patentable if the condition *is* met. I know that a negative can serve to reverse the burden of proof. But two negatives cancel each other out, and all they do is obfuscate things." She didn't comment on that.

At some point, Niebler admitted where she stood: "I want to make it very clear. I do want computer-implemented inventions to be patentable." Given the context and the way she said it, there was no doubt that she meant software patents.

Worlds Apart on the Issue

I can't accuse Niebler of having been unreceptive. She certainly tried to understand my thinking. She spent a lot more time than she had planned, and she didn't insist on the rather dogmatic viewpoint with which she started the conversation. We moved away from the text of the proposed legislation toward a discussion of the practical implications of software patents for the industry and the market.

When I outlined some of the problems that patents cause in our field, she always countered by pointing out that a legal remedy exists for everything. In theory, that's right. If someone wants to squeeze money out of you with a bad patent, you *may* be able to get it invalidated later. If a large corporation comes to you and demands that you pay a royalty fee to them or else they'll check whether you infringe on some of their tens of thousands of patents, then that *may* be a form of patent misuse. If patent thickets are used to shut competitors out of a certain market, it *may* be judged an antitrust violation.

The problem is that a company or individual will be forced to make decisions when confronted with the problems, and most of the victims of such threats can't afford to prove they're right and win their case. They may not have the money. Even if they do, it's a high-stakes gamble, and customers might run away in droves during the year or two patent litigation may take, let alone the many years its takes to conclude an antitrust case.

Niebler didn't deny any of that. She wasn't cold-blooded or cynical. I guess she knew all too well the advice she, as a lawyer, would have to give a small or medium-sized company facing the risk of patent litigation. Even though I disagreed with her in many respects, I did believe that she was honestly concerned with making the right decision.

First Impressions Last

Like many other proponents of software patents, Niebler was under the impression that the opposition to software patents is part of a larger anti-intellectual property movement: "There are people who have this conviction that everything on the Internet must be free and don't accept that some may want to make a profit."

Admittedly and regrettably, there are some software patent critics who have that radical a view. Then there are some who actually don't pursue a broader agenda, but who are misperceived as doing so. However, that's a common phenomenon in most political movements. There are always some to whom the issue at hand is just the starting point for something bigger. Think of the demonstrators against the war on Iraq. Some were against that particular war, some oppose any war whatsoever, and some are against anything American, be it war or peace. You can't easily shut people out of a movement just because they have different ideas on other issues.

The FFII's Erik Josefsson received some friendly advice from an aide to the conservative group in the European Parliament: "If you want to persuade the German conservative MEPs, you have to fly in some software entrepreneurs in their 40s or 50s, with beards and glasses and formal suits, and they must have no affiliation with open source whatsoever. They would have to explain why software patents are bad for their businesses."

I would concur that this is the way the software patent issue should have been presented to conservative MEPs in the first place. I just wasn't sure that there was still time to make up for the missed opportunity. By definition, first impressions can only be made once. In this case, the first impression on the part of many MEPs was that software patent critics are, generally speaking, anti-commercial fighters against intellectual property rights (or even all notion of individual property).

Niebler told me that anti-software patent activists were trawling the parliament before the first-reading vote. Allegedly some of them even followed MEPs all the way into their offices in order to pressure them. None of the people I worked with in this would ever have done anything like that.

It's not entirely impossible that some activists went too far. There were about 50 people walking around in the parliament in the days leading to the first-reading vote, and hardly any of them had lobbying experience. However, it's somewhat more likely that someone purposely exaggerated their behavior in order to portray software patent critics as a horde of barbarians. It wouldn't have been the only time someone made up such an accusation against our camp out of ill will.

Niebler also took issue with the anti-software patent movement's style of communication. She showed me a printout of one of the FFII's articles and complained: "Look at this: I wrote a letter to a citizen who had some questions,

and I didn't know that he was an FFII activist. Now the FFII has the text of my letter up on the Internet and they've completely dissected it!" And she showed me how the FFII had annotated every single sentence of her letter with a paragraph of comments.

I didn't defend the FFII's action because I wasn't responsible for it. Today I think it was perfectly fair. Transparency is an essential requirement for democracy, and documenting the written statements of politicians and helping the average citizen decipher a legalistic message should be acceptable. We live in the Internet age. Politicians like Niebler will increasingly have to choose between telling the truth and facing tough criticism for failing to do so.

Of course, such criticism has to be factual and respectful. At the end of the two-hour meeting, Niebler mentioned that during the electoral campaign someone had shouted at her: "You've been bought by Microsoft!" Certainly that is not a style I'd approve of, and I clearly dissociated myself from that sort of inappropriate behavior.

Dam Square Demonstration

I had found out a week earlier that the day after my meeting with Niebler Dutch activists from the Vrijschrift Foundation were going to hold a demonstration in the city center of Amsterdam. I wanted to meet the high-powered Dutch activists in person, and the demonstration was like a pre-launch of my NoSoftwarePatents campaign: Vrijschrift distributed printouts of some of my English-language campaign information (with my permission of course) to government officials from across Europe who had convened at an Amsterdam hotel. The conference was organized by the Dutch government, then holding the EU presidency. The *NoSoftwarePatents.com* Web site had not officially launched yet.

The protest, held at Dam Square, wasn't large, and no one expected it to be. The intention was to show to the Dutch government that our movement wouldn't give up easily. A large banner said "Brinkhorst: stem tegen" ("Brinkhorst, vote against [the proposed directive in the Council]"), and mentioned the negative effects of software patents on innovation.

The Vrijschrift activists did a good job of approaching those government officials as they entered or exited the hotel. Two of them, Ante Wessels and Wiebe van der Worp, were wearing semi-formal jackets, so they looked more like professionals than protesters. They weren't obtrusive. The various ministry

officials reacted differently. A number just accepted the handout, though there was a Slovak civil servant who was well aware of the issue and basically shared our position on it.

I helped out for a while and also talked to some people who seemed to be participants in the conference – some were, for example, carrying one of the umbrellas handed out to attendees. By coincidence, one of the hotel guests was also from Munich. She was a university researcher and not particularly informed about the issue of software patents, but she knew a lot about the fundamental problem of patent inflation and the EPO's highly questionable *modus operandi*.

At some point during the demonstration, an Australian who happened to be staying at a nearby hotel came over. He started talking to us about the situation Down Under, where the free trade agreement between the US and Australia had imposed a software patent regime on the local market. Some Australians tried to oppose that treaty, but didn't make much headway. It was interesting for that visitor to see that there was a lot of political activity in Europe concerning this issue.

Multilingual Strategy

On my two-city tour of Brussels and Amsterdam, I also met two of the translators working on articles for my campaign Web site. It wasn't easy to find people who could do that. Even though I deliberately wrote my texts as simply as possible, software patents are a difficult topic. There was a fair amount of highly specialized vocabulary that translators don't know unless they either are already familiar with the software patent issue or make an effort to learn the terminology used in the field.

Multilingualism was a priority from the outset. I received a lot of assistance from the FFII and MySQL AB in recruiting translators. While I already knew some anti-software patent activists in various places, I had to go beyond my own contact network.

Those who address Europe's diverse audiences in their own languages have a strategic advantage. But many corporate managers tend to look at this from the perspective of the 20-80 rule: just as 20 percent of their customers often account for 80 percent of their sales, they believe that 20 percent of the languages are sufficient to address 80 percent of an EU-wide audience, and that doing any more than that is inefficient. Those executives who think like this are applying a rule of

thumb that sounds like conventional wisdom, but doesn't deserve being called "wisdom" of any sort.

Most of the translators worked from my English-language text, though a few preferred to work from the German. Some of the translators understood both languages, which made their task easier because there was always a chance that one version would use terms and phrases that were easier to translate into their language.

The speed record was less than a week, set by a Hungarian team assembled and coordinated by András Timár. Shortly afterwards, they used the Hungarian version of my materials for public relations purposes (with my permission).

The French translation was the most critical. The EU has 20 official languages (since May 1, 2004), but English, French, and German are considered the three primary ones, and some EU documents are only available in those three. For a long time, French was the most important of all, but it has been gradually displaced by English as more and more countries where English is more commonly known than French have acceded to the union.

In Brussels, just before my appointment with Niebler, I met Alice Voutsinou, a Greek expatriate who had been living in Brussels for a long time and was responsible for our French version. When we were getting close to the release date and couldn't afford any risk of a possible delay of the French version, Gérald Sédrati-Dinet helped out, and did a fantastic job. By virtue of being an FFII vice president and its French representative, Gérald was highly familiar with the software patent topic.

The Polish translator. Maciej Czapnik, had been recommended to me by his friend Jan "Miernik" Macek, the primary Polish activist against software patents. I met Maciej in Amsterdam where he had a scholarship to study philosophy at the Vrije Universiteit. Some people with more of a technical background later read his translation (after it had been published) and complained that some of the language seemed uncommon to them.

However, other people really liked Maciej's creative use of language. Katarzyna (Kasia) Matuszewska, a Polish MEP assistant and international relations secretary of her party Unia Pracy, later said: "Who did your Polish translation? It's really great. It's so creative and unusual. It's not like all those other texts and you can really see that someone put a lot of thought into it." I knew that Maciej

had been very thoughtful. He usually sent me an SMS message to my cell phone when he asked me to clarify something.

Maciej and I met at a restaurant on Dam Square at about 1 PM. He said that it was "early morning" for him, so he needed a cup of coffee and a cup of tea. Someone having coffee and tea during the same meeting is a little unusual, but it happens. However, Maciej wanted his coffee and his tea to be delivered at the same time, and the waitress simply didn't believe him: she double-checked, even triple-checked, before she accepted the order.

Transcontinental Translators

Alice and Maciej weren't the only expatriates among the NoSoftwarePatents translators. The Greek translation was furnished by Viron Mategaki, a Greek medical student at the university of Bologna, Italy.

Michele Baldessari turned out to be a very good choice for the Italian translation. He had a track record as a translator for commercial Web sites, and he had help from five friends (Sergio Visinoni, Alessio Spadaro, Sol Kawage, Patrick Martini, and Pier Antonio Bianchi).

Reinout van Schouwen translated the campaign materials into Dutch. Like Maciej, he went to the Vrije Universiteit Amsterdam, but it was impossible to meet during the few hours I was in town.

The Czech translation was orchestrated by Juraj Kubelka and Dan Ohnesorg. That team was also very efficient, and after the Web site launch, they were particularly successful at promoting it to the Czech media.

Aigars Mahinovs, the primary lobbyist for our cause in Latvia, recommended Vitauts Stocka, who did the Latvian translation. Aigars and Vitauts made me aware of the peculiar way the Latvian language handles foreign names: they are transliterated phonetically. That is, the letters are changed so that the pronunciation under Latvian rules is as close as possible to the way the name is pronounced in its original language. And all names must end with the letter "s", Hence, my name became "Florians Millers". I was relatively lucky: former Autodesk chairman Jim Warren, who was quoted on my Web site, probably wouldn't recognize his own name: "Džims Vorens".

In Lithuania, Dr. Saulius Grazulis, a researcher at a biotechnology institute, coordinated the translation effort. He took a scientific and analytical approach,

and Lithuanian was among the twelve languages with which *NoSoftwarePatents.com* started.

The Portuguese translation was made by a free software activist who was one of Richard Stallman's local disciples. Since he couldn't agree ideologically with some of my terminology (such as "open source" instead of "free software"), he didn't want to be credited on the Web site for his work. However, he still wanted to contribute to the NoSoftwarePatents project.

The only translator that I had known before my involvement with software patents was Nathalie van Vliet, who is a native speaker of Spanish, Dutch, and German, and had just moved back to Germany to study translation and simultaneous interpretation at the University of Heidelberg. I was unable to find a Spanish anti-software patent activist in time, so I helped with some of the specialized vocabulary. I also took Nathalie's recommendation and brought in a bilingual (English and Spanish) former classmate of hers at the German high school in the Colombian capital, Bogotá, Thomas Sparrow.

After the launch of *NoSoftwarePatents.com*, a few more translations were added. Christian Engström translated my texts to Swedish at a record speed for an individual translator: it only took him about a week. Seikku Kaita organized a Finnish translation to which several other people contributed, and Alex Muntada coordinated the Catalan version. Catalan is not an official language of the EU, but it is understood by about 10 million people in Europe, mostly in the northeast of Spain (Barcelona, Valencia, Balearic Islands).

Visible Results

Preparing a multilingual Web site was painstaking work. For strategic and psychological reasons, I wanted to start with at least ten languages, yet I couldn't keep postponing the launch date forever. I finally settled on October 20, 2004. That way, the Web site would be online in time for the first debate in the German parliament on software patents.

On October 19, the day before the launch of NoSoftwarePatents.com, I received excellent news from Berlin: the conservative group in the Bundestag had approved a proposal for a motion against the EU Council's proposed directive. The text of the motion was unequivocal and helpful. I knew this had been under consideration, but it was gratifying, and almost too good to be true, that the Bundestag colleagues of our arch-enemies in the European Parliament were going

to take that position. For me personally, it was a reconciliation with the party I had voted for on several occasions.

Hours later, around 9 PM, I asked MySQL AB's Gunnar von Boehn, who had programmed the Web site, to remove the password protection we had used to limit access to *NoSoftwarePatents.com* while it was under construction. At that hour, there was no risk of premature media reports.

Within a couple of hours, I got the first emails from visitors to the site. The first to congratulate me was Alex Ruoff of CEA-PME in Brussels. It seems that some of the people in our anti-software patent camp had been periodically looking up *NoSoftwarePatents.com* to find out if it was still password protected or not.

Web design is a matter of taste, and there's no accounting for taste. Everyone always wants something to be different, and thinks he or she has a better idea. However, people seemed quite pleased with the design of *NoSoftwarePatents.com*. There were hardly any complaints.

It's an amusing fact that the visual design of *NoSoftwarePatents.com* was created by Christine Geißler, who also designed Niebler's Web site. This was not a coincidence: when I saw that one, I thought it was well structured, and I hired the designer for my own site. She was a good choice.

On the morning of October 21, I sent out my press release. Traffic went up quickly as soon as the first news site ran a report. The multilingual content of the site and presence of the three well-known corporate sponsors (1&1, Red Hat and MySQL AB) were the key factors that helped make the site known quickly. *NoSoftwarePatents.com* was off to a good start.

Two Simultaneous Debates

On October 21, there were two parallel debates on software patents. One took place in the German parliament, and the other one, pretty much simultaneously, in the German patent office in Munich.

Since I had been invited by the ministry of justice to be on the panel of the Munich debate, I was unable to follow the session in the Bundestag. However, I had enough information to know which points were going to be made in Berlin: All four parliamentary groups were basically on our side, and the speakers from the coalition parties would defend the government against the criticism that would come from the opposition. Later, I read the transcript of the session, and

such a harmonious atmosphere is rarely seen in that parliament (or in any other parliament).

Our panel discussion in Munich showed far more acrimony, and the launch of my Web site the previous day was partially responsible. Most of the people in the room had already read my Web pages, and the patent professionals among them must have disliked what I said about the state of the patent system and its widespread misuse.

The panel was moderated by Dr. Jürgen Schade, the president of the German patent office. Schade had spent almost all of his professional life in the patent system. He was appointed to the patent office presidency in 2001 by the social democrats, under whose banner he previously served as a member of the Bavarian regional parliament.

When Schade introduced me, he quoted a few of my statements from the Web site, such as the claim that "a cartel of large corporations will crush smaller competitors". I could tell by the way he looked at me that he felt personally offended by some of it. Certainly, I hadn't minced words.

I was surprised to see Schade, normally a rather intellectual and erudite man, in such an emotional state. He tried to be a reasonable moderator, but his bias was more than obvious in some situations when he lost his composure. For instance, when I concluded my opening statement by saying that "We don't want patents in our field at all", he commented bitterly: "Of course, you can also give everything away!"

It was clear to me what he meant. He knew that two of my three campaign sponsors were open-source companies, and the pro-patent forces always liked to reduce our resistance movement to "the open-source scene" and ignore the fact that serious commercial interests were involved. Someone with no software business expertise (like Schade) might suffer under the common misapprehension that open source is all about software distributed free of charge. In reality, even large corporations like IBM and Hewlett-Packard view open source as a valid business strategy.

A Siemens Moderate and an EPO Careerist

Hartmut Pilch and I were the panel's patent critics, while Siemens was represented by its senior counsel Uwe Schriek. The German ministry of justice sent Raimund Lutz, and the EPO dispatched Gert Kolle, both of whom clearly

belong to the pro-patent camp. The remaining panelist, Professor Dietmar Harhoff, an economist from the University of Munich, was somewhat neutral.

Schriek said that companies like Siemens primarily obtained patents "for dealing with other large corporations", and that it's more common for smaller companies to bring patent infringement claims against Siemens than the other way round. About half of the audience booed when he said that. Many people from the IT industry were present, some of them because the Systems trade show was taking place in Munich the same week. Overall, we had an audience of 300 or more.

What Schriek said that day doesn't quite prove that software patents are more beneficial to small companies than to large ones. There are indeed statistics showing that large corporations are typically the defendants in patent suits. Large corporations are more often willing to take their chances and let the smaller one sue. Smaller ones, however, can't afford to do this when they are accused of patent infringement, and are therefore often forced to settle on the terms that the larger player dictates.

Only a very few patent disputes lead to actual litigation. So statistics that focus on the few cases that do end up in court are not representative anyway.

The most interesting quote of the evening came from the EPO's Gert Kolle. After I had explained that the Council's proposed directive would make software patentable by saying that "technical" software is patentable without actually defining the word "technical", Kolle came clean: "Software is something technical *per se*!"

In the following months, we made frequent reference to that statement. That one sentence debunked all the lies of the ministry of justice (including the ones in the opening address at the panel) and those the German conservative MEPs told their voters. They all claimed that only "technical inventions" would be patentable under the proposed legislation, and now a very high-ranking EPO official had said clearly that the EPO considers all software to be technical, and thus potentially patentable.

Kolle's statement also revealed something about himself. In the 1970s, Kolle wrote a number of articles on intellectual property protection of computer programs. Back then his position was that a line had to be drawn between technical inventions in the sense of inventions that involve the use of "controllable forces of nature" and innovations within the world of abstract computer programs. He warned that otherwise there would be no limit on

patentability. In the time since, he seems to have decided it would help his career within the patent system if he became a proponent of the broadest possible scope of patentable subject matter.

A Revealing Questionnaire

On the way out of the room where the panel session took place, I spotted Swantje Weber-Cludius from the German ministry of economic affairs. I asked her if she had heard any news about the survey her ministry had commissioned back in the summer. In mid-July, shortly after the roundtable on the island of Rügen, the ministry of economic affairs had posted on the Internet a "questionnaire on the interdependencies between interoperability, patent protection and competition". Interoperability means the collaboration between different computer programs, such as connecting a Windows desktop computer to a Linux server, or opening a word-processed document that someone else previously created with a different program than the one you're using.

Only three of the twelve pages of the questionnaire were specifically about interoperability. Most of it was generally related to the issue of software patents and how they are viewed by IT companies of all sizes. The questions were to the point: "How do you expect software patents to affect your software development activity? What consequences would it have to your business if you were to be sued over a software patent? Do you believe that you have the means to research existing software patents? What impact will software patents have on price levels in the software market?"

The survey was conducted by the University of Applied Science at Gelsenkirchen (near Dusseldorf). About ten days after the questionnaire was published, and just a few days before the submission deadline, BITKOM (the German chapter of EICTA) wrote an indignant letter to the federal government. BITKOM complained that the questionnaire was "tendentious", and in particular they disliked the use of the term "software patents". They insisted that the government out to use the term "computer-implemented inventions", which is actually more misleading.

I didn't take the BITKOM letter too seriously in the beginning, based on the incorrect assumption that the German government would want to show at least some independence from such lobbying organizations. But about a month later, at the end of August, a state secretary (the rank just below minister) named Dr.

Alfred Tacke wrote an obsequious and apologetic letter to BITKOM in which he indicated that the submitted questionnaires wouldn't be evaluated.

Around the same time, Tacke was at the center of a political scandal that made headline news in Germany. It became known that he was leaving the administration to join the EON utilities conglomerate. Tacke had previously been instrumental in securing special dispensation allowing EON to merge with one of its large competitors, overruling a decision taken by the independent German antitrust authority. Obviously this raised questions as to whether Tacke's new job in EON's management was some form of reward for his assistance.

Standing In for the Government

Tacke's discounting the survey on software patents was unreasonable. It's true that they didn't select the respondents by any statistical criteria. However, the availability of the questionnaire had been reported on by high-traffic Web sites. There was a large number of entries – more than 1,400, where only about 100 had been expected. The government simply disliked the results.

My position was that at the very least they owed a statistical evaluation of the answers to those more than 1,400 responding companies, each of which had spent, on average, two to three hours of working time. That was a loss of productivity for all those companies, and besides the economic considerations, the people involved had really hoped that the government would listen to their worries about software patents. To the people who took that dishonorable decision, such considerations didn't matter. They don't mind subverting democracy. They are cold-blooded in their disregard for the citizens whose taxes actually pay their salaries.

No one expected the government to accept the result of that survey as a binding democratic vote. However, the truth deserved to be known.

I was seething with rage. It's a sensation of helplessness when you see abominable behavior and you know that it would be a major political scandal if only the topic itself were of interest to a broader audience. In this case, I was doubtful that we could ever build enough pressure via the media to force the ministry of economic affairs to evaluate those questionnaires.

So I decided to announce that everyone who had participated in the survey could resubmit their questionnaires (almost all of which were in digital form anyway), only this time to my campaign.

Even though the credibility of this initiative was enhanced by a quote from the conservative MP Dr. Günter Krings, some people who looked at this initiative expressed skepticism. How many would actually participate in this "survey reloaded"? In the end, I was sent more than 25 percent of the original submissions. I knew that people could always doubt our results since my intention was obvious, but I still felt that this was the best way to put pressure on the government. As long as the government refused to publicize its own evaluation, my numbers would be the only evaluation out there, and would at the very least serve to raise the suspicion that the government was trying to conceal an unwanted truth. I was also interested in drawing attention to the campaign Web site, still only a week old.

By reading the questionnaires, I furthered my own understanding of how companies of various sizes feel about software patents. I was amazed to see how informed they were about the issue, and how much of an effort they had made to explain their fears in detail. That made me even angrier at those who wanted to ignore valuable input from concerned citizens.

My strategy eventually worked out. It all took longer than expected because I was so busy with other activities that I couldn't evaluate the questionnaires for some months. However, when I finally published my results, it was only a few weeks before the university entrusted with the survey provided the full evaluation that we had been demanding all along. One of the documents that the university published on the Internet indicated that they had performed the evaluation seven months before they actually released it to the public.

There was no discrepancy between my analysis of 25 percent of the submissions and the full analysis by the university. Almost all respondents predicted that software patents would adversely affect their businesses, and that software prices would go up. More than 60 percent feared that patent litigation could drive them out of business.

Poland Is Not Yet Lost

The Nice Day

On the weekend of October 30, I suddenly realized that the very next Monday would be November 1, the day on which the voting weights of the member countries were going to change in the EU Council. According to the 2003 Accession Treaty, on that day the voting weights negotiated under the Nice Treaty (named after the southern French city of Nice) would take effect. The new voting weights would affect all votes in the Council from that day forward, and there was an EU Competitiveness Council meeting coming up on November 25 and 26, a likely time for the Council to formally adopt its common position on the software patent directive.

We had discussed the potential impact of those new voting weights on several occasions in our activist circles. If the Dutch government had acted in accordance with its parliament's resolution, a Dutch abstention would have been enough by itself to require the Council to renegotiate. However, we knew that the Dutch government wasn't going to oblige, and as I looked at the overall situation, I felt that Poland was our best bet. The FFII's Jan "Miernik" Macek had some lobbying activities in progress, and I knew he had already established a line of communication with a cabinet member.

The more I analyzed the information I had, the more I was convinced that the Council no longer had a qualified majority in favor of software patents. I decided to publish an analysis on that important day, and I gathered more information and received valuable feedback from various people on the FFII's private "consilium reversal" mailing list.

Treatise on Treaties

I mentioned the Accession Treaty and the Nice Treaty, so let me tell you a little bit about EU treaties at this point. A treaty is an international contract. While treaties are negotiated by the governments of the countries involved, it's a requirement almost everywhere that a treaty must be ratified by each country's parliament or population (through a referendum) in order to take effect.

Treaties are the foundation of the EU. Everything that the EU does – such as the directives that it passes – derives its legitimacy from an EU treaty. Treaties rank

higher than any other legal documents in the EU. If a directive or an agreement between EU institutions were to contravene a treaty, the treaty would take priority.

Even the proposed EU Constitution is subject to a treaty. Formally, the French and Dutch populations didn't vote against the Constitution itself in 2005, but against ratifying the proposed "Treaty establishing a Constitution for Europe".

Treaties are often referred to by the city in which they were signed. The European Economic Community, the predecessor of the European Union we know today, was established by the Treaty of Rome in 1957. The name was shortened to "European Community" under the Treaty of Maastricht in 1992, when the broader term "European Union" was also introduced. The Maastricht Treaty went beyond purely economic cooperation between the member countries to cover policy areas such as a common foreign and security policy, and cooperation with respect to justice and home affairs.

Besides those best-known European treaties, there are some that are just amendments to existing treaties, such as the Amsterdam Treaty of 1997 and the Nice Treaty of 2001.

Other treaties became necessary to set out the conditions under which new members joined, and those are called "accession treaties". The ten countries that acceded to the EU on May 1, 2004 and the fifteen existing member countries signed the Accession Treaty of 2003. In 2005, another accession treaty was signed between the then 25 EU member states and new members Bulgaria and Romania. References in this book to "the Accession Treaty", without specifying a year, refer to the 2003 treaty that expanded the EU by ten new member states on May 1, 2004. The other accession treaties are irrelevant to the software patent story.

Non-Linear Voting Weights and Blocking Minorities

The Accession Treaty stipulated a two-tiered approach to the voting weights of the member countries. From the date of accession (May 1, 2004) on, the voting weights remained consistent with the Amsterdam Treaty for a six-month transitional period. From November 1, 2004 on, the voting weights of the 25 member countries were in line with the Nice Treaty.

In the EU Council, smaller countries traditionally get more voting weight than their population size would suggest. For instance, Germany, with 80 million

inhabitants, had ten votes under the Amsterdam Treaty, while Spain, with only half the population, had eight (rather than five). Luxembourg, with less than 500,000 inhabitants, had two votes under that treaty. So there was one Council vote for a quarter million Luxembourgers, but one per 5 million Spaniards or 8 million Germans.

A similarly stepped proportional system also determines the number of seats allotted to a country in the European Parliament. Giving disproportionate weight to smaller countries is a concession that larger countries have to make. Otherwise, EU decisions would be negotiated between the five or six largest countries, and everyone else would be stuck with the results.

The Nice Treaty's new voting weights particularly favor Spain and Poland by giving them almost the same number of votes as the four largest countries, Germany, UK, France and Italy. In addition, it establishes the requirement for a "triple majority" for decisions the Council can make by qualified majority: decisions must be supported by votes that represent at least 72 percent of the weighted votes, 62 percent of the EU's total population, and a majority of the member states (currently, that's 13 out of 25).

From the perspective of someone desiring to block a decision, there are now three chances. You need either: 28 percent (90 votes) of the weighted votes in the Council (321 in total); or the votes of countries that collectively have more than 38 percent of the EU's total population; or the votes of any 13 of the 25 member states (even if they are the 13 smallest). If any of those conditions is met, the Council cannot make a decision. In such a scenario, you have a *blocking minority*.

The biggest beneficiaries of the changes that occurred between Nice and Amsterdam are Poland and Spain: each had eight votes (80% of the number of Germany, the UK, France, or Italy), and now each has 27 (93%). Spain had voted against the proposal in May 2004, and Poland hadn't meant to support it. Provided that the Polish government would follow through by abstaining or voting against the proposal, we suddenly would have a blocking minority. The passage of time might be working in our favor.

The Council's Way of Voting

How does it work, practically speaking, if the emissaries of 25 EU member countries have to negotiate a text until there is majority support? Obviously, the

complexity of a negotiation grows exponentially with the number of parties. That's why the Council's internal rules of procedure are designed for maximum efficiency.

Before the Council formally discusses a proposal, a lot of behind-the-scenes work usually takes place in single-purpose working groups. They don't have any decision-making authority, but the people in those groups are government experts who have some idea as to what will be acceptable to the political decision-makers in their governments. The working groups meet behind closed doors, and even the European Parliament isn't really informed about what is going on inside them. That lack of transparency is problematic.

The actual voting takes place in the official meetings. The presidency of the Council determines the agenda, and often proposes specific texts that it believes will be approved. On May 18, 2004, the presidency – then Ireland – checked at the start of the meeting whether there was a qualified majority in favor of the Irish "compromise proposal", which was designed to suit the interests of Microsoft and the other companies that the Irish government was closest to. At first, the proposal fell through because enough countries raised objections to pass the minimum requirement for a blocking minority. Initially, even Germany withheld its support, as did Italy, Spain, Poland, and a few smaller countries.

With no qualified majority in place, the Council can try to modify the text in order to broaden support. That's what they did on May 18, 2004. Various countries as well as commissioner Bolkestein, made proposals for changes to the text. At some point there appeared to be a qualified majority.

In practical terms, the question that the Council presidency asks in this situation is not: "Who supports this proposal now?" Instead, it's this: "Who is still against the proposal, even with the latest changes?"

If you check whether there is a blocking minority, you count the dissenters, and if they have fewer than 90 votes, you know that there's none. Consequently, there's a qualified majority. It's easier than counting all the way to 232 to find out.

Silence and Consent

You may recall that two days after the May 18 Council meeting, the Polish minister for EU integration (who represented Poland at the meeting) declared in writing that he never meant to support the proposal. By remaining silent and

inactive, he meant to abstain, only to find out later that the minutes of the meeting listed Poland among the countries that supported the proposal.

The Council's Rules of Procedure have an annex entitled "Working Methods for an Enlarged Council". Its item 16 says this:

> Unless indicated otherwise by the Presidency, delegations shall refrain from taking the floor when in agreement with a particular proposal; in this case silence will be taken as agreement in principle.

That passage is the reason why the Polish delegate unintentionally supported the Council's proposal. He was unsure, after some minor modifications had been made to the text of the proposal, as to what his government at home would want him to do, and he thought that by saying and doing nothing, he could avoid making a mistake. Since nobody asked him what Poland's stance was, he felt even better about this. Unfortunately, that rule actually means that silence in the Council is tantamount to voting in favor of a proposal. Contrary to common sense, it's not an abstention.

That the Council works by that rule is an anachronism. The modern-day alternative would be to provide every delegation with an electronic means of indicating its latest position, so it could be established exactly who is in favor of a proposal.

During the course of history, mankind has sometimes departed from the idea that silence can constitute agreement, at least in the Western hemisphere. In ancient Rome, there was the rule of "qui tacet consentit" ("he who keeps silent consents"). In medieval times, Pope Bonifatius VIII decreed a slightly softened version of that: "qui tacet consentire videtur" ("he who keeps silent appears to consent").

In today's legal systems, however, there is a common understanding that silence means nothing. The modern theory of agreement is that someone makes an offer and someone else accepts it. That acceptance can be in one of two forms: a positive statement or an action such as paying for goods in a shop when told the price.

You don't have to say anything, but you at least have to actively do something conclusive. There's no way you could enter into a purchase agreement with passive silence. Supposing someone says this: "Unless you contradict me within

the next five minutes, you will subscribe to our newspaper for the next six months." You wouldn't have to worry about it. The law doesn't require you to do anything. You can just ignore that kind of thing.

The only exception is if you do subscribe to the newspaper and the agreement says that it will be automatically renewed for another six months unless you cancel at least 30 days before the end of the six-month period. But that's just a notice requirement under an agreement to which you have already consented, not a new agreement that is made by way of silence.

There's another aspect to the Polish representative's decision to remain silent. A number of countries had given up their resistance to the proposal after Germany accepted minuscule alterations and joined the majority. Denmark then, as we saw earlier, came under immense pressure from the Irish government and commissioner Bolkestein, and finally agreed to support the proposal. After that, everyone including the Polish representative, Dr. Jarosław Pietras, knew that with or without Poland there weren't enough remaining dissenters to constitute a blocking minority under the voting rules in force at the time.

Pietras saw no benefit in standing up and reiterating Poland's dissatisfaction with the proposal. He thought it would make no difference other than wasting everyone's time. However, the Council's formal ratification got delayed beyond October 31, 2004, and then the new voting weights and majority requirements came into force. At that point the Polish stance suddenly made all the difference in the world.

At the time, Pietras had a variety of good reasons to remain silent, which is the problem with viewing silence as consent. There may be many valid reasons for remaining silent that have nothing to do with supporting a proposal. When I discussed this with a politician, she told me that one of the first things she learned in her career was "When in doubt, keep your mouth shut".

If someone has to actively express support, be it verbally or through conclusive action, then there is no uncertainty about the intention. That's why in pretty much all of the civilized world other than the Council of the European Union silence is neutral.

Call for a Recount

In my opinion, the Polish delegate's behavior was an abstention by common sense even if it wasn't an abstention in the peculiar sense of procedural rule 16, which

makes it an expression of consent. After all, that Competitiveness Council meeting on May 18 was one of the very first EU Council meetings in which the Polish government officially participated.

On Monday, November 1, 2004, I published my analysis showing that the Council proposal had lost its qualified majority that day due to the change of voting weights. The analysis got limited media coverage. Most journalists didn't seem to take my theory too seriously. I don't blame them, because my campaign was new and had yet to build credibility. Besides, EU procedures are a complete mystery and a nightmare to journalists, especially those who focus on IT.

In an online discussion forum, people who had read about it were confused: "Why should a change of voting weights on November 1 retroactively affect a decision that was taken on May 18?"

The answer was that the formal decision hadn't been taken yet. I've previously explained the meaning of A and B items in the Council: first there's a political agreement, then the EU's linguistic services furnish translations into all of the EU's official languages, and thereafter the Council formally adopts the decision.

As I look back on this event, I realize that I took a real risk by rushing ahead with this analysis. Certainly it's legitimate for a campaigner to take controversial positions, but if you do it too often, people stop listening. I could have ended up like the doomsday prophets who predict that the end of the world will happen on a particular date. Even though I knew that the Polish government was critical of the Council's proposal, I had no assurance that anything would happen to lend credibility to my analysis. But about two weeks later, my claims were indeed vindicated by events. Let me talk first about some of the things that happened in between.

Bundestag Debate Awakened the Sleeping Giants

In early November 2004, it became all too obvious that the pro-patent lobbyists had been asleep while Marco Schulze and I were lobbying the German parliament. Only a week after the Bundestag debate on October 21, in which all four parliamentary groups supported our central demands, there was a flurry of counter-lobbying activity by our adversaries. Consequently, I had to spend some time on counter-counter-lobbying. Some of our allies asked for help. Big industry tried to exert pressure at all levels, including the party leaders, to whom they had access and we didn't.

On one of those early November days, I received an email from someone in the parliament who asked me to call him back "urgently". He told me that Dr. Michael Rogowski, president of the BDI (Bundesverband der deutschen Industrie), the leading lobbying entity of Germany's industrial giants, had written a letter to chancellor Schröder and the chairs of the major political parties as well as key parliamentarians.

Rogowski's letter was three pages long, and in relatively small print. It expressed serious concerns over the future position of the German government with respect to software patents. I thought it went into far too much technical and legalistic detail considering that the head of government would never micromanage the decision-making process on a highly specialized issue like this. Even though Schröder and Rogowski had previously met on a number of occasions, I doubt the chancellor did much more with the letter than pass it on to Zypries, the minister of justice.

Still we had to take the effort very seriously. One political aide said: "People like Rogowski have better access to our country's political leaders than even we do." I was asked to ensure that other credible entities would follow up with letters of their own to Germany's political and parliamentary leaders, supporting the positions taken by the Bundestag groups in the October 21 debate. Fortunately, I managed to orchestrate that.

Obviously, our adversaries did more than write letters. They made phone call after phone call setting up appointments with politicians and their aides, as well as with organizations that they thought might ally with them. I know from one such organization that one day, a Siemens lobbyist called once an hour insisting on setting up a meeting with the director general. He was eventually offered a short meeting with a staffer who told him they weren't going to work with Siemens anyway.

It may be that the bosses and sponsors of the lobbyists in the other camp were really upset when they saw the recordings and transcripts of a Bundestag debate in which all parliamentary groups spoke out against software patents. They could hardly consider total failure as an adequate return on their investment in lobbying. The BDI, for example, has an office in Berlin with hundreds of full-time employees. Large members like Siemens probably pay many millions of euros every year in fees to sustain that size of operation, and for that they expect some more attention than finding out about a political development only after it's probably too late.

At that stage, our opponents still hoped to water down the joint motion that the four parliamentary groups were negotiating, or to prevent an all-group agreement by getting one or two parties to defect. Even before the October 21 Bundestag debate took place, the four groups had already talked informally and realized that their positions were so similar that they could maximize the political weight of the Bundestag by agreeing a joint position. That was in our interest, but also opened a window of opportunity for our opponents.

In November 2004 some of the same politicians that Marco and I had visited two months earlier told us about some of the activities of our opponents. Besides the BDI letter, we heard of lobbying efforts by BITKOM (the German arm of EICTA), Siemens, Microsoft, an association of patent attorneys, a leading association of German engineers, and the US embassy in Berlin. The involvement of American diplomats on behalf of Microsoft and other US corporations was not much of a surprise: at the panel discussion in Munich two weeks before, state secretary Geiger had welcomed a variety of prominent people in the audience, among them a consul general of the United States.

Their belated lobbying onslaught may have been counterproductive. A political aide told me over the phone: "You know, until we got all those phone calls and visits, it hadn't been clear to me exactly how important this issue is. Of course, we knew that it was important enough that we had to formulate a position, but this here is just crazy and shows how much is at stake. I haven't seen anything quite like it before. We've already had to tell those pro-patent lobbyists that they're too late. Our group and all others have already decided on a position. I don't think we'd have done anything differently even if they had contacted us earlier, but we'd probably have taken more time to listen to them. This isn't the time for them to besiege us like that. They've got to get up earlier next time."

When I heard that, I was even happier about what we had achieved in the German parliament, and about the fact that we had played our cards close to our chest. The analogy of the inferior chess player was right, and if we had overrated our adversaries, it would have been to our disadvantage.

I didn't take personally the fact that they were still attempting to sway the German parliament. In politics, people always try to take away what you have, even if a decision looks final. We were fighting against the EU Council's decision, they were desperately lobbying the Bundestag. It was nice to see the other guys in the role of the challenger for a change.

Working With the Union of Labor

On November 9 and 10, 2004, the FFII held a second conference in Brussels in the same year. Preparations had been made many months before. When the conference was scheduled, most of us thought that by then the Council would already have adopted its common position. But when we assembled in Brussels, it had still not happened.

The day before the conference, I went to the European Parliament to meet Katarzyna (Kasia) Matuszewska, a Polish MEP assistant. Kasia and I had spoken on the phone two days before. She was in close contact with the FFII's Jan "Miernik" Macek as well as Władysław (Władek) Majewski, the president of the Polish chapter of the Internet Society (ISOC). ISOC is a network of more than 100 organizations "addressing issues that confront the future of the Internet", as the ISOC's own Web site states.

Kasia met me at the accreditations center of the European Parliament, where she helped me obtain a weekly pass. There are different ways for a lobbyist to get access to the parliament. The standard procedure for a one-time visitor is to be picked up at the reception desk by an MEP assistant, and given a pass valid only for that day. A weekly pass, which is what I had most of the time, saves time because one doesn't have to line up, fill out a form and present a passport for every single visit to the parliament. But you must still be met by an MEP assistant every time you enter the building. Full-time lobbyists based in Brussels can also apply for yearly accreditation.

Kasia and I usually spoke in German, which she had studied for many years and in which she was extremely fluent. However, she frequently used English words for political terms, since the primary working language in the European Parliament is English. Sometimes we switched completely to English for a few minutes.

Kasia had long been the international relations secretary of her party, Unia Pracy. Unia Pracy means "Union of Labor". It is a social democratic party that was formed in Poland in the early 1990s and is a member party of the Party of European Socialists (PES). Earlier in 2004, Kasia had become an assistant to Professor Adam Gierek MEP, the son of former Polish prime minister Edward Gierek. The elder Gierek led Poland when its democratization was beginning. He was the one to officially accept the creation of Lech Wałęsa's independent labor union Solidarność, and to grant workers the right to strike.

At the time, one of the Unia Pracy leaders, Izabela Jaruga-Nowacka, was a vice president in the Polish government. Initially, our plan was to ask Jaruga-Nowacka to endorse a statement criticizing the EU Council's proposed directive. We also talked about the possibility of contacting potential allies in other European countries through Kasia's contact network. Ultimately, we put those plans on hold because our activists reported that we had an opportunity "for something even bigger".

Unlike the FFII activists and me, Kasia didn't have a technical background to make her interested in the fight against software patents. Nonetheless, she had a very good grasp of the consequences that software patents would have to the economy and society. She was the perfect example of a person focused on the whats of this issue, not on its technical whys. More importantly, she brought an action-oriented mentality and focus to the table. I still remember her saying: "The Competitiveness Council will meet again in about two weeks. Time is not on our side. We have to get people to move their asses!"

I met Jan "Miernik" Macek and Władek Majewski in person for the first time in the lobby of the parliament – they arrived just as I was leaving. That week was an important time for many of us to get together and talk over possible next steps.

A week earlier, Kasia, Miernik and Władek had organized a press conference to draw attention to the software patent issue. I heard that there was even a public performance demonstrating how the May 18 Council meeting had led to the "political agreement", and the immense pressure that commissioner Bolkestein and the Irish presidency had applied to dissenters.

Rapporteurs and Shadows

After my visit to the parliament, I went to the CEA-PME office to meet several key FFII players, including Hartmut Pilch and Erik Josefsson. That year, the FFII itself became a member association of CEA-PME.

Erik called me a little later to ask urgently for key facts on my background to forward to Piia-Noora Kauppi, a Finnish conservative MEP. She was the *shadow rapporteur* on the software patent directive for her group, the European People's Party-European Democrats (EPP-ED), on the software patent directive. Piia-Noora wanted to organize, at unusually short notice, a discussion in the European Parliament, similar to an unofficial hearing. It was set to take place the following

day around noon, and she gave Erik and me an appointment to see her at 7:45 AM, which is almost an ungodly hour by European Parliament standards.

I just said that she was her group's "shadow rapporteur" on the software patent dossier. "Shadow rapporteur" is a term which is commonly used in the European Parliament, but not in many other parliaments, and it's worth explaining.

In the German Bundestag, each parliamentary group appoints a rapporteur for each dossier according to the principle of the division of labor. Basically, all these rapporteurs are project managers, and none of them ranks higher than the others.

In the European Parliament, there is only one official rapporteur per dossier. He is a full or substitute member of the committee in charge, which appoints him. There is an understanding that members of all political groups should have the opportunity to serve as a rapporteur, so the posts are shared out in proportion to the sizes of the different groups.

In the new legislative term that began earlier that year, former French prime minister Michel Rocard, MEP from the social democratic PES group, was appointed as the rapporteur for the software patent directive. He took over from Arlene McCarthy MEP, a British member of the same political group. The even larger EPP-ED group obviously wouldn't let a left-winger handle an important piece of legislation without getting involved as well, and so appointed Piia-Noora as a shadow rapporteur. The other groups also appointed shadow rapporteurs.

The term "shadow" may not convey that the shadow rapporteur fills an essential role. Since Piia-Noora is a member of a significantly larger group than that of Rocard, she was in a way even more important to the opinion-forming process inside the parliament. However, an official rapporteur of the European Parliament has procedural rights that no single rapporteur in a parliament like the German Bundestag would have, almost serving as committee co-chairman for the dossier.

Parliamentary Microcosms

Sometimes the same concept becomes more understandable if it's explained from an additional angle. A committee is like a mini-parliament, and if the rapporteurs from all groups hold a meeting, the conference is like a mini-committee, or, one might say, it's a mini-mini-parliament.

Some national parliaments are bicameral, that is, made up of two chambers. The US Congress consists of the Senate and the House of Representatives, the British Parliament has the House of Lords and the House of Commons, and the German legislature is made up of the Bundestag and the Bundesrat. In some cases, such as the US Congress, both chambers have approximately equal weight in the legislative process. In others, the nominally higher-ranking chamber may actually have less power. Most of British politics is really decided in the House of Commons, and the House of Lords is mostly a legacy.

The size of a parliament varies from country to country, and from time to time. As a rule of thumb, parliaments typically have hundreds of members. The European Parliament currently has 732 seats. If you include observers (that is, MEPs without voting rights, from countries likely to join), the number may even be closer to 800. The parliaments of larger countries usually have between 500 and 700 MPs. In smaller countries, such as Austria, the number is often between 100 and 200.

For a long time, I thought that all those parliaments should be reduced in size. After all, they represent a significant cost to taxpayers. When I became a political activist, I realized how important it was that the number of constituents per parliamentarian stays within reasonable bounds. Otherwise members of parliament will have little time available for citizens and will therefore meet with only a few professional lobbyists. It's also a question of how well they can understand complex issues, and the software patent topic was something that really took people time to understand.

In the plenary, each political group has a chair (some groups, such as the Greens/EFA, even have two co-chairs). That structure is mirrored in the committees, which have delegations from the political groups. The size of each such delegation is proportional to the size of the group. Each delegation has a head, called a "coordinator" in the European Parliament. His function is similar to that of a group chairperson, but only inside that committee. Similarly, the committee chairperson is like the president of that mini-parliament.

Each of the three "zoom levels" – plenary, committee, rapporteurs – has its upside and its downside. For democratic purposes, decisions must be taken by the plenary, even if most of those who cast a vote just follow their groups' specialists. At least they *can* form their own opinion. The committee gives each person more speaking time and encourages more of a constructive discussion between

members who are reasonably informed. But even committee members generally don't know as much about a dossier as the rapporteurs.

The First-Reading Heroine

Getting back to the meeting with an actual shadow rapporteur: I was unprepared for the early-morning meeting with Finnish conservative MEP Piia-Noora Kauppi. Usually I did some Internet research on politicians before meeting them so I would have some idea of their background, or I asked around among people in my contact network who might know them. In this case, the meeting had been set up on short notice, and I didn't have a portable computer with me, so I was unable to look her up on the Internet.

Everything I had heard about Piia-Noora up to that point was overwhelmingly positive. Hearsay had it that we owed to her in no small part the positive outcome of the European Parliament's first reading on the software patent directive, in which the parliament passed a long list of meaningful amendments that we liked. Her group's then shadow rapporteur, Wuermeling, acted as if he was a puppet of Siemens and other pro-patent forces, and Piia-Noora led a large group of dissidents within the EPP-ED group.

Since she wasn't officially responsible for the software patent directive back then, she had to gather signatures within her group in order to introduce her amendments to the legislative proposal. The European Parliament's Rules of Procedure allow MEPs to file amendments without the support of a parliamentary group, provided that a minimum number of MEPs signs. At the time, that number was 32. The signatories don't have to be members of the same parliamentary group, but such initiatives are more likely to be politically accepted if that is the case.

So I basically knew three things about Piia-Noora. One, she wanted to exclude computer programs from the scope of patentability. Two, she had the courage to stand up against the official line of her parliamentary group. And three, she had been an MEP in the previous legislative term. All of that combined led me to believe that she was at least 40 years old. When we entered her office, I discovered that she was around 30, and in fact younger than I. If her assistant hadn't opened the door, I would have thought that the young woman at the desk was an assistant herself based on her age.

Piia-Noora just wanted to find out from Erik and me if there were any new developments concerning the software patent directive. We gave her an update, and I told her about our progress with the conservatives in the German Bundestag.

Because of Piia-Noora's success at the first reading, her group appointed her as the EPP-ED's shadow rapporteur for the second reading. Since there had been elections between the two readings, that was a little less embarrassing to the original shadow rapporteur Wuermeling than it might have been, but a change of rapporteur or shadow rapporteur between two readings is still not the norm.

The same thing had happened to Arlene McCarthy, a UK Labour MEP who was the parliament's rapporteur in the first reading and who was replaced by Michel Rocard, a former prime minister of France. Rocard had been involved with the software patent directive at the first reading through his service on CULT (the culture and technology committee). While CULT only had an advisory role at the first reading, some of Rocard's proposed amendments were strongly supported by the parliament plenary.

We'll probably never know why even our opponents in the parliament had readily accepted the appointments of Rocard and Piia-Noora as, respectively, parliamentary rapporteur and EPP-ED shadow rapporteur. Some theorized that this was part of the pro-patent forces' strategy. On the one hand, their official roles better enabled Rocard and Piia-Noora to influence the debate. On the other hand, now they would have to play a reasonably neutral role. That became clear in our conversation with Piia-Noora although she never said so explicitly.

The Panel at the Park Hotel

After the conversation with Piia-Noora, I ran back to the Park Hotel, where the first day of the FFII conference was taking place. I was a few minutes late for the first panel in the morning, and I was due to speak on it. I can't remember any other case when I didn't arrive in time for a panel speech, but I knew that most people in the audience would accept the excuse that I'd had an appointment with an important MEP on short notice.

The content of the panel presentations at this conference was very well coordinated. It paid off that the FFII had worked closely with its adviser Professor Brian Kahin on the planning, and that Brian also chaired a couple of panels. He was formerly a senior policy analyst at the White House Office of

Science and Technology Policy under President Clinton, and at the time of the FFII conference was a visiting professor at the University of Michigan. Having watched the seemingly never-ending expansion of American patent law into new fields, Brian was well aware of the problems that patents can cause in certain areas such as computer software.

We had another American academic on the panel: James Bessen, a lecturer at Boston University and former high-tech entrepreneur. Through his non-profit project Research on Innovation, Jim takes a scientific look at factors that spur innovation or stand in its way. Together with Robert M. Hunt, a senior economist at the Federal Reserve Bank of Philadelphia, Jim had written a notable study that addressed some common myths concerning patents and their effect on innovation. He presented some of his key findings on our panel.

The proponents of patentability always point to statistics showing that countries with the highest number of patents in a particular field tend also to be home to the global market leaders in that same field. Jim confirmed this correlation, but at the same time he stressed that correlation doesn't necessarily mean causation. Pro-patent lobbyists make it sound as though the existence of many patents were the reason for the presence of market leaders in a given economy. However, on closer examination it's the opposite: market-leading players they have an interest in protecting their market position by means of patents, which are unfavorable to late entrants and come in handy if your primary desire is to stake your claim.

I've previously dwelled quite a bit on the progressive evolution of Microsoft's take on software patents. The dominance of American companies in the software industry and the high number of software patents issued by the USPTO are a typical example of the causation that the pro-patent lobbyists deny. Microsoft and other large software companies were able to grow to the size they are today because of the absence of software patents at the time when they entered the market. Today they want to prevent others (both commercial entities and open-source software projects) from entering the market under the same conditions, so they see software patents as a way to erect barriers to entry.

Therefore, it would be totally false to interpret the correlation between the high numbers of software patents and the high global market share of US companies in the software business as a sign that Europe's software industry would benefit from software patentability. Since patents are granted to anyone regardless of the inventor's geographical location, they always favor the leaders of the past and

further fortify the status quo, which from a European perspective can't possibly be desirable.

Jim and his fellow researchers had used a variety of methods to determine what really drives the appetite of companies for patents, not just in the field of software. The net result of his analysis was that only 15 percent of companies' overall strategic purpose in obtaining patents is related to protecting innovation. The prevalent incentives are the aforementioned desire to cement a market position, as well as amass a patent portfolio in order to strike cross-licensing agreements with other patent holders.

For a free-market economy to work, it's essential that leaders strive to defend their market share against new entrants. However, society and the economy as a whole only benefit if being able to defend one's market share is a function of continuing to innovate. If, from the perspective of a very large company, patents are a less expensive way of creating obstacles for competitors than incrementally investing in innovation, it's inevitable that companies will reduce their spending on product development. In the US software industry, this is exactly what has occurred in recent years.

The Bessen-Hunt study gives strong indications that companies in some fields, such as software, have viewed patents as an alternative to, rather than a reason for, real innovation. A lot of money that could otherwise be spent on real research and development instead goes into applications, licensing, and litigation. That doesn't mean to say that all patents are necessarily anti-innovation devices. But on the bottom line, the negative implications far outweigh the positive effects in our field.

The Dutch Delegate

Activists probably made up the majority of the conference participants, so through my speech on the panel I mostly tried to galvanize our movement into taking more action to prevent the EU Council from making a decision. For me, playing such a role was a new experience, since I had only become involved at the previous FFII conference, less than seven months before.

The audience also included some journalists (like Simon Taylor from the IDG News Service), company executives (such as ILOG's chief technology officer Jean-François Abramatic), and political aides. Almost all of the speakers stayed for the entire conference, even such high-profile individuals as Bruce Perens (the

author of the Open Source Definition) and Simon Phipps (open-source evangelist for Sun Microsystems).

In the foyer outside the room where the panel sessions were held, many interesting conversations took place among activists, as well as between activists and other attendees. Interestingly, it turned out that Roland Driece, an official from the Dutch ministry of economic affairs, stopped by the conference after his meeting with the linguists working on the proposed directive and the EU Council's software patent working group.

Driece listened to everyone politely, and answered questions without disclosing any details of the internal proceedings of the Council or the Dutch government. I asked him about the formal adoption of the Council's common position in the light of the changed voting weights. He said: "Yes, I've read your analysis, but your theory is based on the assumption that Poland wouldn't support the proposal."

I asked him whether the positions of the member states would come into play one more time: "Is there going to be another check on whether the qualified majority is in place, or is the Council simply going to put the proposal onto the agenda of a meeting as an A item that goes through unless someone stands up?" Driece said that this would be up to COREPER, and to his knowledge, COREPER always ascertains whether a qualified majority exists before finalizing the agenda for a Council meeting.

COREPER is one of those special EU terms. It's an acronym for the French term "Comité des Représentants Permanents" (Committee of Permanent Representatives). The permanent representatives are the ambassadors of the member states to the EU: diplomats who do most of the work. COREPER is the gathering of those ambassadors, and its purpose is to handle as many decisions and practical issues as possible in order to minimize the number of issues that the ministers or state secretaries (who formally represent their countries in the meetings of the Council) have to deal with.

Some of us wanted Driece to tell us whether the Council would formally adopt its common position at the meeting forthcoming in about two weeks. Driece didn't give a specific answer. He did say that the linguistic issues appeared to have been resolved, so the political decision should happen shortly, but how soon he couldn't or wouldn't say.

One of the most remarkable moments in all of this was when Jan "Miernik" Macek showed Driece and others that he had the latest version of the text of the directive on his portable computer, and asked Driece to explain the meanings of some symbols and abbreviations relating to changes made by the linguists. I found it incredible. There was this Polish activist, who looked like he was 19 or 20 even though he was in his mid-20s, and he had access to an internal document of the EU Council, the most important decision-making body of the European Union. Driece acted as if this was the most normal thing in the world, but to me it was just amazing, and I bet that even Driece wouldn't have expected someone in our movement to be privileged enough to receive such internal documents.

Miernik amazed me on more occasions than this. He spent a number of months fighting against the proposed software patent directive without getting paid: he asked only that the FFII cover his most basic living expenses. He always figured out the least expensive way to travel from one place to another, often taking overnight trains at hugely discounted rates. And I heard stories that he sometimes slept in the office of a friendly MEP and below a desk in the CEA-PME office. There was no personal inconvenience that he wasn't prepared to accept in order to pursue his mission.

At some point I asked him to what character trait or habit he owed his nickname. In 1995, he participated in a summer camp for young people from Poland with a particular interest in science. Some Russians sold him a Geiger-Mueller counter on the street, and he used the device to measure radioactivity. "Miernik" means "measurer": the others saw him running around with his measuring device all the time. He didn't identify any uranium. Miernik just collected the data to draw a map of farmers in the area who used potassium fertilizer. I could easily imagine him doing so with meticulous precision because I saw how well organized he was when we worked together. Miernik kept track of every meeting and every telephone conversation on his portable computer in the kind of details that only very few professional lobbyists do.

High Noon in the Parliament

The discussion that Piia-Noora Kauppi had organized took place in the European Parliament at lunchtime. She had reserved a meeting room that is primarily used by the EPP-ED group. Invitations had gone out to the offices of all MEPs, but most of those who actually came were from the EPP-ED.

There were about ten chairs on each side of the table, and by the time the discussion started, there were more than twice as many people as chairs. The level of interest in this discussion exceeded our expectations. This was a meeting on same-day notice, and the software patent directive wasn't formally on the agenda of the parliament at the time. The ball was in the Council's court, yet a number of people in the European Parliament already wanted to seize this opportunity to further their knowledge or to contribute to the debate.

Piia-Noora moderated the discussion. She took the seat right in the middle of the "speakers' side" of the table. To her left were some pro-patent lobbyists: Mark MacGann, the director-general of EICTA, and Nokia's Tim Frain and Ann-Sofie Rönnlund. On her other side, I was sitting with Erik Josefsson and Dr. David Martin of M-CAM, an American company that advises clients all over the world on financial risks related to intellectual property rights.

We started with an introductory round in which everyone outlined his position on the issue. Since it's such a complex matter, there's no way to deliver a full explanation of everything that people need to know in just a few minutes. Rather than continually recycling one particular way of addressing the topic, I always tried to think about the level of knowledge an audience would have and then decide which angle to take. In this case, the important people to convince were those members of the EPP-ED group who might still be undecided. My feeling was that conservative politicians and their aides should hear an absolutely business-oriented view, and I also thought that this was the best way for me to complement the points that Erik was going to make on behalf of the FFII.

Therefore I explained that software developers are protected "by copyright in conjunction with other factors". Copyright law prevents someone else from stealing one's program code. What copyright, unlike patents, does allow is looking at the ideas behind a program and implementing them independently. However, it takes time for that process to lead to a functional product.

Unless your idea is so simple that it doesn't deserve much protection anyway, an imitator will need a year or two, or even more, before he can release his own product. In the meantime you, the original innovator, can generate revenues, acquire customers, build brand recognition, and pursue other strategies to turn your technological lead into sustainable economic value. And while you're doing that and others are catching up with you, you can already be at work on the next generation of your technology, "turning this game into the race between the

Tortoise and the Hare". At some point you might sell the business that you have built.

It really is oversimplification when the proponents of software patentability say that copyright only protects the particular computer program, but not the ideas it implements. Their perspective is static, while the actual market is dynamic. Obviously, a patent is perfect if all you want to do is sit on a certain right for up to twenty years. But the necessity for an innovator to convert his intellectual creation into lasting commercial value is a productive process that is economically desirable.

After all, someone has to put out a functional product and make real sales. We can't all live by acquiring patents and litigating. A parasitic business model only works for a few, not for the general public.

The First Casualty of War Is Truth

The pro-patent lobbyists from EICTA and Nokia pursued their usual strategy of denying the problem's existence. They claimed that they didn't want patents on pure software, and that the EU Council's proposed directive would not allow pure software patents.

Nokia's Tim Frain told the story of computer-implemented inventions that he said weren't software patents. He really looks like a fellow you would buy a used car from: timid facial expression and soft-spoken voice. Unfortunately, this particular used car wouldn't even start. What he said was completely unreasonable. A little later in the debate, Dr. David Martin confronted Frain with the fact that Nokia owns thousands of software patents already. David knew what he was talking about: his firm has a large database of all patents worldwide, and he can instantly perform that sort of statistical analysis.

Mark MacGann was even more aggressive than Frain in voicing the same position on the effect of the proposed legislation. What he didn't say, obviously, is that his own organization has as members some major software companies like Microsoft and SAP, and these clearly demanded this legislation in order to ensure they would have access to patents for themselves.

Then he came up with another inaccurate claim: "Usually we have an internal debate over policy issues, but on this one we have 100 percent consensus." He remained silent when I later mentioned EICTA member organizations in two European countries as well as Sun Microsystems, all of which had officially

disassociated themselves from EICTA's official position on software patents. I also contested his claim that EICTA represents "the industry".

During the course of that discussion, MacGann had some more goodies to offer. For instance, he complained that our movement was "lobbying some of the new member states to change their position in the Council, which would be a terrible problem for democracy". The fact that we were lobbying against a formal adoption of the Council's proposal in some member states was one of the few things he said in that debate that was actually correct. If there had been more time, I would have asked him to elaborate on why it was undemocratic.

The Council's Rules of Procedure give countries the right to change their position at any time until the formal decision is taken. In Poland's case, it was pretty clear that the country's government had not meant to support the Council's proposal, even though its failure toward the end to reiterate its abstention might have been misinterpreted that way. Preventing the formal adoption of an EU Council decision might have all sorts of effects, and one might take the position that such a change of mind would be undesirable for reasons of efficiency, but it's definitely not an assault on democracy. On the contrary, by getting national parliaments involved, we were actually trying to add a highly democratic element to the decision-making process.

At any rate, it was good to see how nervous MacGann had become about that Council decision. If he had considered our lobbying in various member countries to be totally futile, he probably wouldn't have bothered making a fuss about it.

Despite everything, I do have to give MacGann credit for his impeccable manners. He even made a conciliatory remark to Erik Josefsson after the official debate was over. However, if I had a choice between truthfulness and courtesy, I'd always pick the first.

Heated Exchange With Harbour

In the early part of the discussion, one of the people on the non-speaker side of the table gave Piia-Noora a sign that he wanted to intervene. When she addressed him as "Malcolm", I knew that he was Macolm Harbour, the British conservative MEP whose position paper on software patents had previously been harshly criticized by the FFII's Hartmut Pilch. I remembered the mention of him at the meeting with Nirj Deva MEP back in April, the first lobbying conversation in which I ever took part. I had also read various comments about Harbour on the

FFII's Web site in the meantime, so I knew that this politician was a staunch supporter of big-industry interests in the parliament.

In other words, I was finally about to confront one of the most influential of all pro-patent MEPs. He immediately addressed me, something which happened to me at almost every software patent discussion I participated in because I often made points that forced our adversaries to come out and challenge me. Harbour claimed that everything I had said up to that point was irrelevant since, he said, the legislative proposal wasn't about software patents.

The ensuing discussion between the two of us was a semi-heated back and forth. He pretended to be outraged over our "unreasonable" interpretation of the legislative proposal. I had no intention of letting him win this debate, so my response was equally aggressive, and that made the situation escalate. At some point, Piia-Noora had to intervene like a referee who steps in between two fighters who aren't obeying the rules. If she hadn't, the rest of the discussion could easily have become a dialogue between Harbour and me. It might have been entertaining and informative for those in the room who were still shaping their opinions, but a two-man debate wasn't the idea behind this unofficial hearing.

Harbour was extremely rude. He interrupted others all the time. He misquoted. Hardly anything he said was true, but he made it sound like he was the sole defender of truth in the room. And he pulled out the text of the misleading legislative proposal and read out sentences to buttress his claims that the proposed directive didn't allow software patents. Another politician who witnessed the discussion said that it was very bad form since the legislative text should only be discussed when everyone has a copy to consult.

Citing the European Patent Office, the European Commission and the EU Council as sources for the claim that the directive excluded software from patentability, Harbour accused me of propagating a "conspiracy theory" by saying that the aforementioned institutions weren't telling the truth.

In my reply, I compared the collective behavior of those institutions to a World Cup match between Austria and Germany in 1982, which went down in soccer history as a disgrace for the sport: "With a score of 1-0 in favor of Germany, both countries knew they had clinched a berth in the next round, so once that score had been reached, neither side tried to score a goal. It's not as if they had fixed the game beforehand. They just found it advantageous independently of each other.

It's the same with the proponents of software patentability: they don't need an informal agreement. They all just believe it serves their purpose to misrepresent the effect that the proposed law would have, in order to suppress any debate over the issue. That way, the discussion stays on the legalistic level of where to draw the line between software and technical inventions, something that few people can understand because it's such a confusing and highly specialized thing."

The whole point of the discussion was to persuade those in the audience who didn't know whom to trust, so I picked the simplest way of showing that Harbour, Nokia, and EICTA wrongly claimed that the directive wouldn't allow software patents *per se*: "There's really no reasonable basis on which one can say so. Microsoft and SAP have already said in the press and at official events that they want that particular legislation so they can take out patents on their stuff. So what is this about, if it's not pure software patents?"

Harbour raised his voice and called this "absurd", and I really believed that he was provoked by realizing that the somewhat neutral people in the audience must have understood the simple logic of what I said. Even after we had left the meeting room, Harbour still went on attacking me verbally in the corridor. There were only five or six bystanders, but he wouldn't stop. He insisted that he and others "could still have perfectly legitimate reasons" for interpreting the proposed legislative text the way they did, regardless of whatever Microsoft and SAP may say. I agreed that he's entitled to his own opinion, but not that the reasons were "perfectly legitimate".

The Defector From the Cause

The next day, the FFII conference continued in the European Parliament. According to arrangements made only about a week earlier, the participants in the FFII event were also invited to a conference of the European Internet Foundation (EIF) at the Marriott Renaissance hotel, a stone's throw from the parliament.

The EIF says its mission is "to help shape public policies responsive to the unique potential and character of Europe's Internet revolution". What the EIF calls an "open and inclusive dialogue" mostly means to facilitate meetings between politicians and company representatives (usually lobbyists, sometimes senior executives). They insist that the EIF "does not itself take positions on specific issues".

While companies contribute all the money that finances the EIF, MEPs have most of the decision-making power. From the perspective of the business members, the return on their investment is getting additional access to politicians, and bolstering their relationships with the MEPs who regularly participate in EIF meetings.

The EIF has political members from a variety of political parties, and offers a reduced membership fee of €2,000 per year (instead of the standard €10,000) to smaller companies. However, small and medium-sized companies don't generally have representation in Brussels, nor can they easily afford to send representatives to Brussels every few weeks in order to really benefit from EIF membership. Consequently, almost all of the EIF's business members are large multinational corporations, and its associate members include many lobbying organizations that are controlled by big industry.

Also, contact networks like the EIF often enable corporations to grant "special benefits" to politicians, such as paid-for luxury trips to the United States to visit the headquarters of a well-known software company.

The most active MEPs in the EIF are, not surprisingly, primarily the ones who are most interested in close ties and frequent interactions with big-industry lobbyists. That's why Malcolm Harbour wouldn't miss an EIF event for anything in the world.

On the second day of the FFII conference, I finally got to know the EIF's chairwoman, German social democrat MEP Erika Mann. I was in conversation with Hartmut Pilch and Oliver Lorenz outside the European Parliament canteen when Erika Mann walked by. We had a brief chat with her.

Hartmut mentioned that he and Mann go back a long way. Several years earlier, Mann had been one of the FFII's political allies and helped oppose the legalization of software patents in Europe. She even introduced some good proposals for amendments to the software patent directive during the first reading in 2003, but when push came to shove in the weeks before the vote, her position changed fundamentally. Hartmut said to her that she was "a Paul who turned into a Saul", a reversal of a biblical metaphor. It implies that someone has defected from the good side and joined the forces of evil.

Mann didn't exactly deny that she had switched sides. She said that she had simply come to realize that software patents "are needed because there's demand for them", and claimed that we couldn't prevent the software patent directive

from taking effect. We proved much later that everyone was wrong about the latter, and the former isn't an acceptable approach to policy-making. Obviously, if governments hand out monopolies, there are likely to be some who want them. Moreover, the word "demand" makes sense in a free market, but not with respect to regulation.

The Merger of the Two Conferences

Originally, Erika Mann and the EIF scheduled their conference on software patents opposite the FFII conference. They announced their event for the evening of November 10, 2004, after it had already been announced as the second day of the FFII conference.

The EIF wanted to make it even harder for the FFII to attract MEPs to its conference in the parliament. The FFII conference was essentially viewed as a Greens/EFA event, which kept some people from other groups from attending. The EIF, however, is a multi-partisan initiative, and therefore they knew that they could get more MEPs to attend their conference in the Marriott Renaissance hotel, which is less than a five-minute walk from the parliament.

While the FFII conference was naturally focused on the negative implications of software patents, Mann saw to it that all of the EIF's panelists were in favor of them: "There are companies that need those patents, and they should also be listened to". However, over time the organizers seemed to realize that there should at least be some semblance of the "open and inclusive" approach that is part of the EIF's mission statement. First they offered me the opportunity to give a five-minute speech after the panel, and then later they agreed that the FFII should end its conference a bit earlier that day and invite its audience to the EIF conference.

The hand-picked panel was as lopsided as expected. Almost all of the small and medium-sized companies that favor software patents fall into one of two categories, and both types were represented on that panel.

The first group is made up of companies that have highly specialized products which fulfill only one or two functions, such as processing payments, so that there is a one-to-one relationship between product and patent. If you own the patent on that particular function, you're all set and don't need anyone else's patents. Pharmaceuticals and chemicals work that way, and those are areas where the benefits of the patent system seem to outweigh the drawbacks.

However, the interests of those who build products of extremely limited functionality shouldn't dictate the practices of a market in which multifunctional products are more important. In the field of software, extremely limited products corresponding to just one or two patents serve a purpose as components of far larger programs, but they aren't really useful on their own. It would be impracticable for software authors to obtain a license for every little component that anyone can easily develop.

That second group includes companies spun off from universities and research institutes, especially those that are owned by a single professor or a group of academics. As they try to commercialize the results of their scientific research, they face a problem: in the scientific world, people tend to publish everything, a practice that may sometimes run counter to the strategies of a commercial software vendor. In order to get the best of both worlds for themselves, they want access to patents.

It's just not reasonable. These individuals really want to get paid twice for the same work. If they are on a university payroll, which in most cases means they're paid with our tax money, it's only fair that the public should own whatever comes out of that work. If they want to trade the job security of a public servant for the opportunities open to an entrepreneur, then they should take that option, but it's unreasonable for them to ask for everything. "No risk, no reward" is a principle that should apply to everyone.

Besides representatives of those two types of companies, the panel also included a French ministry official. He explained the current legal situation based on Article 52 of the European Patent Convention, and he emphatically repeated those two words "as such", which the patent system uses as an excuse to bend and break the applicable law every day by claiming that a program that runs on a computer is not a "computer program as such". A public servant who highlights the words "as such" in this context is likely to be one of the ones who have been neglecting their duties as supervisors of the national patent systems as well as the EPO. Some of those public servants simply lacked the competence and/or courage to take action and rein in a system that serves itself instead of the public interest, while others encouraged or proactively contributed to that bending of the law.

The Tribes in the Jungle

To make room for the FFII's delegation to the EIF conference, the hotel staff brought in a few dozen more chairs and took a piece out of the wooden partition between two rooms, but left most of the wall still standing. It served as a symbol of the division between the two political camps. I don't want to attribute too much to the room's layout, but one doesn't have to believe in Feng Shui to agree that the setting has a psychological effect on such get-togethers. The atmosphere was confrontational.

After the panelists had finished, there was time for several more speeches, which they called "interventions". Erik Nooteboom, head of the Industrial Property Division of the EU Commission's Directorate-General Internal Market, likened the patent universe to a jungle. He said that some wanted to cut a few trees while others (by which he meant us) wanted to cut all of them. That was a gross exaggeration since we are only against software patents, not against patents that constitute an advance in a field of an applied natural science.

Nooteboom said that in the past, there had only been two tribes in that jungle: those who work in the patent offices (as well as the ministries that supervise the patent offices), and the patent lawyers (independents as well as corporate employees). The two tribes lived together and worked things out among themselves. With the debate over the software patent directive, a third tribe had come into play. That was a reference to us. While he tried to describe that development non-judgmentally, we know that patent professionals like him actually lament and resent the fact that a wider audience has taken an interest in what they do. At the Munich panel a few weeks earlier, the EPO's Gert Kolle had wallowed in memories of the good old days. However, someone had to start to defend the public interest against that profession's special interests.

The next speaker was Henne Schuwer, the deputy permanent representative (that is, deputy ambassador) of the Netherlands to the EU. The bearded diplomat picked up Nooteboom's jungle metaphor and said that his tiny country was "king of the jungle" for six months, referring to the Dutch presidency of the EU during the second half of 2004, but would soon "get relegated to the bottom of the food chain". He said that the Dutch government fully intended to formally adopt the EU Council's common position on the software patent directive. He completely dismissed our theories and efforts concerning the existence of a qualified majority: "We've read some absurd theories, but getting all those translations

right simply takes something like six months. That's the only reason for the delay."

While Schuwer pledged his government's allegiance to the Council, he didn't say even one word about the resolution of the Dutch parliament that called on his government not to support the proposed directive. Diplomats aren't necessarily democrats.

Schuwer then said that due to the time the linguistic services had taken, the proposal wouldn't be ready for formal adoption by the EU Competitiveness Council later that month, and the next meeting wouldn't be until March, but the item would be put on the agenda of a different Council meeting in the early part of December, the last month of the Dutch EU presidency. This was new information for us. It was consistent with the hints given to us by Roland Driece, the Dutch ministry official at the FFII conference, but more specific.

In the early part of this book, I mentioned that the EU Council meets in different "configurations" that are specialized on certain areas of policy. The software patent directive fell within the scope of the Competitiveness Council. Because the next Competitiveness Council after the one in November wouldn't take place before March, they planned to have a different Council configuration formally adopt the Council's common position. It's legally possible, but it's an oddity. It's like a defense ministry temporarily managing its country's economic policy.

Voices of Dissidence

After all those pro-patent speakers, Peter Joseph, an executive of software maker Novell, took his turn. He introduced Novell as a company that traditionally sells closed-source software, but that had become a major Linux distributor through its acquisition of the German company named SuSE.

Peter didn't clearly speak out against software patents, but he criticized the proposed directive as a law that would, ultimately, deprive customers of choice. In other stages of the debate, the glass would have seemed half-empty: we wouldn't have wanted a company like that to give any indication that it supports software patents in principle. However, at this particular juncture, the glass was half-full: it was all about convincing politicians that the Council's current proposal was unacceptable.

After Erika Mann had introduced me as a representative of open-source interests, I first had to give people more background information about myself. If everyone

in Europe understood how much of an opportunity open source represents, then overstating my involvement with open-source software would have been politically helpful. However, I knew that there were politicians and aides in the audience who misperceived open source as an anti-commercial movement. So I mentioned the fact that I had spent most of my time in the industry on projects unrelated to open source, and had worked only about three days a month for three years as an adviser to MySQL AB.

It was also true that 1&1, my campaign's largest sponsor, wasn't an open-source vendor, and was significantly larger than the two other sponsors combined. In situations like this, I also stressed that I had interrupted the development of a computer game based on Microsoft's .NET technology: "And last time I checked, that was not an open-source platform."

Then I explained, like I did in the parliament the previous day, how software developers can convert a technological lead into sustainable economic value on the basis of copyright law and trade secrets, with complexity representing an additional kind of protection. I had the impression that this was a new angle for most people in the audience.

As Peter had already mentioned that customers have an interest in choice, this was a perfect occasion for talking about Deutsche Bank's unfavorable view of the proposed legislation. In closing, I warned everyone of the bill's implications for organizations like Deutsche Bank that depend heavily on the use of information technologies and develop software internally for their own use: "If at the end of this process, a company like Deutsche Bank needs a patent department, because of the software they use and develop, then we have all failed."

Conventional wisdom wouldn't suggest concluding a speech with a negative message. Usually one ends a political address with a call for positive action. However, there are exceptions to rules like that, and in my mind this was one such. We were trying hard to prevent the Council from formally adopting its common position. First, we had to discredit the proposal that was on the table, and if we succeeded in doing that, then later we'd deliver more positive and constructive messages.

Surprising Statements From Arlene McCarthy

After my speech, Erika Mann said it was time for comments from the audience, and that MEPs would get to make their points first. As a speaker, I was seated in

the second row, and right in front of me, I had noticed a piece of paper indicating a reservation for Arlene McCarthy, a British Labour MEP. I hadn't met her until then, but everything that I had heard about her had been extremely negative because at the first reading she had pushed very hard for the patentability of software, ultimately losing out against a parliamentary majority.

An American speaker at a conference on software patents once even coined the term "IP McCarthyism", by which he meant to describe politicians' general extremism in favor of endlessly expanding the scope of intellectual-property rights. The choice of the name McCarthy in this context was intentionally ambiguous. On the one hand, there was Arlene McCarthy' aggressive behavior in the debate over the EU software patent directive. On the other hand, the term "McCarthyism" usually refers to former US senator Joseph McCarthy's crusade in 1950s American politics against anyone he suspected of communist beliefs: politicians, movie stars, journalists, and military personnel. Nowadays the term primarily stands for people who disrespect, or unreasonably restrict, civil rights.

I knew that Arlene McCarthy and Malcolm Harbour had forged a cross-partisan alliance at the first reading. They both worked toward the same goal of total software patentability. Usually, there is strong competition between their two parties because within the UK one is usually in government while the other is in opposition. However, in the European Parliament, traditional party lines mean little. Pursuing the same goals on an issue can easily break down barriers.

Even though I hadn't been at all involved in this debate during the European Parliament's first reading, I had only to read transcripts of speeches on the Internet to know that Arlene had indeed been a proponent of software patents. In the European Parliament plenary debate on September 23, 2003, the day before the first-reading vote, EU commissioner Bolkestein wanted to "thank her in particular for the excellent work on this dossier". In that same speech, Bolkestein tried to blackmail the parliament by threatening to bypass it and seek an intergovernmental agreement without its involvement.

In that same plenary session, Malcolm Harbour also gave Arlene credit for "such a good job as rapporteur on this directive. Because she has consistently seen the importance of this in the knowledge-driven economy, has directed us in that direction, to look at ways of improving this and making it work better. She has not allowed herself to be diverted by all the noise around, she has gone for that." By the "noise around", he meant the FFII's lobbying efforts.

Now, more than a year later, Arlene surprised all of us. She stood up and turned to face the audience. We thought that she, like her colleagues Harbour and Wuermeling, would fully support the Council's proposal. While she admitted that the parliament had passed a number of amendments in the first reading that she disliked, as matter of principle she still wanted the parliament to be respected by the Council: "We have had 64 amendments in the European Parliament. I may not have personally agreed with every one of them. But I think it's important to have those amendments on the table. And I have to say frankly to the members of the Council that we were not persuaded of having more of the same."

She even said that the Council's behavior made the FFII's concern over "a drift towards more and more patentability" appear more legitimate. We started to wonder whether she was still the same Arlene McCarthy, or whether something was suddenly wrong with her. This was too good to be true, but then she reverted to her usual pro-patent propaganda.

When Brute Force Backfires

While she partially accepted the position I had taken in my speech, she also said: "Florian, what I'd like to say to you is that I'd like to think that there is a world where perhaps we would have to have patents." She contradicted me on a key point: I had said that a company can exploit its technological lead while others are still working on their own product to catch up, and that this gives the innovator a window of a year or two or more, unless the innovation consists of something small and simple.

Arlene, however, said that "the big players" wouldn't need years. In her opinion, they needed only a matter of months, which obviously wouldn't be enough time to let a small company capitalize on its innovation. She really seemed to wholeheartedly believe what she said.

This was a typical case in which politicians, who usually don't have hands-on experience in programming a computer, simply didn't know the facts, and were easily misled by the pro-patent lobby. Everyone who does know a thing or two about programming could have told Arlene that she was wrong and I was right. In situations like that, it's easy to become frustrated, and they make fertile ground for theories of conspiracy and corruption if politicians deny the facts, even if they do so only out of lack of better knowledge.

It's generally difficult to accomplish anything by "brute force", that is, to accelerate a process by devoting a huge amount of resources to it. Many years before the political debate over software patents, I heard a simple story outlining the problem: "If it takes one man eight hours to dig a hole in the ground, how long does it take eight men?" The spontaneous answer might be "one hour", but that's wrong. If you assign eight workers to the task instead of one, you need one to organize the work, deciding who will dig in which area, who will be allowed to take a break at which time, and many other things. You may need some sort of labor union or workers council. You get bureaucratic overhead, and a lot of time is spent on coordination instead of productive work.

Relatively speaking, it's still much easier to dig a hole by brute force than to develop software. Coordinating programmers to discuss how to name variables, how to use the computer's various resources, and most of all, how to communicate between the different modules of a larger program, is a much more complex task than digging a hole in the ground. Consequently, enlarging a programming team entails losing efficiency at a breathtakingly exponential rate, and therefore some of the most significant breakthroughs in software development have indeed been achieved by individual programmers.

In his acclaimed book, *The Mythical Man Month*, former IBM manager Frederick Brooks wrote: "Adding manpower to a late software project makes it later." Only someone with a significant amount of programming experience will truly understand that fact. With everyone else, it's a question of whom they trust.

Embarrassment of the EPO

A reasonably good discussion followed the panel, the "intervention speeches" and Arlene McCarthy's partially emotional appearance. As always, some of our opponents claimed that the directive in question wasn't about software patents. A Philips lawyer arrived relatively late, and he got completely worked up because he noticed that our camp wasn't adhering to the "computer-implemented inventions" terminology.

In the middle of the debate, Yannis Skulikaris, the director of an examining directorate at the European Patent Office, made a statement. The EPO often sent him to such events in order to present the EPO's official view on the issue of software patents. This is a highly delicate matter, since the EPO bends ands break the law every day by granting software patents even though the European Patent Convention prohibits patents on computer programs. EPO representatives always

have to steer clear of admitting that they act in contempt of the law, although that's really what they do. If they ever acknowledged the plain truth, it could draw much more attention to the fact that an international institution and its in-house courts bend the law with the silent support of politicians and civil servants, some of whom are just incompetent and others of whom are completely irresponsible.

After Skulikaris denied that they issued patents on software and business methods, Oliver Lorenz brilliantly debunked the EPO story. Oliver pulled out a piece of paper on which he had jotted down the short descriptions of various software patents that the EPO has granted. Like a lawyer in court, he didn't just monotonously read out a list. Instead, Oliver accentuated the most important words, strategically placed pauses of a few seconds, and repeatedly looked Skulikaris straight in the eye. The final example of EPO software and business method patents was "a shopping cart for the Internet".

Skulikaris became visibly nervous, which must have made it clear to any reasonably open-minded person in the audience that he hadn't told the truth. Sometimes you really need to carry this kind of silver bullet with you, something that makes it abundantly clear where someone else has misinformed people in a way that is easy to understand even without profound knowledge of the issue beforehand. I sometimes liken those materials to the cross and the wooden stake: Buffy, the Vampire Slayer – the lead character of the popular TV series – never leaves home without them.

While Oliver was reading his list, Arlene defiantly said: "Those are American patents, not EPO patents!" She didn't say it loud enough for everyone to hear, but since she was sitting in front of me I told her: "Yes, they are EPO patents!" She seemed not to want to accept that fact. It made me really wonder how she could have been the European Parliament's rapporteur at the directive's first reading when she didn't know what the EPO had actually been doing for many years. The FFII had documented many illegal grants of software patents by the EPO, and I'm sure they sent those materials to Arlene at least once.

All of this showed to me that something must have gone awry very early in the software patent debate. Probably some pro-business politicians had misconceptions based on a wrong impression of our camp.

James Heald, a former UK representative of the FFII, published a very favorable comment on the EIF event, from which I'd like to quote:

> EIF organized an excellent event [...], which provided an enormously useful opportunity for all parties in the CII discussion [...] to meet and discuss the directive, first in a well structured more formal session, and then more informally over drinks and then a buffet dinner.
>
> In the process I believe that all sides gained a much deeper face-to-face understanding of what the other players were really trying to achieve, and I can only hope that a number of misunderstandings were reduced.
>
> In the end, such an organization can become an avenue for a one-sided corporate entertaining/infomercials; or it can create an almost unique inclusive, welcoming and balanced forum for raising the whole information quality of the debate, and the level of understanding of all the participants. Which path it takes is determined by the integrity and vision of the MEPs on its board. In this case I was well impressed.

I, too, believe that the EIF deserves credit for its openness and hospitality. Erika Mann's original plan might have been to counterbalance the FFII conference with a panel of pro-patent speakers, but the EIF's decision to invite our group over to their event turned out to have been a good one.

After the buffet dinner, I had a chance to speak to Erik Nooteboom from the EU Commission. He acknowledged that I made some points in my speech that he considered valid, and we exchanged business cards. He also indicated that the EU Council's proposal for the directive, "was a compromise, but that compromise may have been slightly too much in favor of the patent society".

Shortly before I left, someone approached me and said: "I know your Web site, and it's great, and you really need to have it translated into [his language]". Since this person is employed by a corporation that aggressively lobbies for software patents, I don't want to say which language it is or which company he came from. I assured him that the relevant translation was underway, and I promised not to tell anyone that he was actually against software patents.

It often happened that employees of pro-patent companies contacted me or the FFII and said that, contrary to their company's managers and in-house lawyers, they were personally against software patents. However, this incident at the end of the EIF event was the first, and to date only, case in which a lobbyist for the other side secretly admitted he supported our cause. I never want to be forced to lobby politicians against my inner convictions.

Great News From Poland

I returned from Brussels on Thursday, November 11, and for a while I was considering a trip to Bologna in Northern Italy the following day for a conference on software patents. However, I had a lot of work to do back home, so I decided to deal with my backlog of emails and everything else.

Around 5:20 PM on Tuesday, November 16, Jan "Miernik" Macek sent an email to our most conspiratorial mailing list, the "consilium reversal" list, and its subject line stated excellent news: "Poland cannot support the text of the agreement of 18 May 2004"

Miernik informed us of an official statement published by the Polish cabinet after a meeting. He first provided the Polish text, and since this played such an immensely important role in this political process, let me quote the original first:

> Rada Ministrów zajęła stanowisko dotyczące projektu dyrektywy Parlamentu Europejskiego oraz Rady w sprawie zdolności patentowej wynalazków realizowanych przy pomocy komputera.
>
> Z uwagi na liczne niejasności i sprzeczności dotyczące obecnego projektu dyrektywy, Polska nie może poprzeć jego brzmienia, które zostało przyjęte w głosowaniu Rady 18 maja 2004 r.
>
> Jednocześnie Polska zdecydowanie opowiada się za jednoznacznymi instrumentami prawnymi, gwarantującymi, że wynalazki realizowane przy pomocy komputera będą posiadały zdolność patentową. Jednak ponad wszelką wątpliwość program komputerowy lub jego fragment nie będą mogły być patentowane.

Miernik provided an English translation, and, with minor corrections, this is what he wrote:

> The Council of Ministers [the Polish council of ministers, that is, the Polish cabinet – not the EU Council] formulated a position on the proposed directive of the European Parliament and the EU Council on the patentability of computer-implemented inventions.
>
> Due to numerous ambiguities and contradictions in the present proposal, Poland cannot support the text which was agreed upon in the vote of the EU Council on 18 May 2004.
>
> At the same time, Poland is definitely in favor of unambiguous regulations which would guarantee that computer-implemented inventions can be patented. But beyond any doubt, a computer program or a fragment thereof shall not be patentable.

Jan pointed out that the Polish original text, like his English translation, didn't contain the usual "as such" loophole that the proponents of software patents usually used to try to conceal their intentions.

I was completely amazed and couldn't get over it. Fifteen days earlier, I had taken quite a risk by claiming that the EU Council had lost its qualified majority in favor of the pro-patent proposal, as a change in voting weights had just made the Polish votes decisive. I had been derided by some, but now that theory had become highly relevant. And I finally understood why our Polish friends had decided to go for "something bigger" than a declaration that a few politicians would sign.

Seizing the Opportunity

In an immediate reply to the mailing list, I congratulated Miernik, Władek Majewski of the Polish chapter of the Internet Society (ISOC), Kasia Matuszewska, and everyone who helped them. I was not then aware of the pivotal role that Józef Halbersztadt of the Polish patent office played.

I suggested issuing a press release the following morning. Since this statement had been published on the Internet, there was nothing wrong in disseminating it further. It was just too late in the day to reach journalists before the end of usual business hours. The risk that a message in Polish will spread quickly across the Internet is somewhat lower than with English or German texts, so we didn't have to act within minutes to preempt everyone else. In that respect, it was different from the Munich Linux story a couple of months earlier.

In politics, something that doesn't make it into the media can be the same as something that hasn't happened at all. Of course, the Polish cabinet had taken a decision. But decisions aren't always executed, and they can be changed. After all, we were working on the reversal of a decision that everyone else considered a done deal. The same could happen to us.

By getting it into the media, I hoped, among other things, to achieve a further destabilization of other EU members' positions on the directive, and to create a situation in which it would be hard for the Polish government to step back from this decision without losing face. Another objective was to encourage our activists in other places to push even harder so that more governments might follow suit.

Without getting it into the media, we might have had nothing in our hands only days later. Other country governments could have pressured Poland into supporting the proposed common position.

It's a little bit like Schrödinger's cat in quantum theory. The Austrian physicist Erwin Schrödinger used the example of a dead cat to explain the phenomenon that the measurement, or perception, of something creates a fact, and not the other way round. In the macrocosm we live in, no one would seriously claim that it's only 3 PM if we look at a clock and see that it's 3 PM. It can be 3 PM even without our noticing it. However, in quantum physics, the result of an experiment is often only decided by the measurement itself, and the first such measurement can determine the values that all subsequent measurements will predictably deliver as well.

Schrödinger's dead-cat experiment, which is completely imaginary, works like this: a cat and a radioactive atom are put into the same box. The cat dies if a measurement indicates that the atom has decayed. However, the point in time at which the atom decays is unpredictable, and if the box is locked, no one can see it from the outside. And the atom doesn't "decide" on its state – decayed or not decayed – until a measurement takes place. Consequently, the cat isn't really dead until the box is opened. It's neither dead nor alive. It could be one or the other, and only the measurement will tell. The later the measurement takes place, the more likely it is that the cat is dead.

Obviously, Schrödinger's experiment is just theoretical. It wouldn't work in reality because the cat would at least have to breathe, so the inside of the box couldn't be completely insulated from the rest of the world. However, the cat we

wanted to kill, the Council's qualified majority in favor of the software patent proposal, indeed was in an unclear state now, and we had to open the box in order to get the effect we wanted.

Working Out the Wordings

It was quickly agreed that the Polish chapters of the FFII and of the ISOC would make this announcement together with the NoSoftwarePatents campaign. The two former organizations deserved a lot of credit for the political breakthrough in Poland, and NoSoftwarePatents had provided the analysis of the impact of the Council's changed voting weights on November 1. Another reason for my involvement was that I had some experience in working with the media, and already knew which journalists to contact.

However, putting the release together collaboratively was easier said than done. Frankly, it became a logistical ordeal. Miernik and other activists tended to stay up late at night, while my usual rhythm is that of an early riser, especially in winter. Miernik and I also had to somehow run this by Władek, who took an early-morning flight to Hahn (a provincial German airport) and then continued by car to Strasbourg, where he was scheduled to speak at a meeting of Polish MEPs.

I got up early and contacted Miernik by Internet Relay Chat (IRC), and he seemed to have hardly slept. Bad for him, but at least this way he was easily reachable quite early. I put together a first draft and sent it to him, and then we had several hours of back-and-forth discussions on the Internet. Miernik was a perfectionist in his way, and I was struggling to convince him of the necessities of public relations. There were things that Miernik wanted included, and that I felt would distract from more important issues, and similarly I wanted to provide general information on the software patent topic that Miernik thought was redundant.

We could have gone on fighting over every word in the press release for another day or more, but there came a point when we really had to act. At 11:09 AM my time, I received an email from a news agency correspondent:

> I hope you had productive meetings in Brussels last week. I am hoping you can help me with a story I'm working on.
>
> It is my understanding that Mark MacGann, Director of EICTA, went to Poland to try and convince the Polish government to support the software patenting directive. It looks like he failed,

because today the Council of Ministers decided that Poland will be against the current version of the directive. Major Polish IT associations lobbied for a long time for such a decision.

Do you know if there is any truth to this?

At this stage, I had to insist that we put out our press release without more delay, and Miernik finally supported it. I reached Władek on his cell phone, and while we only had about two minutes to talk, it was enough to get the go-ahead.

The Press Release on the Polish Decision

This is the release we finally sent out to the media:

FFII, Internet Society Poland and NoSoftwarePatents.com

Joint Press Release

Poland Does Not Support Current Proposal for EU Software Patent Directive

Official statement on government Web site after cabinet meeting: "Poland cannot support the text which was agreed upon by the EU Council" – Political agreement of May 18th on a proposed directive can no longer be formally adopted as the common position of the EU Council

Warsaw, 17 November 2004. Subsequently to a cabinet meeting, the Polish government officially declared yesterday evening that "Poland cannot support the text that was agreed upon by the EU Council on May 18th, 2004" as a proposal for a "directive on the patentability of computer-implemented inventions". Consequently, the EU Council is unable to formally adopt that legislative proposal as its common position. Without the support of Poland, those countries that supported the proposal in May now fall short of a qualified majority by 16 votes. New voting weights took effect in the EU on the 1st of this month.

After extensive consultations with organizations of IT professionals and the Polish Patent Office, the Polish cabinet concluded that the proposal at hand does not achieve the stated

goals of limiting patents on software and business methods in Europe. The Polish government explained that it would "definitely" support "unambiguous regulations" but not a directive under which the functionality of computer programs could be patented. The EU Commission and various governments of other EU member countries claimed that the legislative proposal would not allow for the patentability of programs that run on an average personal computer. However, at a meeting hosted by the Polish government on the 5th of this month, everyone including representatives of the Polish Patent Office, SUN, Novell, Hewlett-Packard and Microsoft, as well as various patent lawyers, confirmed that the present proposal of the EU Council does make all software potentially patentable.

Last week, the permanent representative of the Netherlands to the European Union had declared that the Council, which is currently under a Dutch presidency, would aim to refer its common position on the software patent directive to the European Parliament in mid-December. The EU Council will now have to renegotiate the legislative proposal instead of being able to formally ratify the invalidated political agreement of May 18th. The formal ratification had been delayed, officially due to a shortage of translation resources.

Jan Macek of FFII Poland said: "Countries such as Luxembourg, Latvia, Denmark and Italy had called for changes similar to the amendments made by the European Parliament, but those were rejected by the then-Irish presidency. They now have a chance to propose their amendments again, with support from Poland. That will help bring the directive more in line with the European Parliament which took the position of clearly disallowing software and business method patents."

Wladyslaw Majewski, president of the Internet Society of Poland, emphasized the economic and societal implications of software patents: "The questionable compromise that the EU Council reached in May was the biggest threat ever to our economic growth, and to our freedom of communication. The desire of the patent system and the patent departments of certain large corporations must never prevail over the interests of the economy and society at large."

> The political agreement of the EU Council had been under heavy criticism ever since it was announced on May 18th. Politicians from all parts of the democratic spectrum, small and medium-sized enterprises, software developers and economists called on the EU Council to reconsider its position. Deutsche Bank Research and PriceWaterhouseCoopers had expressly warned of the negative consequences to European IT companies, to innovation, and to the ability of the EU to achieve the goals set out in its Lisbon Agenda. On July 1st, the Dutch parliament passed a resolution that its government change the position of the Netherlands from support to an abstention. On October 21st, all four groups in the German parliament spoke out against software patents and the legislative proposal in question, and introduced different motions to that effect.

We added some Internet addresses of documents and declarations that the press release referred to, as well as background information on the three entities that jointly issued the release, and contact data for journalists who wanted to speak with Miernik, Władek, or me. I also translated the text into German, and Gérald Sédrati-Dinet, a vice president of the FFII who represented the FFII in France, provided a French translation the following day.

Big Waves and Confusion

Even though the media had paid much more attention to the topic of software patents after the Munich Linux story, in my view it wasn't a given that the announcement of the Polish cabinet decision would make waves in the media. I certainly felt confident that we could generate some publicity on major IT Web sites, but anything more else seemed unpredictable.

Within a matter of hours, the first reports appeared. The British news site *TheInquirer.net*, which is known for a rather humorous style and sometimes gloating remarks, particularly highlighted this story that EICTA's MacGann had flown to Warsaw in vain: "The Polish government, although it had a flying visit from an €nvoy to push it in the opposite direction, said it wouldn't support the directive." I don't know whether Mike Magee, the editor of the "INQ" (the short name of that online publication), used the euro currency sign to indicate visually that MacGann was an envoy of big money or because of the EU connection. Possibly both.

Some EU-focused Web sites also covered this new development, and the next day the major news agencies became aware of it. An AP story was carried by media around the globe. At that point, we had no doubt that almost everyone who was professionally involved with this piece of legislation must have been informed.

MacGann expressed his disappointment over the Polish move and claimed that there would still be a qualified majority in the Council if Belgium, which had previously abstained, supported the proposal. EICTA, he said, had made good progress in talks with the Belgian government. But apart from the fact that Belgium wasn't going to change its stance, his theory was completely wrong: being a much smaller country than Poland, Belgium wouldn't have had enough votes to make the difference anyway. The Belgian votes were within the margin of error that we could afford.

There were also others who doubted that we had accomplished our mission of forcing the EU Council to renegotiate its proposal. *Heise.de*, the leading German IT news site, gave more coverage to the software patent issue than any other comparable site around the world. On November 18, the day after they first reported on the statement of the Polish government, they published another story, quoting the German ministry of justice. The ministry said that it had received a translation of the Polish statement and claimed that it didn't "make it possible to draw any particular conclusions concerning the future actions of the Polish government".

The fact that they had obtained a translation, especially since the German government won't have had countless Polish translators available, meant that they took it seriously. Their reaction, however, showed that ministry officials still intended to go forward with the proposal that all German parliamentary groups had already criticized.

Polish government officials made comments that, at first sight, were inconsistent. AP initially talked to the Polish science minister, Michał Kleiber, whose statements seemed to reaffirm our interpretation. In another report a few days later, deputy minister Włodzimierz Marciński appeared to indicate that Poland still wouldn't prevent the EU Council from adopting its common position. I was worried enough about that to ask Miernik, since I knew that Miernik had met Marciński at least once. Miernik said that we shouldn't put too much weight on it since Marciński was actually on our side and just wanted to avoid diplomatic irritations.

Miernik also told me that when he inquired about the effect of the Polish government's stance on the qualified majority, a senior Polish diplomat had told him: "You can do the math yourself. You know what it means."

About a week later, a Dutch COREPER diplomat, told the press, on condition of anonymity, that he expected a "hard fight" with Poland over the adoption of the Council's common position. The FFII assumed the diplomat in question was probably Henne Schuwer. At any rate, this behavior showed the Dutch government's profound disrespect for democracy and for its own national parliament, possibly under allegiance to Philips, the Dutch electronics giant. Philips had aggressively demanded software patents, even committing political blackmail. Instead of embracing the Polish initiative as a chance to honor the resolution passed by the Dutch parliament on July 1 without losing face, they were prepared to pressure the Polish government into unwillingly supporting a Council decision.

A few days after the Polish government's November 16 announcement, some of our Polish activists held a boozy party in Brussels. I think they deserved to celebrate their achievement, but looking at the contradictory statements that had appeared in the press, I personally wouldn't have been in the mood. We were closer than ever to our immediate goal, yet we didn't know if the ball would get kicked right back into our half of the field at any moment.

"You Forgot Poland"

A commentary on the IT Web site *ZDNet UK* focused on the pro-patent lobby's apparently having been in deep sleep while the Polish government was formulating its position on the software patent directive. The editor quoted "You forgot Poland!", the exclamation by President George W. Bush in one of his televised debates with his 2004 challenger, John Kerry. The Democratic candidate criticized Bush for a lack of international support for the Iraq war and didn't mention Poland, which had indeed made a symbolic contribution, among Bush's allies.

In fact, our adversaries didn't just neglect events in Poland. They were generally focused on the European Parliament and considered the EU Council's decision a mere formality. However, a number of success factors fell into place in Poland: overnight success had taken well over a year, and while we were grateful that it happened at all, it could easily have happened even sooner.

The primary difference between Poland and other countries was that the Polish patent office, unlike those of the other 24 EU member countries, spoke out against the patentability of computer software. This may be the only case in the world in which a patent office put the public interest so far above any considerations of growing and extending the power of its own organization. If the world's other patent offices, or at least those in the largest economies, adopted that approach, the trend would unleash so much creativity and such powerful market dynamics that it would ultimately create a lot of wealth.

If one wanted to boil the Polish patent office's stance down to one particular person, the number one candidate, other than its president, Dr. Alicja Adamczak, would be Józef Halbersztadt, a patent examiner. The first time I saw him was the April 2004 FFII conference. His speech required a profound understanding of the software patent issue; because I was just getting started at the time, it was hard for me to follow him.

Besides his full-time job at the Polish patent office, Józef served on the boards of the FFII and the Polish chapter of the Internet Society (ISOC). He also maintained contacts with IT industry and professional associations, and co-wrote material on the software patent issue that appeared in the major Polish weekly *POLITYKA* in August 2003. The other important event that started the debate over software patents in Poland that year was a discussion panel on software patents held in November at the annual conference of Polish IT professionals.

At the time, Poland had not yet formally acceded to the EU, but it was well on its way to doing so, and new member states must accept the decisions that have already been taken. Knowing that the EU software patent directive would affect Poland one way or the other, Jozef took the initiative. For that matter, Miernik supported the FFII's lobbying effort in the European Parliament as early as in September of 2003 even though the parliament didn't yet have any Polish MEPs with voting rights. From May 1, 2003 until May 1, 2004, there were so-called "observer MEPs" from the ten member states that were due to join the EU at the end of that time. The purpose of having observer MEPs is to give delegates from soon-to-be member states a chance to familiarize themselves with the processes of the European Parliament, and to report to other politicians in their countries on the status of legislation in progress.

In January 2004, the General Assembly of ISOC Poland passed a resolution against software patents. Several people made that decision happen, three of whom I met over time: Józef Halbersztadt, Władek Majewski (the president of

ISOC Poland), and open-source activist Łukasz Jachowicz, known in Poland for his *7thGuard.net* Web site. Two months later, ISOC Poland began writing letters to all groups in the Polish parliament.

A Conference That Made a Difference

The Polish chapters of ISOC and the FFII jointly organized a conference on software patents that took place on May 10, 2004, in a Polish parliament building. That was two days before both the first demonstration at which I ever spoke and a panel discussion in Munich. Hartmut arrived quite late at the Munich event after having been to Warsaw and one or two other cities. At the time, I didn't know how important the Warsaw conference had been, but I found out later.

About 300 people participated, and with only three votes against and four abstentions, they made a near-unanimous resolution calling on the Polish government to oppose the proposal of the then Irish presidency of the EU. The resolution was supported by the representatives of all the industry associations and political parties at the event. The few dissenters may have been patent lawyers or delegates from large corporations.

The day's marquee speaker was Richard Stallman. Without him, the number of attendees as well as the level of media attention would probably have been much less. Richard's accomplishments always managed to open doors, including those of some high-ranking politicians. And RMS mobilized the free software community against software patents like no other luminary, appearing all across the European Union. When he toured the Baltic states in the summer of 2004, Marco Schulze joined him.

The other speakers were a good mix of activists, academics, politicians from several parties, company representatives, and officers of industry and professional associations.

Hartmut must have delivered a pretty good speech. He brought his linguistic knowledge to bear when explaining to the audience that there was a striking parallel between the EU and the Soviet Union: the EU is primarily governed by the Council, so one could call it a "council union", and that's exactly what the term "soviet union" ("sovyetsky soyus" in Russian) stands for. Robert Jezelski, a Polish Green politician, confirmed that Hartmut's play on words unfortunately held some truth. This must have been quite a strong point for a Polish audience

since the Polish people had been oppressed by the Soviet Union for more than 40 years. Hartmut called for a Solidarność-like effort against software patents.

Laurence van de Walle of the Greens/EFA group told people about the situation in the European Parliament, and stressed the steep challenge that our movement was going to face in a second reading. She particularly warned us about the parliament's Legal Affairs Committee, which was going to be the only one to deal with the directive at the second reading. She said the committee was dominated by "the servants of big business and the legal profession". Her assessment of the prospects and timelines was: "We can lose within a matter of months, but we'd need years to win."

The Warsaw conference was a bit too late to still have a chance to influence the Polish government's actions in the EU Council. This was only about a week before the political agreement of May 18, and that wasn't enough time to get the government to make a strategic decision (plus properly communicate that decision to the emissary they sent to the Council meeting). However, along the way to the Polish government's November 16 announcement, the conference six months earlier played a major role.

Włodzimierz Marciński

Theoretically, you can influence political decisions with a completely bottom-up approach, starting with people in the lower echelons of political parties and working your way up the hierarchy to the leaders. But that takes time and untiring effort, and in practice it rarely happens. What a cause really needs is a high-ranking champion, and the Polish government became much more determined and vigorous about this issue when Włodzimierz Marciński was appointed as a deputy to the Polish science minister.

Minister Michał Kleiber had been a positive factor before. In June, he wrote a letter to the Polish patent office, and the answer was drafted by Józef Halbersztadt.

In July 2004, Marciński took over responsibility for information technology policy, with a particular focus on extending the use of and access to information technologies throughout the Polish economy and society. As a mathematician, Marciński knew well that some forms of knowledge and certain types of concepts should be free from patents (such as mathematics and logic), and that a

distinction can certainly be made between achievements in applied natural science and the pure logic of computer programs.

In October that year, Marciński initiated closer contacts with the Polish patent office, and in early November, his ministry and the patent office held a joint conference on the software patent directive. In the press release we issued after the Polish government announced that it would withhold its support for the software patent directive, we mentioned the "extensive consultations with organizations of IT professionals and the Polish Patent Office" as well as "a meeting hosted by the Polish government on the 5th" of that month.

In an FFII IRC chat in the fall of 2004, Miernik seemed nervous because he was going to meet Marciński the next day, and it was going to be his first time meeting such a high-ranking politician. However, the meeting must have gone very well, judging from all the good things that later came of that contact. In fact, Marciński went on to become a true hero of the resistance against software patents. But we also owe a lot to other key individuals in the Polish government, such as minister of economic affairs Jerzy Hausner and his deputy Krzysztof Krystowski, and to the president of the Polish patent office, Dr. Alicja Adamczak.

Control and Destiny

The Two Parallel Tracks

The phase of the political process that concerned the software patent directive was a war on two fronts. On the one hand, we wanted to prevent the EU Council from ratifying the proposal that was on the table. On the other hand, no one knew how quickly the issue would return to the European Parliament, and our opponents were already making a substantial effort to persuade MEPs.

Since our resources were severely constrained compared to those of the pro-patent lobby, the obvious conclusion would have been that we were forced even more to choose only one priority and devote all of our efforts to it. However, when the Polish government announced on November 16 that it didn't want to support the Council's proposal, we viewed its decision as a reaffirmation of our strategy of tackling both challenges in parallel.

On November 17, the day on which we spread the Polish news to journalists throughout and beyond the EU, Władek Majewski visited the European Parliament, which was having a plenary session in Strasbourg that week. Three days later, he posted an interesting travel report to a mailing list.

Władek gave a 12-minute presentation in front of all Polish MEPs. In the European Parliament, sometimes MEPs from the same country collaborate closely even though they are fierce political competitors at home. If the MEPs from a country identify something as an issue that is very much in the national interest, they may ignore party lines and vote in a national bloc.

Władek's primary objective was to give the Polish MEPs basic information so they were better prepared for future debates. Following the previous day's Polish cabinet decision, he explained why the Polish government's actions had been wise.

The Liberal MEP Grażyna Staniszewska said that all Polish parties are against software patents anyway, so she saw no need for internal debate on the issue. Everyone agreed. Since the software patent directive wasn't even on the European Parliament's agenda at the time, some seem to have felt it was premature to talk about it at all. Probably most other MEPs besides those from Poland viewed it the same way: only eight guests showed up for a pro-patent lobbying dinner that the

Campaign for Creativity hosted a few hours later. Four of them were MEPs, and the only MEP who spent much time at the event was Wuermeling, the Southern German conservative who was staunchly in favor of software patents without admitting the fact, and who had lost the shadow rapporteur function within the EPP-ED group to Piia-Noora Kauppi.

Campaign for Creativity was one of several Microsoft-sponsored pro-patent lobbying organizations. Having previously succeeded in getting gene patents legalized in Europe, its lobbyists were considered unbeatable. While the Campaign for Creativity claimed to represent "artists" and "authors", the fact that it had received funding from Microsoft and SAP said something.

A German patent lawyer delivered a speech at the event and, according to Władek's report, portrayed Hartmut Pilch extremely negatively (to put it mildly). Obviously, someone who indulges too much in *ad hominem* attacks may do so because he lacks strong points to make on the issue itself. In Władek's account, some of what was said was completely out of line, including totally unfounded statements involving Hartmut's family. I thought Hartmut was going to sue. However, he thought that the lawyer's statements would hurt his own reputation more than Hartmut's, and that he was therefore kind of useful to us.

I wondered how Władek as an anti-software patent activist was able to attend a dinner hosted by pro-patent lobbyists. It came about because Kasia Matuszewska called the office of the Campaign for Creativity and asked if Władek, whom she described truthfully as her adviser on IT policy issues, could accompany her. The Campaign for Creativity very much encouraged hem both to show up, but once Władek had asked some critical questions of the presenters, they asked for his name again. Only then did they identify him as the one who was quoted in that day's press release on the Polish government's decision.

From an information-gathering point of view, Władek's trip to Strasbourg was time well spent, and his presentation to the Polish MEPs was much more timely than anyone would have expected.

The Open-Source Triumvirate

Anticipating that the EU Competitiveness Council might make a decision on November 25 or 26, I was preparing an open letter on behalf of a group of software luminaries that I wanted to issue at the beginning of the week in which the Council meeting was going to take place.

Based on the information given at the Brussels conferences about two weeks earlier by Dutch government official Roland Driece and Dutch diplomat Henne Schuwer, it was almost certain that the Council wouldn't formally decide on that occasion, but at another meeting in December. However, nothing is ever 100 percent certain in politics. The Dutch government might also have tried to mislead us. What if they were going to wait until the last minute to put the item on the agenda of the meeting on November 25 and 26, in hopes of taking the Polish representative by surprise?

The other reason why I decided to go ahead then was that the subsequent Council meetings weren't going to be meetings of those ministers who were really in charge of patent law. Even though the Competitiveness Council was probably not going to make a formal decision on software patents at that meeting, it was still the occasion when the ministers who actually had with responsibility for this piece of legislation would meet.

My open letter had been approved by Linus Torvalds (the programmer who created Linux), Rasmus Lerdorf (the creator of the PHP programming language), and Monty Widenius of MySQL. All three were European citizens. Linus and Rasmus had moved to California years ago. In my press release, I called them the three leading European open-source figures, and I think that claim was justifiable and defensible even though there are other significant open-source projects that started in Europe.

Getting such famous people to lend their names to a statement, especially a political one, only works on special occasions, and it's almost impossible unless there are personal contacts to build on. In this case, Mårten Mickos, the CEO of MySQL AB, received an unusually quick and positive response from Linus Torvalds. They had known each other for some time, they both lived in California, and, most importantly, they were both members of Finland's Swedish-speaking minority. Despite all those common factors, Mårten still wouldn't be able to count on Linus's support often, but it worked out in this particular case.

This statement's publication on November 23, 2004, was one of the highlights of the campaign against software patents. The level of media attention was way beyond expectation, and so was the traffic to our Web site.

The letter was quite aggressive, particularly in its third and fourth sentences:

> We urge the governments of the EU member states, which are represented in the EU Council, to oppose the adoption of the

> said proposal as a so-called "A item" without debate. In the interests of Europe, such a deceptive, dangerous and democratically illegitimate proposal must not become the common position of the member states.

It was not the fame of the signatories alone, but the combination of that with the very pointed language that drew so much attention. It made for headlines such as "Torvalds slams EU patent proposal". A more diplomatically phrased text wouldn't have interested the media to nearly the same degree.

The open letter had a noticeable lasting effect. Besides getting us press coverage on the issue, it noticeably raised the number of people who visited *NoSoftwarePatents.com*. I later heard from two freelance journalists, one based in Europe and the other in the United States, that they found it much easier to sell articles on the EU software patent debate after that statement than before.

The success of this initiative may also have been partly attributable to the fact that our press release on the Polish government's decision not to support the Council's proposal had made a lot of noise just the previous week.

Feelings of Uncertainty

On the morning of Friday, November 26, I received the information that the rapporteurs of all four groups in the German Bundestag had agreed on a joint motion for a resolution against the Council's proposal. The agreement still had to be formally approved by the groups themselves, but four parliamentarians from the government coalition decided to issue a press release nonetheless.

That was another encouraging event, and that whole week and the previous one looked great on the surface. However, I felt like a supporter of a soccer team that puts enormous pressure on its opponents and plays spectacularly well, but hasn't yet scored a definitive goal. It might do so at any moment, but equally it could concede one or run out of time.

As I analyzed the situation concerning the Council, I was increasingly worried. There's this saying of "Once bitten, twice shy". In this case, we had been bitten twice: the Dutch parliament had taken that historic decision, and its government wasn't going to truly comply with the substance of that resolution. Also, I remembered a phone call that came in from Hartmut when Marco and I were having lunch in Freiburg before our meeting with German MP Gernot Erler. Hartmut told Marco, who in turn told me, that he had met government officials in

an EU country that was all set to request a renegotiation of the Council's position. He didn't tell us which country it was, but what mattered was that the country in question didn't actually follow through.

I was very worried that Poland would become a third case where an announcement or promise gave us hope, only to be followed by deep disappointment later. At least this case was different from the previous ones, but there had also been statements that disconcerted us from both inside and outside Poland.

In a situation like that, one can make many mistakes. Two are particularly common. The first is excessive optimism: it's so easy and enjoyable to indulge oneself in premature declarations of victory. The other risk is to be overly susceptible to FUD (fear, uncertainty and doubt) tactics. One's opponents will always contest every fact that makes their case look bad, and will at most concede some (not even all) of the facts that have been proven to be indisputably true.

It's not always possible to avoid those pitfalls, as purely factual analysis doesn't necessarily lead to a clear answer. Rather than definitive facts, one must deal with probabilities, with many unknowns, and with some moving targets. In this particular case, even the mathematical probabilities lost some of their usual meaning: there were indications that something unprecedented in EU history could happen. Anything that has never happened before appears to have a statistical probability of zero until it happens for the first time. As in this case.

When No Doesn't Mean No

After the German ministry of justice told the media that the Polish government's statement didn't seem unambiguous to them, someone said in an online discussion forum: "Which part of NO don't you understand?"

Wasn't it sufficiently clear that the Polish government said that it "cannot support" the Council's proposal? Is there any reasonable room for interpretation when someone says that?

From a common-sense perspective, the Polish statement left no doubt as to what Poland wanted *politically*: they wanted the proposal to be renegotiated. However, they didn't say what they were prepared to do *procedurally* to make that happen.

The Council's two-stage decision-making with A and B items has already been explained: the Council first negotiates a proposal as a B item. Then it goes to the linguistic services for translation, and is subsequently adopted without further debate as an A item. Adopting the B item is only a "political agreement" that is not legally binding, and adopting the A item is the formal act. While a country may change its mind in between the political agreement and the formal adoption, it's an unwritten rule within the EU not to do so.

If a country has originally supported the B item (or, as in the case of Poland, was misperceived as doing so) but now wants to officially withhold its support for the A item, there are two things it can do in the EU Council). Article 3 of the Council's Rules of Procedure contains two different items, 6 and 8. According to article 3(6), a "member of the Council" (that is, a delegate from the government of a member country) can ask for a statement to be included in the minutes of the Council meeting:

> 6. The provisional agenda shall be divided into Part A and Part B. Items for which approval by the Council is possible without discussion shall be included in Part A, but this does not exclude the possibility of any member of the Council or of the Commission expressing an opinion at the time of the approval of these items and having statements included in the minutes.

The idea behind it is that a country can have its dissent to a decision documented in a way that doesn't actually prevent the decision from being made. If a country is absolutely determined to block the decision, then it has to invoke item 8:

> 8. However, an “A” item shall be withdrawn from the agenda, unless the Council decides otherwise, if a position on an “A” item might lead to further discussion thereof or if a member of the Council or the Commission so requests.

Here's what would it look like if a country exercises that right: there would be an A item on the agenda, such as the proposal for the software patent directive. If no one protests, the A item will simply be adopted without discussion. That's the way it usually works. If, however, a country asks that the A item be "withdrawn from the agenda", the Council has to reopen the debate on the proposal as a B item on another occasion.

There is a subordinate clause ("unless the Council decides otherwise"), which says that the Council can still keep the A item on the agenda if a qualified

majority of its members wants to do so. Practically, this means a single country's request may not be enough to get an A item withdrawn from the agenda: there must also be a blocking minority against any motion to reject the withdrawal request. The blocking minority must include at least four countries, with the exact number depending on the voting weights of the dissenters. Otherwise – without the possibility that a qualified majority could reject the request for the agenda change – a single obstructive country, no matter how small, could stall the entire EU Council forever.

Allowed But Not Accepted

I believe that everyone knew what the Polish government intended to do: they didn't want the Council to go forward with a formal decision. But as the official government statement didn't expressly say that they were going to request that the software patent dossier be downgraded from an A item to a B item, there was indeed some room for interpretation. The German ministry of justice, when denying that the declaration from Warsaw was "unambiguous", probably wanted to make it easier for the Polish government to do nothing more than save face by attaching a unilateral statement to the minutes of a Council meeting.

Other proponents of unlimited software patentability interpreted the Polish statement closer to the way we did. The German conservative MEP Wuermeling accused the Polish government of "a singular act of obstruction". In discussions with other German-speaking MEPs, he said "De derfa des ned!", which in his regional dialect meant "Die dürfen das nicht!", or in English: "They're not allowed to do that!"

Actually, in legal terms Poland did have the right to oppose the formal adoption of the Council's common position even though the minutes of the meeting on May 18, 2004, in which the political agreement had been reached, stated that Poland had supported the proposal. Article 3(8) of the Council's Rules of Procedure says that an A item is withdrawn from the agenda "if a member of the Council [...] so requests", and no requirements are specified.

But we've already had that argument: the Dutch government said that it couldn't exercise that right without major implications to its standing within the EU.

The difference is that the Dutch government was known to be in favor of software patents, but the Polish government was not. However, the risk we faced was that other countries would exert diplomatic pressure on Poland to comply

with the unwritten rules of the EU. The Polish government would then have to decide whether it wanted to pay the political price of making itself unpopular. Other governments might indicate that they would be less likely to side with Poland on other issues. For instance, the next time the EU Council talked about agricultural legislation that might be even more important to Poland than software patents (even if only in the short term), Poland would find it much harder to garner support for its political demands from the other countries.

We had to take that political price into consideration. The question was how to lower it. The best solution would have been to find other countries to side with Poland. That way, either the political price would have been shared among a group of countries, or it would have gone away completely: an initiative by several country governments might just have found broad enough acceptance to eliminate any future rebound effect on countries opposing the software patent decision when the Council considered other issues of concern to them. However, while we had activists working in several countries on this type of project, there wasn't really any other country that was likely to emulate Poland any time too soon.

Back to Square One

In that situation of confusion and uncertainty, I felt strongly that the time had come to act on the idea of getting the directive's legislative process restarted. I thought it would be better for our movement to take this initiative rather than wait for the Polish resistance in the Council to crumble.

Rule 55 of the European Parliament's Rules of Procedures allows the parliament to request that the European Commission resubmit a proposal. If that happens, everything up to that point in the ongoing legislative process is annulled, and the game starts all over again with a new first reading in the European Parliament based on the text that the Commission proposes. That could be the same proposal as before or a new one, depending on what the Commission decides to do.

There are several different scenarios envisioned in the procedural rule under which the parliament might make that request. In our case, the reason would have been the fact that parliamentary elections had taken place in the middle of the legislative process. That concept is called *discontinuity*: a newly elected parliament, in which there will always be at least some new members, should not be bound by the decisions made by the previous composition of the parliament.

Discontinuity is quite common in national parliaments. In the United States, a third of the seats in the Senate and all of the seats in the House of Representatives are up for grabs every two years, and the principle of discontinuity requires a legislative process to go from start to finish within that two-year window or begin anew. In the German Bundestag, all legislative proposals and decisions are specific to a legislative term, and don't survive into the next one.

In the EU, the principle of discontinuity is not the norm. If it were a constitutional requirement as in the US and Germany, the EU's ability to pass laws would be severely impaired. Legislative processes in the EU tend to take much longer than in national parliaments. Some dossiers stay in the Council for many years until a political agreement is reached. The composition of the Council changes all the time due to elections in the member states. Since the most powerful legislative body of the EU is already in flux, it is not considered problematic if the parliament changes substantially every five years. However, if the parliament believes that the discontinuity principle should be applied, it can ask the Commission to resubmit a proposal.

The idea of invoking that little-used procedural device for the software patent directive was first tossed out by Olga Zrihen, a Belgian left-wing MEP, after the Council's political agreement in spring 2004. She was on our side and thought that this might be a way to invalidate the Council's decision, which was unacceptable to a majority of the MEPs because it practically ignored the position taken by the European Parliament in its first reading. However, at the time an electoral campaign was in progress for the upcoming European elections, and Zrihen was not reelected.

There was some talk about restarting on an FFII mailing list. My own involvement was just in the early stage, but from the knowledge I had, a fresh start of the process seemed strongly preferable to a second reading in the European Parliament, based on the common position that the Council had agreed upon. However, some key players such as Jonas Maebe, a member of the FFII's board, and Ries Baeten, an MEP's assistant from the Netherlands, were extremely skeptical as to the benefit we would get from a new start in comparison to the negative effect of invalidating the European Parliament's original first reading along with the Council's common position.

Restart As an Exit Strategy

In July, when the next legislative term began and the newly elected European Parliament convened, the FFII's Erik Josefsson called me from Strasbourg and stressed the need for quick action if we wanted to push for a restart. He had just learned that the parliamentary group leaders usually review the list of unfinished legislative processes at the beginning of a new term and then decide which ones they want to continue and which ones they might prefer to be restarted.

Erik was in favor of a restart, and I would have liked to help him, but I was still waiting for commitments from the corporate sponsors I needed for my campaign. I told my prospective supporters that the closing window of opportunity for the restart was yet another important reason to proceed quickly. Things still took more time.

When I finally reached agreement on the NoSoftwarePatents campaign in early September, neither friends nor foes seemed receptive to the restart idea. Friends like the Greens thought that the original first reading had yielded such a valuable result that we shouldn't try our luck in a new one. Adversaries claimed that this directive was a very urgent matter that shouldn't be delayed by a restart. Obviously they liked the Council's proposal because it reflected their position, which had originally been a minority view at the European Parliament's first reading. They felt that the higher majority hurdle for the parliament in a second reading would help them finally get their way.

But in late November, a little over a week after the Polish government had made its announcement, a restart looked to me like a move that many might welcome by many as a face-saving exit strategy. If the parliament were to officially evaluate the possibility, I hoped some countries in the Council would embrace it.

After all, it would mean that no one had to pressure the Polish government into supporting the Council's decision against its will, and protected Poland from having to stand up to such pressure. The Dutch government wouldn't have to interpret its national parliament's resolution that it should abstain in a far-fetched and questionable way. The German government knew that it didn't have the support of the Bundestag. A lot of confrontation could have been avoided by simply restarting the process. At the same time, the Council wouldn't have had to deviate from its usual *modus operandi* of never renegotiating the substance of a bill after a political agreement.

There are various ways in which governments could have supported the push for a restart. The Council, usually represented by its president, often talks to the leadership of the European Parliament and also to the Commission, which could theoretically have restarted the process even before the European Parliament had requested it. More informal contact takes place between national governments and their countries' MEPs, and within government parties that typically also have a large number of MEPs.

It was these dynamics I was primarily hoping for when I proposed to the FFII that we make an aggressive push for a restart request by the European Parliament.

Internal Division Over Strategy

Before we convinced the first outsider, we held an intense internal discussion over the right course of action. The exchange of opinions took place over the last weekend in November on a private mailing list.

The discussion marked a new stage in my relationship with the FFII. At the conference earlier in the month, I had begun to realize how much had changed in the seven months since the first FFII conference I had attended. Initially I was just trying to learn and to make small contributions. Then I took ever more initiatives of my own. By launching *NoSoftwarePatents.com* with the support of corporate sponsors, I had become somewhat autonomous. By the month of November I began to want to influence our movement's strategy, knowing that I wouldn't be able to accomplish much on my own without the FFII.

When someone's role evolves like that in the space of only seven months, it makes some people extremely uncomfortable. Those whom I tried to convince to adopt the restart strategy had all been involved in the first reading, and some of them dated their involvement even further back. The core activists in some countries had previously been key players in organizations of the free and open-source software movement, and I hadn't.

Since I believed that the Polish government might give up its resistance in the Council any day, I thought we were running out of time and pushed very aggressively for a restart initiative. That led to an even more heated debate than we'd have had otherwise.

Fortunately, some of the most important players supported the restart idea from the beginning. Hartmut Pilch had never had any doubt that we had to do whatever we could to get the Council to renegotiate its position. Hartmut thanked me for

taking this initiative now. Erik Josefsson had already explored the possibility of a restart, and when I called him to discuss it, I realized that he also wanted to pursue this strategy. However, he wanted to ensure that our key allies in the parliament were comfortable with this, and I understood the desire although I obviously wanted him not to be swayed over this strategic issue.

Jan "Miernik" Macek was also positive, and it was only a minor logistical issue for him to come to Brussels the following Monday, a week earlier than he had originally planned. Doing so required him to go from Brussels to Austria and back on overnight trains, since he had already arranged a meeting with activists from Austria and some of its Eastern neighbor countries. It was another one of Miernik's achievements that, besides the tremendous job he did in Polish politics and in the European Parliament in general, he called people in many places to action and helped organize our resistance movement in other countries, especially some of the ten new EU member states.

Erik, Miernik and I agreed to meet on Monday, November 29, in front of the European Parliament at about lunchtime. Over the weekend, there were still intense discussions with other people, but at least we had a core team in place to form a vanguard for this strategic mission.

The Calculated Loss

The whole strategy was to give up, in procedural terms, the positive outcome of the European Parliament's original first reading in order to require the Council to negotiate a new common position, which would then send the matter into the European Parliament's second reading on the basis of a more favorable common position.

Now imagine you have a whole group of people sitting on one side of a chessboard arguing internally about how to go forward. There will always be different ideas about what the next move should be, but the discussion will get particularly heated if someone suggests sacrificing a cherished piece (in this case, the procedural heritage of the original first reading) in order to gain a positional advantage. While experts have somewhat favorably evaluated the merits of classical gambits (sacrifices made in the opening stages of a chess game), people are always more uncomfortable about making such trade-offs later on.

For some of us, including Hartmut and me, it was absolutely clear that the potential gain far outweighed the calculated loss. For others who assessed the key

parameters differently, the restart idea was a highly uncomfortable notion. They thought we'd pay too high a price for too uncertain an advantage.

For instance, they strongly doubted that the Council would arrive at a significantly better common position in a new legislative process. I knew there was no guarantee, but at that time Poland had joined the formal dissenters from the political agreement in May (Spain, Italy, Belgium and Austria), and the governments of Germany and the Netherlands had come under pressure from their national parliaments. With that list of countries, we were comfortably above the minimum requirement for a blocking minority in the Council. If you have a blocking minority in place, you can keep the ball in the Council's corner for years and try to build your own qualified majority over time by bringing country after country onto your side. (Of course, your adversaries will typically be trying to do the same thing.)

Most, but not all, of us agreed that our movement had usually benefited from the passage of time. Some people always scaled back their involvement or left the ranks of our activists entirely, while new ones were joining or stepping up their commitment to the cause. Overall, though, the quantity and quality of our resources trended upwards. The big question mark was how much stronger our movement could get, and I was optimistic about that because I saw how much more publicity we were able to generate for the cause in late 2004 compared to the first half of the year. I also believed that having three corporate sponsors back my NoSoftwarePatents campaign was a proof of concept for future, larger-scale commitments by companies.

The item that made our internal discussion most emotional was assessing the value of the original first reading. Formally, a restart would require a new first reading, and to some of our first-reading heroes that implied that we would be throwing away the fruits of their labor. However, I thought that the result of the original first reading would always play a psychological role and serve as a beacon.

Given the fact that the majority requirement to get a piece of legislation amended or thrown out in a second reading is significantly higher, I thought we'd either be able to succeed in a new first reading be much less likely to surmount the higher majority hurdle in the second reading. And without stressing that thinking in public, I wouldn't have considered it a huge problem even if a new first reading had produced a less favorable result. As long as we had a blocking minority in the

Council, I thought we would still be in better shape than we would be with a strong first reading but an unfavorable common position from the Council.

Some Institutions Are More Equal Than Others

No one in our camp disputed the fact that trying to win in a second reading in the European Parliament was going to be an uphill battle. Nor did anyone, including me, claim that our side would necessarily lose in a second reading. The difference laid only in how much one feared that software patents would be legalized only because a procedural disadvantage for the European Parliament in its second readings makes it very hard to change an unfavorable common position into a reasonable piece of legislation.

Article 251 of the EU Treaty (the article that stipulates how the codecision procedure works) may first give the impression that passing legislation is a back-and-forth between the EU Council and the European Parliament until they reach agreement, with some involvement by the European Commission along the way. On the surface, it looks as if the Council and the parliament are peers, but if one reads the article closely and thinks through its practical implications, it becomes clear that even a majority of the European Parliament isn't necessarily sufficient to oppose the Council.

Someone once made the cynical remark that the EU's procedures are designed in such a way that the parliament gets as little power as possible without making it look completely ridiculous. That is a bit of an exaggeration, but unfortunately it does hold some truth.

When the first direct elections to the European Parliament were held in 1979, its function was only consultative: it expressed opinions, but the governments of the member states decided on their own in the Council. The governments of the EU member countries were free to ignore anything the parliament said. A parliamentary position against a legislative proposal provided some ammunition to those politicians who wanted to influence the Council's decision, but it was a very limited degree of influence.

Over time, the member states decided to give the parliament more power. They decided that decisions in certain areas of policy should be taken under the "cooperation procedure", later replaced by today's codecision procedure. While they did concede to the parliament some right to have a say, they still didn't enter into a true power-sharing agreement.

The logic of the codecision procedure is that a few countries can easily prevent a legislation from going through, while the European Parliament can't easily do so, even with a majority.

Unlike national parliaments, the European Parliament can't start or abort legislative processes. That privilege is reserved for the European Commission. It is in the Commission's sole and absolute discretion to withdraw a proposal at any time, and that gives it a permanent veto right that the European Parliament has only on certain occasions, and only if there is a solid majority coupled with a strong political will.

The Parliament's Procedural Handicaps

Let's analyze some passages of article 251 of the EU Treaty:

> 2. The Commission shall submit a proposal to the European Parliament and the Council.

That's the aforementioned privilege of the Commission, which includes the right to withdraw a proposal and thereby abort a legislative process.

> The Council, acting by a qualified majority after obtaining the opinion of the European Parliament,

The syntax leaves no doubt that the Council is in the driver's seat. Note that the outcome of the European Parliament's first reading is called an "opinion". That wording reflects the original idea that the parliament would only have an advisory role rather than a true share of legislative power at eye level. The word "opinion" is much weaker than "position" or "proposal". It implies that it's only a preparatory step, and the real legislative process begins when the Council decides. (The Council starts its internal discussions as soon as the Commission's proposal is on the table, long before the parliament concludes its first reading).

> – if it approves all the amendments contained in the European Parliament's opinion, may adopt the proposed act thus amended;

This is a scenario of a first-reading agreement: the European Parliament suggests modifications to the Commission's text during its first reading, and then the Council decides in its own first reading that the parliament's suggested changes are acceptable. This might have happened with the software patent directive if the

European Parliament had adopted only the amendments that were proposed by its first-reading rapporteur, Arlene McCarthy. Those changes would have been so weak that the Council might have accepted them in order to resolve the issue quickly and not risk future disagreement. However, as the FFII and its political allies succeeded in building majority support for much stronger amendments, the process had to continue beyond the first-reading stage.

> – if the European Parliament does not propose any amendments, may adopt the proposed act;

Here is a different scenario of a first-reading agreement: if the European Parliament and the Council are happy with the Commission's proposal "as is", there's no need to go into a second reading. In the full European Parliament, there will usually be people who are unhappy with some aspects of a proposal, but if not even one amendment receives majority support, then the parliament may effectively support the Commission's proposal in its entirety at the first-reading stage.

> – shall otherwise adopt a common position and communicate it to the European Parliament. The Council shall inform the European Parliament fully of the reasons which led it to adopt its common position. The Commission shall inform the European Parliament fully of its position.

On May 18, 2004, the Council politically agreed on a common position that allowed for software patents all the way and thereby deviated from the European Parliament's first-reading opinion, which would have clearly abolished software patents.

The second sentence mentions the need for the Council to provide a statement explaining its reasons (for adopting the common position), and on December 3, 2004, only a few days after we started our push for a restart, all 20 language versions of such a statement were published on the Internet. That indicated to us that the Council was indeed forging ahead with its effort to formally adopt the common position and forward it to the European Parliament in accordance with the passage quoted above.

> If, within three months of such communication, the European Parliament:
>
> (a) approves the common position or has not taken a decision, the act in question shall be deemed to have been adopted in accordance with that common position;

At the time, that was our worst-case scenario. We feared that the Council would send its proposal to legalize software patents to the European Parliament, and that the European Parliament might not be able to agree upon even a single amendment (or the rejection of the entire proposal) in its second reading, in which case the Council's proposal would have taken effect as a European law, period.

> (b) rejects, by an absolute majority of its component members, the common position, the proposed act shall be deemed not to have been adopted;

This is the scenario of a second-reading rejection, which lets a legislative process end without result. Up to that point the European Parliament had never once exercised its right to reject a common position of the Council in its second reading. That's because of the combination of the high majority requirement ("absolute majority of its component members", which we'll talk about in an instant) and the general reluctance of politicians to let a decision-making process fail rather than achieve some kind of compromise.

Even if parliamentarians are very unhappy with a common position, they're more inclined to suggest amendments (in order to be constructive). They can still kill a legislative proposal in a conciliation proceeding (where the Council and the European Parliament negotiate directly) or in a later third reading. Previously, one directive had indeed died in conciliation, and three bills had been rejected in a third reading, which takes place right after conciliation.

With the track record of zero second-reading rejections in mind, Dany Cohn-Bendit told me in December 2004, at a joint hearing between the Greens in the German Bundestag and the Greens in the European Parliament: "You'll never get a majority of the European Parliament to reject a bill in a second reading, but what we can do is lay an axe to this part of the patent system." He implied that the European Parliament would have to take a similar position in a second reading to the opinion it had expressed in the first reading, and that this would prevent an agreement between the institutions. But the more direct path that the

European Parliament would say "No way, José" seemed too unrealistic a possibility at the time.

> (c) proposes amendments to the common position by an absolute majority of its component members, the amended text shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

At the discussion panel hosted by the German government in Munich the day after the launch of *NoSoftwarePatents.com*, Raimund Lutz from the German ministry of justice predicted that the European Parliament would neither accept nor entirely reject the common position, and that it would suggest amendments in accordance with the passage quoted above.

Since the European Parliament had been so much on our side in the first reading, we should have welcomed this idea. However, the second-reading hurdle of the high majority requirement had us worried that the parliament might not agree on amendments with sufficient impact to force the Council to negotiate further.

An "absolute majority of [the European Parliament's] component members" means that all absences and abstentions count in favor of the Council's common position, that is, against us. A 50 percent majority of all 732 MEPs is a minimum of 367 votes. If only 500 MEPs are present for the vote, you need well over 70 percent of the votes of everyone in the chamber in order to make any changes to the Council's proposed bill. It's a bit pessimistic to assume that only 500 out of all 732 MEPs would be present, but it wouldn't be unusual to need about 60 percent of the votes cast in order to get to the required 50 percent of all members.

> 3. If, within three months of the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the European Parliament, the act in question shall be deemed to have been adopted in the form of the common position thus amended;

This was one of the scenarios we feared: a weak second-reading position by the European Parliament would be adopted by the Council, and we'd have a law that effectively legalized software patents in Europe.

> however, the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

This passage enables the Commission to up the ante. If the parliament proposes an amendment that the Commission dislikes, the Commission can raise the majority requirement from a qualified majority to the need for unanimity in the Council. That way, the Commission can make it harder for a proposal from the parliament to really take effect as a law.

> If the Council does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

The net effect of this is that the Council can really only take two kinds of decisions in its own second reading (after the European Parliament's second reading): it either accepts all of the amendments that an absolute majority of the European Parliament's component members decided upon, and then the directive takes effect with those changes, or it doesn't. If there is only one amendment that the Council doesn't accept, the process goes into conciliation. Even if the Council wanted to kill a proposal at this stage, it couldn't formally do so. It could only decide not to accept the parliament's amendments and then try to derail the legislative process later.

Let's not look at the conciliation and post-conciliation stages of the process in too much detail. This is a simplified version of the story. The conciliation committee consists of delegations from the Council and the European Parliament, and as always the Commission muddles around. That conciliation committee is formed within six weeks and has another six weeks to agree on what is called a "joint text", that is, a proposal the conciliation committee can agree upon. If there's no agreement, then the legislative process dies in conciliation, which as I said had happened only once before. Usually the conciliation committee does produce a joint text, and then the Council and the European Parliament must both ratify it within another six weeks (which until then had happened in all but three cases).

The ratification of the joint text is the third reading. At that stage the majority hurdle goes down from an absolute majority of the European Parliament's members to an absolute majority of the votes cast (as in the first reading). However, the psychological hurdle MEPs have to get over in order to reject a joint text of a conciliation committee is very high. It's a take-it-or-leave-it proposition: if the parliament does say no, there'll be no directive.

The whole idea behind the conciliation procedure is, quite understandably, that agreement between the Council and the European Parliament becomes more

likely the longer the process takes. The parliament's handicap in its second reading is intended to keep the number of proposed changes that need to be discussed to a minimum. If a legislative process goes into conciliation, everything is theoretically up for renegotiation, even including the proposals that didn't get a parliamentary majority in the second reading.

The Council's common position is the single most important document in a codecision procedure. The intention is that the outcome of a legislative process will be either identical to, or at least largely consistent with, the common position.

Mixed Reactions to the Restart Idea

On November 29 , 2004, the first day of our push for a restart, we saw that the politicians who supported us basically displayed the same two opposing views concerning the price we might have to pay as our circle of activists.

Our highest priority was to contact Michel Rocard, the official rapporteur for this directive. I agreed that it would be extremely helpful to get his blessing for our initiative, but I didn't concur with those who said that we should drop the idea if Rocard didn't support it.

We couldn't reach Rocard directly, and his assistant suggested we talk to Xavier Dutrenit, an aide to Gilles Savary, like Rocard a French socialist MEP and also an immensely important ally for us in the parliament. That Monday, Erik called Xavier from his cell phone while I was standing next to him near the European Parliament canteen. Erik explained briefly that we'd like to talk about the possibility of getting the legislative process restarted, and Xavier's immediate reaction was: "Are you crazy?"

Erik reacted constructively by saying: "Could we perhaps meet so you can tell us how crazy we are and why?" However, Xavier just said "We'd lose everything that we've got", and claimed that he couldn't make time available to see us.

That was about the worst start we could have had. Erik thought very highly of Xavier, and was disconcerted by his complete and unconditional dismissal of our idea. I told Erik not to overestimate the importance of this setback: "If someone responds like that and isn't even willing to listen to our reasoning, then that's certainly a negative thing, but let's not believe that he's so smart that he can fully assess the pros and cons of a proposal without even engaging in an open-minded

discussion. He may simply be emotional because of all the work that he put into the original first reading."

Minutes later, Erik spotted Wojtek Niewierko, assistant to Polish MEP and former prime minister Jerzy Buzek. Wojtek was just on his way to lunch, and didn't have time for a long discussion, but he seemed much more receptive. The idea wasn't completely new to him, and he arranged for Erik and Miernik to meet him and Buzek later. Since our activists had already been in contact with the Polish delegation to the European Parliament, there was considerable awareness of the issue of software patents.

By the afternoon, our idea had begun to get a little traction. Erik, Miernik, and I were waiting for someone in a corridor, and Miernik thought we might get valuable information from Polish deputy minister Włodzimierz Marciński as to the situation in the Council. From his cell phone, Miernik called Marciński's office. While he was dialing, I asked: "Are they really going to put you through to him?" Miernik replied: "Sometimes it works." He said a few sentences in Polish and then gave us the thumbs-up. A minute later he was connected to Marciński. This was like the moment at the FFII conference earlier that month, when Miernik showed the Dutch government official an internal working document of the Council. I considered it even more amazing that this young activist was in a position to call a member of the Polish cabinet and be put through as if it were no big deal.

Marciński indicated that it would be difficult for the Polish government to oppose formal adoption of the common position in the Council for much longer. Diplomatic pressure to conform to the Council's unwritten rules of diplomacy was just too strong. It was exactly as I had feared. Later, someone implied that our restart initiative made Poland let up, but the conversation between Miernik and Marciński proved to me that we had simply started the right thing at the right time. The inevitable couldn't be delayed forever. If we had indulged in false hopes instead of taking action, we would have lost.

Marciński immediately embraced the idea of lobbying the European Parliament for a restart of the legislative process. Miernik didn't have to do much persuading: The strategy was self-explanatory to Marciński. Just like me, he believed that this was a good time for the European Parliament to take an active role.

After that telephone conversation, it was also clear that the Polish government was willing to work with Polish MEPs to make this happen. We all agreed that

we didn't want to position the restart request as something that exclusively concerned the new member states, but those were the ones whose desire for a restart was particularly obvious, since the earlier stages of the legislative process had taken place before the ten new member states acceded to the EU. A restart was a chance for them to become fully involved from the outset.

Finding a Procedural Way

Watching politics on television can give the impression that it's a very exciting and often emotional field. As soon as one actually gets involved in it, whether as politician or as activist, it turns out that a large part of politics is dull. Away from the newspaper headlines and the cameras, there's a lot of drudgery, especially when it comes to the details of procedural rules.

While we were trying to build political support for our restart project, we also had to find a formal way of introducing the proposal into the parliamentary system. Fortunately, our activists knew people to talk to. We received valuable advice from Kjell Sevón, the legal adviser of the Greens/EFA group. From his point of view, the idea of a restart was very interesting. At that stage, the Greens/EFA expert on IT policy, Laurence van de Walle, was less enthusiastic. She generally preferred to discuss actual policy rather than procedural tactics.

By coincidence, Erik ran into Paul Dunstan, the head of the European Parliament's Tabling Office. In political discussions, the verb "to table" has already led to major misunderstandings between Americans and Britons. In American English, an item that is tabled is taken off an agenda. In British English, tabling puts it on an agenda, and the latter meaning roughly describes the purpose of the European Parliament's Tabling Office. It is the office that performs a first check whether a motion complies with the European Parliament's Rules of Procedures.

As part of the parliament's administrative services, the Tabling Office is based in Luxembourg, but on this particular day Paul Dunstan was visiting the EP in Brussels. Usually, an internal parliamentary department wouldn't be available to inform outsiders like us unless an MEP says officially that someone like Erik is an adviser. However, after Erik had already spent so much time in the parliament, he was able to have a brief conversation with Dunstan even without first asking an MEP to make a formal request.

It was during those days that I realized how extremely well connected Erik was in the European Parliament. One day we met in the lobby and walked to a meeting. On the way, Erik had to stop about once a minute to greet someone he knew. He had put a lot of hard work into building such an extensive contact network. Alex Ruoff of CEA-PME told me that Erik usually spent all day in the parliament, and then went to the office in the evening and worked there past midnight.

In our quest for procedural advice, I also got to meet Richard Corbett, a British Labour MEP. He co-authored the best-known book on the European Parliament, and is an expert on the EU Constitution project. Kasia Matuszewska, the Polish MEP assistant who helped us in so many ways, saw him as he walked by, and introduced us to him.

The following day, I concluded that it would take us several more days to work out the procedural questions, and I flew back home on Tuesday, November 30, 2004. Erik could handle everything on the spot in Brussels, and I was available to return any time to talk to more politicians about this initiative.

As I was waiting at the departure gate for my flight to Munich, I saw a fellow traveler that I recognized from the picture on his campaign poster earlier in the year: Bernd Posselt, the conservative MEP from Munich. I adhered to my principle of not lobbying politicians in their spare time, but he noticed that I recognized him, and we shook hands and exchanged some small talk. Posselt asked what I was up to, and I mentioned my work concerning software patents. He asked: "On which side are you? Open source?" As always, I pointed out that I was not exactly an open-source activist, but I was indeed against software patents if he meant to ask that. Posselt replied: "Then we're on the same side. I'm all for open source, unlike most of my party colleagues here."

I said that I'd contact him some other time about software patents, and he was happy with that suggestion. His own specialty is foreign policy, and he told me about his untiring efforts against full EU membership for Turkey. He was flying back to Munich to deliver a speech at an event there, and he would return to Brussels the next day. He mentioned that he works more than 100 hours per week, and his aides, some of whom he was still going to meet later that evening in Munich, about 70 hours.

On the Internet, I later learned that he's really part of the European Parliament scenery. Since 1979, the year of the first direct elections to the parliament, he has gone to Strasbourg for every single plenary week. He started out as an assistant to

Otto von Habsburg, a conservative MEP and an offspring of the Austrian dynasty that once ruled a large part of the Western world. In 1994, Posselt became an MEP himself.

Growing Popularity of the Restart Project

The biggest progress we made in the following days was within our own camp. Some friendly MEPs confirmed that the restart initiative was a good idea, and after the weekend's heated email discussion, more and more of our activists supported the strategy after they had given it more thought.

Those who had hoped that the Council would renegotiate its common position saw the writing on the wall on Friday, December 3, 2004, when the Council's Web server suddenly listed all 20 language versions of a statement explaining the official reasons for adopting the Council's common position. That document was an indispensable requirement if the Council was to forward the common position to the European Parliament.

The mere fact that it was available said a lot, and its content showed the Council's disregard for the European Parliament's first-reading opinion. Without providing much justification, the statement just generally said that the Council deemed the parliament's suggestions unacceptable.

The Council's arrogant and ignorant behavior made some of us finally realize that the European Parliament's first-reading opinion was going to be procedurally lost one way or the other. A restart would lead to a new first reading, but the alternative was that the Council would invalidate the parliament's first-reading opinion in a way that seemed even worse to me.

That same week, some of our activists also gained a new appreciation for how difficult it would be to prevail in a second reading. We were going to face a high majority requirement and an unprecedented lobbying onslaught by the pro-patent forces, which had not taken the European Parliament's first reading too seriously but were now determined to do whatever it would take to win at the second reading.

James Heald, who for some time represented the FFII in the UK, wrote in an email at the beginning of the following week:

> Having seen Tim Frain last week, and the intensity with which he's planning lobbying over the next 3 months, I'm convinced and I withdraw any previous objections: restart is the way to go.

Tim Frain is the Nokia patent lawyer and lobbyist who also participated in the unofficial hearing in the European Parliament that Piia-Noora Kauppi had organized that November.

Even the activists who originally argued against the restart initiative were now for the most part on board and contributing to the project. On that basis, the FFII was able to arrange for several more of its activists to travel to Brussels on or before Monday, December 6, 2004. On a cold winter morning, about half a dozen of us met outside the accreditation center of the European Parliament to receive our weekly badges.

United in Diversity

With all the familiar talk about cross-cultural competencies and European unification, it was great to see a pan-European movement in action. Our group had a common political goal, and in accordance with the EU's motto, we truly were "united in diversity".

Erik from Sweden, Miernik from Poland, Dmitry from Latvia, Luca from Italy, Dimitrios from Greece, Bernhard from Austria (then a resident of Germany) – we all worked together with ease. We knew we needed multiple nationalities on call in order to talk to MEPs from different parts of Europe. There wasn't even time to think about which of our countries had been at war in the last century. All of our activists were reasonably fluent in English, which is no surprise given that we all had an IT and Internet background.

Marco, with whom I had lobbied the German parliament, joined later, and so did Petr from the Czech Republic. It was also the week in which Antonios from Greece first became very actively involved in our lobbying efforts, and he played a key role later.

In addition, we got support from people in other countries who weren't able to travel to Brussels on short notice but contacted "their" MEPs by telephone. And in Brussels, we were helped by two interns at CEA-PME, Patrick from Germany and Jolanta from Poland.

This ability to put together such an international task force within about one week showed how strong a movement the FFII had built over the years. Many have contributed to that network in important ways, especially Hartmut Pilch, the FFII's visionary founder, and Holger Blasum, the organization's untiring factotum.

The flexibility and agility of this virtual network of volunteers gave us access to a level of resources that at times frustrated our opponents. They were backed by organizations with deep pockets, but due to red tape couldn't respond to new challenges as swiftly as we could.

Different Approaches

On December 6 and 7, I talked to people from various countries, and the most important conversations took place with Austrian politicians.

I received a phone call from Dr. Eva Lichtenberger, an Austrian Green MEP, who wasn't in Brussels that day and wanted to analyze our strategic options. She was very receptive to the restart idea, yet concerned about making the right strategic move. I had met her at the FFII conference the previous month, which she was the only MEP to attend in person, though others sent assistants. She actually stayed throughout most of the conference, which is very unusual for an MEP. She also went to the EIF conference right after the FFII event and there made a pretty good statement. Eva had just been elected to the European Parliament that same year. Both Hartmut and I thought she was extraordinarily determined to fight for this cause, and that she really strengthened our camp.

Because she hadn't been directly involved before, Eva was prepared to risk sacrificing the outcome of the first reading. However, she thought that it was best to wait a little longer and see if the Council would renegotiate its common position before we made a move that would prevent that from happening.

That was also the opinion of Mag. Othmar Karas, an Austrian MEP and a vice president of the conservative EPP-ED group (Mag. is an abbreviation for "Magister", an Austrian academic title). I first met him on Monday, December 6, although by coincidence, I had seen him in passing the previous week as he entered the Marriott Renaissance hotel to go to a meeting or reception. That was an example of how small the world is, especially in the EU districts of Brussels. I wouldn't have recognized Karas at the time, but Becky, a friend of mine in Brussels who occasionally worked for a catering service, did: "I don't know his

name, but I do know that the person who just walked in is an important Austrian MEP."

Being one of the leaders of the largest parliamentary group, Karas had a bigger office and more staff than ordinary MEPs. I was initially surprised to see him dressed semi-formally in red denim jeans and a dark blue blazer. But this was Monday, the day on which most MEPs travel from their home country to Brussels. Some dress comfortably for the journey and only visit their offices briefly in the afternoon. There are very few official events on Mondays in Brussels.

Karas had previously called on the Council to renegotiate its common position, especially after the Polish government's announcement in mid-November, and he now told me he was going to pose the Council a set of official questions. One of his aides, Mag. Michaela Gutmann, joined our meeting, and I was amazed how well informed she was about the status of the software patent directive. She seemed to be up-to-date on everything relevant to this issue as far as the EU institutions were concerned. The only area in which I was able to add to her knowledge was the situation in a few member countries and their national parliaments.

At first I was a little disappointed that Karas wasn't going to support our restart initiative right away because he really would have been an extremely powerful ally in that endeavor. However, the more I thought about it, the more I liked the idea of a high-ranking MEP demanding explanations from the Council. He even said, both in our conversation and later in a press release, that it would be "antidemocratic" for the Council to formally adopt a proposal that would no longer have the support of a qualified majority when the formal decision was made.

The T-Shirt on the Wall

The next day, I had a meeting with Dr. Maria Berger, an Austrian social democrat MEP. She was also the coordinator of the center-left PES group in the Legal Affairs Committee, the committee in charge of the software patent directive. I was joined in the meeting by Bernhard Kaindl, an FFII activist from Austria who worked in Nuremberg, Germany.

Berger was definitely in favor of a restart. In a press release she had demanded a "period of reflection" for the software patent debate, and a restart would have

provided exactly that, while continuing the legislative process based on the Council's proposed common position would have done the opposite.

She agreed that a second reading represented a high hurdle. She thought we could prevail, but she also believed that a whole new legislative process would be likely to yield a more favorable result, especially as far as the Council's common position was concerned. Toward the end of our conversation, Berger said that in her eight years as an MEP, no other topic had come close to generating as much interest among constituents as the software patent directive. She really liked the fact that this was an occasion on which her electorate took a real interest in what she was doing. Most of what happens in Brussels goes largely unnoticed at home.

Another interesting detail is that she had pinned one of those yellow FFII demonstration T-shirts to the wall in the corridor, right outside her office. On the front, the T-shirts were labeled with "No Software Patents", and on the back with "Power to the Parliament", which was the side of the T-shirt that Berger had turned outward. Still it was some kind of statement.

The only significant disagreement between us and Berger was procedural: she didn't share our belief that a motion signed by 37 or more MEPs could lead to a vote in the parliament's plenary on whether to request a restart. According to her interpretation of the European Parliament's Rules of Procedure, such a request had to come from the commitee, and she would put this item on the agenda for that committee's next meeting, scheduled to take place on January 19 and 20.

That was excellent news. It really didn't matter to us which procedural avenue was the right one. We thought that if there was a political will, there would be a procedural way. Trying to take our request for a restart through the committee was legally safer because the Rules of Procedure left no doubt that the committee could make such a request. However, most of us, as well as some MEPs, interpreted the Rules of Procedure differently, believing they also allowed the parliament's plenary to do so if the proposal comes from a political group or any group of at least 37 MEPs. We intended to pursue both possibilities in parallel, and before the meeting with Berger we didn't even know there might be a short-term opportunity to achieve our goal through the Legal Affairs Committee.

The Belgian Minister's Assessment

On that same Tuesday, December 7, 2004, our advocacy in the European Parliament wasn't our only effort to promote our restart project. Our Belgian

activists had continued to communicate with friendly members of the Belgian parliament, which, like the European Parliament, is located in Brussels. In the afternoon, the FFII's Benjamin Henrion walked over to the Chambre des Représentants de Belgique in order to hear Belgian minister of economic affairs Marc Verwilghen reply to a question from Zoé Genot concerning the status of the software patent directive. Zoé, a young parliamentarian from the Ecolo party (the Greens of the French-speaking part of Belgium), specifically asked about the next steps in the process and the stance of the Belgian government.

Contrary to previous claims by EICTA, the Belgian government still intended to abstain, which in the Council is technically the same as voting against a proposal. But there was much bigger news than that. Verwilghen said that the software patent directive was not on the agenda for the COREPER meeting the next day "as the qualified majority no longer exists", and noted that the EU Competitiveness Council would not hold a vote on this issue before the end of the year.

Erik and I were in the office of Laurence van de Walle of the Greens/EFA group in the European Parliament. Laurence was at a meeting, and there was a computer in her room that the FFII activists were allowed to use any time to access email from within the parliament. That kind of hospitality was one of several respects in which the relationship between the Greens and our camp was truly unique. We had some political support from all parties, and there were parliamentarians with whom we worked closely all across the democratic spectrum, but the Greens helped us in certain ways that no one else did.

We received the news on the Belgian minister's statement from Benjamin by SMS and phone. It was the best turn of events we could have hoped for. It suggested that the Council would have to renegotiate its common position, and that all of our efforts to persuade certain countries to side with us had finally succeeded.

However, we really wanted to get definitive confirmation in the form of a transcript of that parliamentary session. Shortly thereafter, a summary appeared on the Web site of the Belgian parliament, but it didn't quote Verwilghen's statement concerning the absence of a qualified majority. Benjamin still swore to us that he had heard exactly those words, and later we saw a complete transcript which indeed confirmed that:

> La proposition de directive n'est pas mise à l'agenda du COREPER du mercredi 8 décembre, au motif que la majorité qualifiée n'existerait plus.

The French verb form "existerait" implied that Verwilghen claimed not to know whether the qualified majority had indeed fallen apart. It was a statement in indirect speech, and his source had presumably been the Dutch presidency of the Council.

The next morning, we disseminated that statement. We wanted people to know, as it was really the first major sign of instability concerning the Council's qualified majority for software patents since the Polish government had announced that it "cannot support" the proposed text.

But one day later, on December 9, 2004, we had a roller coaster experience: our Polish activists received the information that the government of Poland had given up its resistance in the Council, and that the Council was now all set to still adopt its common position during the Dutch presidency. The formal decision would have to happen within a week or two.

Busy Time Before Christmas

Fortunately, our restart project had already made some progress by the time the bad news about the Council reached us. The restart initiative was now spearheaded in the parliament by Polish MEPs Jerzy Buzek (a conservative who had been prime minister of Poland from 1997 until 2001) and Adam Gierek (a socialist whose father governed Poland during the beginning of the Solidarność movement's fight for democratization).

That cross-partisan alliance could appeal to politicians across the spectrum. Our activists quickly gathered a few dozen MEPs' signatures in support of a motion that the plenary of the parliament should vote on whether to restart the legislative process concerning the software patent directive.

We knew there was some uncertainty about the procedural basis for a restart motion for the plenary of the parliament, but a law firm analyzed the European Parliament's Rules of Procedure for us, and like the MEPs who supported the motion, those lawyers agreed with our interpretation of Rule 55 of the European Parliament's Rules of Procedure. Meanwhile, Berger was still pursuing the same objective through the Legal Affairs Committee.

At this stage we knew that the Council might manage to adopt its common position before Christmas, but that the European Parliament wouldn't formally start its second reading before the following month. The procedural requirements are such that the president of the European Parliament can only formally announce a common position of the Council during a plenary week. Under another article (Rule 57) of the European Parliament's Rules of Procedure, the restart initiative would have to bear fruit before the common position was formally forwarded to the parliament, or it would be too late. Rule 57 implicitly blocks the parliament from requesting a restart after it has begun its second reading.

The Wheels of Diplomacy

After were learned that the Polish government no longer stood in the way of a formal decision by the Council, the software patent directive progressed toward passage step by step. The diplomatic machinery in Brussels seemed inexorable.

On Monday, December 13, 2004, we heard that the software patent directive was on the agenda for that week's COREPER I meeting, due to take place two days later. The next day, we heard that the Mertens group, which prepares all meetings of COREPER I, had given the green light.

Usually, if a country wanted to object to the adoption of that common position, it would have done so at that stage or alternatively at COREPER on the 15th, but that didn't happen. The reason for Mertens to prepare COREPER meetings and for COREPER to prepare the official Council meetings is to get the diplomats to try to agree on as many details as possible among themselves, so that only the areas of disagreement are escalated to the next level.

Occasionally, even the ministers can't resolve an issue. If that happens, and the dossier is really important, it will be discussed at a European Council meeting. Legally that is also a Council meeting, but the participants are the heads of government, who by virtue of their authority can sometimes work out agreements where everyone else has failed.

Based on how things usually work in Brussels, anything that passes COREPER is set for adoption without debate at a subsequent Council meeting. In this situation, I had given up hope that we could prevent the inevitable, but Hartmut urged me not to make pessimistic statements to the press. He managed to convince me he was right: "We're not experts on the Council's customary working methods. In

politics, many things only happen at the 11th hour, and we have to fight against the Council's decision until the last minute. Even if we don't succeed, our opponents will at least have to pay a higher price for what they do."

Bath Water Quality and Software Patents

That Friday, December 17, 2004, the Council secretariat published the agenda for the Environment Council meeting that was scheduled for Monday, 20 December. That agenda contained two A items: one for a regulation concerning bath water quality, and the software patent directive.

It's easy to see why bath water quality would be on the agenda of an Environment Council meeting, but software patents? Dutch COREPER diplomat Henne Schuwer had already told us why at the EIF event the previous month: they didn't want to wait until the next meeting of the EU Competitiveness Council in March, and in legal terms any Council meeting can make a decision for any area of policy.

Legally speaking, the Council is indivisible: a Council meeting is a Council meeting is a Council meeting. The meetings of the EU Council are numbered sequentially. That Environment Council meeting was meeting number 2632 of the EU Council, and the Agriculture and Fisheries Council meeting the following day would be EU Council meeting number 2633. If a decision is a mere formality, which is the way the Council viewed the software patent bill at this stage, the only issue is which ministers remain silent when the president of the Council announces the list of A items for the meeting.

On that Friday afternoon, the software patent directive suddenly disappeared from the agenda of the Environment Council meeting, and it became known that instead the common position was moving to the agenda of the Agriculture and Fisheries Council meeting on Tuesday, December 21, 2004. We didn't know why the change was being made, and the Council didn't give any particular reason. It made no sense, because software patents aren't the responsibility of the Agriculture and Fisheries Council any more than of the Environment Council.

Fishy Business

The notion that this important decision on software patents was going to be taken by an Agriculture and Fisheries Council made many people in our camp very angry. Someone suggested mailing fish to the politicians and ministries involved

in the software patent decision. Several activists fell in love with that idea, and even asked Richard Stallman whether he'd participate in the malodorous campaign by sending a fish to the permanent representation (sort of an embassy) of the EU to the US.

While I was ready to take part in other last-minute activities before the Council meeting, I urged people to refrain from such a distasteful and desperate act, which wouldn't have been helpful to the reputation of our movement. Fortunately, the idea was dropped within a few hours.

What we did put in place without any loss of animal life was an Internet campaign. We quickly mobilized thousands of Web masters to display banners on their sites, and numerous people answered our call to contact politicians and ministries. Of all our online activities, that one went the fastest. By the weekend we already had significant momentum on the Internet. We knew we wouldn't directly reach politicians that way, but we had to call our supporters to action.

Over the weekend, we talked to those parliamentarians whose private telephone numbers we had to see if there was anything they could possibly do on Monday, the day before that Council meeting.

I heard from Jan Wildeboer that one of the leaders of the German youth organization of the Greens called his party's chairman Reinhard Bütikofer on his cell phone and told him that a Green minister, Renate Künast, was about to represent the German government in a meeting at which the Council's proposal to legalize software patents would be ratified.

The Greens didn't like the Council's proposed common position at all, and while they weren't going to break up their coalition with the social democrats over the issue of software patents, they certainly didn't want to be seen as playing a decisive role in the Council's adoption of its common position.

The minister in charge of the software patent directive within the German government, justice minister Brigitte Zypries, wasn't even aware of the impending formalization of the Council's decision. On Saturday, December 18, 2004, she sent me an email as she was just cleaning up her mailbox and found a message that I had sent her a couple of months earlier. Her note was friendly, but said the Council was going to decide in early 2005.

Her statement was probably made on the same basis as that of Belgian economic affairs minister Verwilghen's to a question in his parliament. Presumably the

news of this latest push to ratify the decision just before Christmas had not yet reached the German justice minister. Zypries obviously had lots of other political issues to attend to, while we were completely focused on this particular EU directive.

It was quite a surprise to receive a semi-formal email from the minister of justice on the Saturday before Christmas. The way the email was written, there was no doubt that she had typed it herself, quite possibly at home. It didn't look like a message written by a secretary. Zypries used to be friendly and down-to-earth in her communication with me, and I appreciated that. However, I had to constantly remind myself that what we really wanted was to prevent a bad piece of patent legislation, and the German ministry of justice was pursuing the opposite of what we wanted, no matter how personable the minister herself was.

'Twas the Week Before Christmas

I had been skeptical about the impact that our Internet protest could have, but on Monday it turned out that journalists had noticed our banners, open letters and other activities. It also helped that the mayor of Munich issued a statement that he had contacted Künast, the minister who usually represents Germany in the Agriculture and Fisheries Council.

That same Monday I received a phone call from a freelance journalist who was researching for a story on behalf of *spiegel.de*, the Web site of the most influential German newsweekly. That was one of the few publications that really had the power to influence politics. To those who weren't familiar with EU processes, it seemed very strange that an Agriculture and Fisheries Council should decide on software patents. If more legislative processes in the EU were given a similar level of attention, people would simply know about that procedure.

I told the journalist that my real objection was the absence of a qualified majority based on the political will at this stage. With a majority in place, I wouldn't criticize them for formalizing the decision at an Agricultures and Fisheries Council meeting. Without a proper majority, I didn't think any Council should adopt a common position.

Later that day, Dow Jones Newswires wrote that the "tug-of-war" over software patents continued. Apparently, a Dow Jones reporter had talked to a diplomat in Brussels who told her that there was an unusual flurry of activity now before a

decision that, from the diplomats' perspective, should be just a formality like any of the other approximately 1,000 similar decisions that the Council takes every year without interference at that stage.

Nevertheless, I saw only a little hope, and I expected the Council to simply take its decision, despite all our efforts. The Council's press office had already invited journalists to the press center in the Council's Justus Lipsius Building for 10 o'clock the next morning.

Most of the Council's work takes place behind closed doors, but the Council holds "public deliberations" on legislative proposals that are subject to the codecision procedure (that is, also involve the European Parliament) and considered ready for a political agreement or formal adoption (the case here). Even the public is allowed to go to the Council and watch those sessions, but there's fairly little demand for places since these meetings are usually just formalities and far from entertaining.

The agenda stated that there were half a dozen A items on the agenda, which would be adopted without discussion. Adoption without debate doesn't take much time: the president of the Council just lists the titles and file numbers of the relevant items. Everyone remains silent. Then the whole list of A items has been formally adopted, and the part of the meeting that the public can view is over. Usually, the meeting then continues on a confidential basis.

This was going to be the last Council meeting of the year and therefore the last under the Dutch presidency of the EU. To a decision on feed hygiene regulation, the Dutch added five A items to the agenda that were unrelated to agricultural policy. Our directive was one of them, along with a directive on the recognition of professional qualifications, a regulation on operations to aid uprooted people in Asian and Latin American developing countries, a directive that amended several existing directives concerning financial services, and a regulation related to the Schengen system (the reason for the fact that there are no more border controls between certain EU member countries).

Since it would only take them a few minutes to go through that list, I expected the Council's common position on software patents to be adopted a few minutes after 10 AM. Early that morning, I prepared a press release and sent it to a few journalists I considered trustworthy. At the top, I pointed out the basis on which I tentatively provided it:

> This is a press release that I have prepared for the virtually certain event that the EU Council today adopts the common position on the software patent directive. I thought I'd send it to you beforehand.

The press release condemned the Council's decision and criticized the Council for bowing to the threats of Philips and other large players that they'd axe many more jobs in Europe if they didn't get software patents. I hadn't completely given up hope, but I wanted to ensure that our message would form part of any news reports on the Council's decision.

One Minister Flew In While Another Chickened Out

Very shortly before 10 AM, when a number of journalists and a couple of our activists had already left for the Council building, the Council's press office published a revised invitation to the public deliberations part of that day's Council meeting. The adoption of the A items was now scheduled for 3 PM, with a plus/minus sign to indicate that this wasn't a precise time.

At first they gave no reason for the rescheduling, so there was some speculation. Lucy Sherriff of *The Register*, a British IT news Web site, asked for my assessment of the situation, and I replied:

> The sudden postponement from 10 AM to 3 PM may have purely administrative reasons. However, it may also have to do with political instability concerning this issue (like some more phone calls to be made between heads of state or whatever).

The next sign of instability was that the German agriculture minister, who had flown to Brussels that morning, was reported to already be on her way back to Berlin. The ministry said she had been to Brussels "for bilateral talks", but we knew she had originally intended to participate in the Council meeting, and then chose not to do so because of all of the pressure in the media and within the Green party. Instead, she had a German diplomat represent the government. The fact that Künast left Brussels again must have shown other national governments that the software patent decision was contentious.

A little later, around noon, the Council's information office attributed the delay to the fact that "the Polish Minister wishes to make a statement concerning item 16 (patentability of computer-implemented inventions)". I phoned our activists in

Brussels, and we knew that there had been some activity on Miernik's part, but he hadn't given us any details.

Now we heard that Polish deputy minister Włodzimierz Marciński had personally traveled to Brussels to speak out at the Council meeting. However, that didn't really mean much. The most likely scenario was still that the Council would decide, and that Marciński would only add comments to the minutes of the meeting. We had a little more hope at that stage than earlier in the day, and it seemed that they really needed time to have some talks behind the scenes, but I still thought that there was at least a 90 percent likelihood that the Council was going to adopt its common position.

At 3 PM, nothing happened. I was in contact with Erik and Miernik, who were in the press room of the Council building watching the meeting over closed-circuit television. They spotted Nokia lobbyist Ann-Sofie Rönnlund in the audience. It was good to see that all of our activities had at least made our adversaries nervous. Usually, it would be pointless for a lobbyist to go to the Council building for a mere five-minute formality. In this case, nothing was normal.

The only new information that Erik had for me was that "there has been some coordination between Polish politicians in the government and in the European Parliament".

A half-hour later, the public deliberations part of the meeting still hadn't begun, and there had been no announcement of an exact starting time.

Marciński's Heroic Feat

Finally, after about a one-hour delay, the broadcast began. A few minutes later, I reached Erik and he said: "They took it off the agenda! They didn't adopt the common position!"

He then passed his cell phone on to Miernik: "This was incredible! Marciński stood up and said a few sentences in Polish that he wanted to make a really constructive statement, and he asked the chairman of the meeting to remove the software patent directive from the agenda so that he could have more time to prepare that statement. The chairman asked whether anybody objected to it. Nobody said anything. Then an EU commissioner spoke up and he expressed some regrets, but he also seemed to accept it, and that was it!"

I again talked to Erik, who then had a brief conversation with one of the Council's security personnel. The Council has strict rules that after the end of a public deliberation part of a meeting, the press and the public must leave the building quickly.

At 4:02 PM, I shared the incredible news with a journalist who had just sent me an email to find out about the latest from Brussels. He immediately asked: "Has that been confirmed? How could that happen so suddenly?" I then sent a very brief email with the basic information to a few more journalists.

I still had some phone calls after 4 PM, such as from a Dow Jones Newswire reporter who wanted a comment, and then I had to write up English-language and German-language versions of a press release. I really hadn't been able to prepare anything for this surprising turn of events. At 4:31 PM, my German press release went out to the first journalist, and at 4:48 PM, I started distributing the English version.

I had never been that fast at writing a press release: only 15 to 20 minutes per language version. My record time until then was closer to 30 minutes, and it's usually quite difficult to decide what to put into a press release. My joy over the turn of events in the Council may have given wings to my writing.

Thank you, Poland!

The Polish intervention in the Council elicited tempestuous applause from all over the world. Even some columnists in the US hailed the Polish action. A number of people really understood the relevance of this political fight in the EU to the global evolution of patent law. If the EU were to legalize software patents, then all of the First World would be under a US-style patent regime, and emerging markets would inevitably follow. But as long as the EU would preserve its exclusion of computer programs from the scope of patentable subject matter, a worldwide turn-around in that area of policy would be possible.

Positive responses came in quickly from our political allies, such as the Greens/EFA group in the European Parliament. When the mayor of Munich welcomed the Polish move, the British IT Web site *Silicon.com* came up with the humorous headline, "Beers raised in appreciation of patent delay". For someone like me, who grew up in Munich but doesn't drink alcohol, it's always funny to see the rest of the world identify Munich with the stein-raising Bavarians at the Oktoberfest and the Hofbräuhaus.

Shortly after that wave of media reports, I was contacted by Norbert Bollow, a German software developer and (then) a resident of Switzerland. Norbert quickly programmed a Web site, *thankpoland.info*, where people from all over the world could sign up to express their gratitude to the Polish government, a heartfelt desire for many. Someone in an Internet discussion forum asked for the email address of "Włodzimierz Marciński, our hero and freedom fighter". For a moment I also considered something similar to *thankpoland.info* as a part of my campaign site, but since Norbert actually did it I supported him. For a couple of weeks, my Web site featured a big "Thank you, Poland" banner at the top, and that linked to Norbert's site.

In about a week, Norbert already had his first 25,000 sign-ups, and that fact got covered by some IT Web sites. He added a feature that allowed people to enter personal comments, which Norbert promised to forward to Marciński.

A few weeks earlier, I had already had a defining moment when I saw our international group of activists in Brussels, "united in diversity" according to the European Union's official motto. This situation with Poland was also quite an experience. People from many European countries (such as Germany) needed the help of the Polish government against their own governments, which tried to legalize software patents in Europe only in order to pander to a few large corporations and lend more power to the patent system. We had to look to one of the ten new member states for our salvation.

Accidental Prophecy and Misunderstandings

A couple of hours after Marciński had played the role of a *deus ex machina*, the German minister of justice issued a statement to the press, which I translated into English for international journalists and politicians:

> German Ministry of Justice Takes an Open-Minded Approach to Further Discussion
>
> At the request of Poland, the EU presidency today adjourned the ratification of its common position on a draft directive on the patentability of computer-implemented inventions. Poland had expressed a need for further consultations. On 18 May 2004, the EU Competitiveness Council had politically agreed upon a common position on the EU Commission's draft directive, which was slated to be finally ratified today.

Germany's federal minister of justice, Brigitte Zypries, said:

> "The German government had already achieved a lot with the political agreement in May. Nonetheless, we were well aware that the compromise also has room for improvement with an eye to the objective of arriving at a consensus position between the EU Council and the European Parliament. We will continue to work constructively toward finding a solution that even better meets the needs of those concerned than the decision taken in May of this year. In the process, we will also introduce the position formulated in the meantime by the German parliament (Bundestag) into the discussion in the Council."

This was her attempt to jump on the bandwagon, or at least to create the appearance of being a winner rather than a loser after a turn of events to which Zypries had made no contribution at all. In fact, the German government had until then represented the pro-patent interests, and continued to do so after this press release, which was nothing more than lip service.

For me, the statement was even more interesting to read because of the email I had received from Zypries four days earlier. Back then, she didn't even know that the Council had the software patent directive on its agenda for the following week, but her prediction that the Council wouldn't decide before the end of the year actually turned out to be right, thanks to the Polish government. There is not the slightest possibility that she knew about the Polish plan because I know from Miernik that the conversations which led to that action mostly took place on the following day, Sunday.

Analysis in the Aftermath

What most people, including the German minister of justice, misunderstood was Poland's "need for further consultations". The Polish government didn't demand that the Council renegotiate its common position. It only asked for more time in order to write up a unilateral declaration, which, according to article 3(6) of the Council's Rules of Procedure, can be attached to the minutes of the meeting in which the Council takes a decision. Such declaration can have psychological impact, but it doesn't formally block the decision.

The Polish government argued that the agenda of that Council meeting had not been provided to the Council's members 14 days in advance as required by article 3(1) of the Council's Rules of Procedure:

> 1. Taking into account the Council annual programme, the President shall draw up the provisional agenda for each meeting. The agenda shall be sent to the other members of the Council and to the Commission at least 14 days before the beginning of the meeting.

Our Polish friends claimed that they would have needed much advance notice in order to exercise Poland's right to attach a unilateral statement to the minutes of the Council meeting in which the A item is adopted. We were told previously countries had sometimes insisted on the notice period. Most of the time, everyone silently accepts it if the agenda of a Council meeting is provided (or, like in this case, updated) at short notice, but occasionally someone objects.

The previous week, Miernik asked me by phone: "Why don't you want a delay?" I then explained that I hadn't actually spoken out against a delay, but I did want to make sure that everyone thought carefully about whether a delay, if it were only a delay and not truly a step toward renegotiating the Council's common position, would really serve our purposes. To get the restart initiative through the European Parliament, we needed a little more time, but I was worried that it would never take off without the pressure to act.

In this case, the delay was really crucial, and Miernik did a fantastic job by making it happen. The previous weekend he had talked to key Polish politicians by telephone, and on the Sunday he had participated in a conference call with Marciński and MEP Jerzy Buzek. Everyone was also informed of our legal analysis showing it was possible for the European Parliament to request a restart of the legislative process, as well as of the fact that the parliament's administrative services had told us that we'd have to go through the Legal Affairs Committee to achieve that goal.

That was a potential timing problem: if the Council had adopted its common position on December 21, the president of the European Parliament would probably have announced the position in plenary at the next opportunity, the week of January 10, in Strasbourg. Thereby the window of opportunity for a restart request would have been closed before the next meeting of the Legal Affairs Committee on January 19.

The whole reason that Poland caused this delay was that they wanted to give us extra time to make the restart happen. The government asked Miernik to promise that he'd make good use of the moratorium. That was an enormous commitment for someone in his mid-twenties, but he took it upon himself.

We later heard that Polish prime minister Marek Belka phoned his Dutch counterpart, Jan Peter Balkenende, the next day to discuss this at the highest level with the country government holding the Council presidency. If it weren't for Buzek's personal involvement in this matter, there would not have been such direct contact between the two prime ministers.

Judging by the statements from Belgian minister Verwilghen and his German colleague Zypries, the Dutch government must have temporarily given up plans to adopt the common position before the end of the year. It's quite possible that they became aware of our restart initiative and then (in order to preempt us) they put the item on the year's last Council agenda, failing to comply with the notice period of 14 days.

Marciński's move was a spectacular way to end 2004, but Hartmut and I stressed that it was just a delay, and it was going to be up to us to make something of it.

Democracy Under Siege

Approaching the End of the Term of the Campaign Agreement

At this point I really needed the quiet week between Christmas and New Year's. The previous months had been a period of immense pressure for all of us, and I had needed to be in a constant state of alert every day. During the last week of the year, there were hardly any phone calls, and I finally got around to writing up a summary of the campaign's achievements in 2004. I sent the campaign sponsors that report on January 3, 2005.

The report summarized what had happened politically as well as the publicity we had generated for our cause. The Web site statistics also indicated a very successful start: in its first ten weeks, the *NoSoftwarePatents.com* Web server counted more than two million page views. By the end of the year, Google had found 11,600 links from other Web sites to *NoSoftwarePatents.com*, a number that doubled shortly thereafter. Google also reported 150,000 hits for the search term "NoSoftwarePatents", 118,000 of which referred to the long form of the campaign name, that is, ending with ".com". A year later, those numbers have more than tripled.

I also reminded my corporate partners that we only had one more month to go under the initial campaign agreement's five-month term. I offered a one-month renewal on the same terms and conditions so that there would be enough time to agree on a longer-term support for the campaign (that is, for another six months or more).

The strategic objectives I explained to my sponsors were the same as our original ones: ideally we hoped the Council would renegotiate its common position, but doing so would be a first in EU history (at least as far as anyone could remember). My report called this the "least likely scenario". Alternatively, a restart request by the European Parliament would have the effect of invalidating the Council's political agreement of May 18, 2004. But even that wasn't going to be easy to do, so I only described it as a "moderately likely scenario" and urged my sponsors to prepare for a second reading in the European Parliament, the "default scenario", as I put it. At the time it seemed as though the process would take about another year including the total of second reading, conciliation and third reading. That was roughly the prediction that Erika Mann had made in

conversation with Brian Kahin and me at the dinner after the EIF conference in November of 2004.

I alerted my sponsors to the fact that we'd need substantially greater resources in order to be able to influence the outcome of a second reading, given the onerous requirement for an absolute majority and the determination of the pro-patent forces to spend large amounts of money on lobbying. I hoped that my existing sponsors would help bring in new ones, since a sponsor is always in a better position to talk to other businessmen than a campaigner trying to raise funds. However, they were all so busy with their day-to-day responsibilities that they didn't really act upon my early warning that I'd become unavailable if the campaign agreement expired without the resources in place that I deemed necessary to continue. After all, I had interrupted a project of my own only on a temporary basis.

Rule 55 and the Crux of the Subheadings

On January 4, the Associated Press and the *Financial Times* published stories on the uncertain status of the software patent directive after the surprise in the Council on December 21. Now the software patent directive had become a topic that at least some journalists considered as one of the more interesting carry-overs from the year that had just ended.

Those media reports focused on the situation in the Council, while we directed almost all our efforts at the restart initiative. About a week before Christmas, a restart motion signed by 61 MEPs from 13 different countries (and from four political groups: EPP-ED, PES, ALDE and UEN) had been given to the European Parliament's Tabling Office.

We knew that the Tabling Office had originally interpreted the relevant procedural rule in a way that was unfavorable to us, and we attached an analysis by a top-notch law firm to the motion. That law firm was known to have some of our political adversaries among its clients, and it would have been virtually impossible to get the firm to work for the NoSoftwarePatents campaign. However, MySQL AB was willing to pick up the cost, and it had an ongoing working relationship with the firm. So when Kaj Arnö asked them to write up an analysis, they were willing to help out. MySQL AB then gave the report to me, and I shared it with a few key politicians, especially our Polish friends.

Our disagreement with the Tabling Office was about the effect of a subheading in Article 55 of the European Parliament's Rules of Procedure. Here is the relevant text of that rule, with the parts which were clearly irrelevant to our case (even in the opinion of those who otherwise disagreed with us) removed:

> Rule 55 : Renewed referral to Parliament
>
> *Codecision procedure*
>
> 1. The President shall, at the request of the committee responsible, ask the Commission to refer its proposal again to Parliament
>
> - where [...]; or
>
> - where [...]; or
>
> - where, through the passage of time or changes in circumstances, the nature of the problem with which the proposal is concerned substantially changes; or
>
> - where new elections to Parliament have taken place since it adopted its position, and the Conference of Presidents considers it desirable.
>
> 2. [...]
>
> *Other procedures*
>
> 3. [...]
>
> 4. The President shall also request that a proposal for an act be referred again to Parliament in the circumstances defined in this Rule where Parliament so decides on a proposal from a political group or at least thirty-seven Members.

The first paragraph basically says that the committee in charge of a bill can instruct the president of the parliament to request the Commission to restart the legislative process if one or more of several circumstances (the bullet points that begin with "where...") apply.

The first two circumstances, which I cut, weren't relevant to us in any way. One could argue on the basis of the third bullet point that there had been a substantial

change in the nature of the problem, but the wording is very vague. The restart motion mentioned this vagueness as an additional argument, and there had been enough important events concerning software patents in the interim that perhaps we could have based our case on that, but this wasn't our primary argument.

The strongest basis was the fourth bullet point: new elections to the European Parliament had unquestionably taken place since the original first reading. The addition "and the Conference of Presidents considers it desirable" then ties that circumstance to the condition that the Conference of Presidents support the committee's request for a restart. The Conference of Presidents of the European Parliament consists of the president of the parliament, who is involved but can't vote, and the leaders of the political groups, whose voting weights are directly proportional to the size of the groups over which they preside.

The fourth paragraph says that, as an alternative to the committee in charge of the bill, the plenary of the parliament, and a political group or a minimum of 37 MEPs can call for such a vote. That was what we were trying to achieve with the motion for which we had gathered signatures the previous month.

However, the Tabling Office took the position that the subheading "Other procedures" (between the second and the third paragraph) limited the meaning of the fourth paragraph to legislative procedures other than the codecision procedure, under which the software patent directive fell.

At first sight, one might agree with the Tabling Office. It looks like the two subheadings strictly divide the article into two sections, the one that exclusively applies to the codecision procedure, and the one that solely relates to all other procedures.

But our advice from legal experts was that subheadings are generally not a strong indication of the limitation of the scope of a text. Rule 55 is the only article in the European Parliament's Rules of Procedure that has subheadings at all. Also, in many printed editions, the publishers simply insert subheadings themselves in order to make navigation easier for the reader, even if those subheadings aren't in the text that lawmakers formally voted on.

There were really strong reasons to assume that the fourth paragraph also applied to the codecision procedure. An analysis of its language shows that it contains some very broad, general terminology that must have been meant to apply to the entire article, not just to the part below the "Other procedures" subheading. Comparing it with earlier versions of the Rules of Procedures confirmed that

impression. And quite importantly, the paragraphs are numbered consecutively, whereas one would use a different numbering system to definitively divide the two parts of the article (such as 1.1, 1.2, then 2.1, 2.2).

Our lawyers were of the opinion that if a disagreement over the procedural rule were to be decided by the European Court of Justice, we'd be very likely to prevail. At the formal level, we'd at least have been able to raise serious doubt that the "Other procedures" subheading had to be interpreted as a granite wall that couldn't be pierced by good reasoning. Then the judges would have asked themselves which interpretation really made the most sense. In all likelihood they would have concluded that the right of 37 MEPs to ask for a vote on a restart request is an essential minority right, and that it wouldn't be reasonable to leave such an important decision exclusively to the committee in charge and not provide an alternative route for the plenary of the parliament to achieve the same effect.

However, it would have been difficult to find an MEP or a party to sue the European Parliament's administration. A few even disliked our having asked a law firm to analyze the procedural rule, as some prefer to avoid all external discussion of the interpretation of those rules. The European Parliament's administration has a reputation for interpreting the parliament's rules to please the leadership of the largest groups. Might makes right. Unfortunately, we knew that some key players of the conservative EPP-ED wouldn't want that rule to be interpreted our way.

It was still very helpful to have a motion signed by 61 MEPs in place, so we could demonstrate a political desire for the restart. But we realized in January that we'd have to win the formal support of the Legal Affairs Committee and the Conference of Presidents. Unfortunately, the first meeting of the Conference of Presidents took place very early that year, on January 6, and there was not going to be enough time to accomplish much between MEPs' return from their end-of-year vacation and that meeting. So our next goal was to work toward a restart vote at the next meeting of the Legal Affairs Committee on January 19 and 20.

Looking IBM's Gift Horse in the Mouth

In their end-of-the-year reviews and next-year outlooks, some pundits had predicted that software patents would be an important topic in 2005, and they were right.

On the morning of January 11, I saw that IBM had announced a plan to "give away" 500 patents to open source. I had other plans for that day, but the IBM press release required an immediate response. To me it was quite clear that this was simply a trick. 500 patents were an insignificant percentage of IBM's total portfolio of 40,000 patents. It was only about the number of new patents that they take out in a month or two. IBM pretended to be a benefactor, but it only wanted to derive benefit for itself by currying favor with the open-source community. At this critical juncture of the political process concerning the EU software patent directive, it was also possible that IBM hoped to soothe the politicians who were concerned about the implications of software patents for open source.

In legal terms, IBM promised not to sue open-source developers if they infringed any of the specified 500 patents. It turned out later that many of those patents weren't even relevant to software development. Most of them were typical hardware patents and some of them covered inventions in the field of medical technology. Many were on the verge of expiring, and IBM may not even have planned to pay the renewal fees when they next came due.

Even if the 500 patents had been somewhat useful, that "generous gift" wouldn't have made a real difference except as a gesture of goodwill. In the US alone, there are well over 100,000 software patents (by some counts several times more), and as Richard Stallman had said at our meeting with Deutsche Bank: "If you have 100,000 land mines in a park and you take out a few thousand, then the park is still an unsafe place to walk."

It wasn't easy to counter IBM's announcement. First, it always seems ungrateful to disparage the value of a present or express doubts about the sincerity of the intentions behind it. Second, there were some who thought we were such fundamentalists regarding patents that we didn't even want to use patents to create a protective shield for open source. But to me, there was really no contradiction in trying to win a game within the existing rules while working at the political level toward a better regulatory framework. So I had to make it clear that I considered IBM's "pledge" of 500 patents an ineffectual measure given the parameters of the US patent regime, in which software patents are generally enforceable.

Third, I had to stage an extremely rapid response that morning, or the media reports on IBM's "generosity" would be completely one-sided without mentioning my criticism. Most news items of this kind only generate a single wave of media reports.

Instead of issuing a full-fledged press release, I just wrote up a quick comment that referred to IBM's announcement. As the day wore on, I saw that I had been fast enough. My comments made it into almost every article in the German press and into a large percentage of the English-language media reports. At 7:57 AM Eastern Time (1:57 PM Central European Time), Reuters even added a second update to its story: "Update 2 (adds comment from anti-software patent group)"

A few of the press comments made it sound like I was being destructive, especially one US Web site that claims to be independent but that many suspect is secretly sponsored by IBM. Another Web site lamented that "IBM's good deed gets bad press", and said that "much of the vitriol came from one source", that is, from me. But I was very pleased to have thwarted a deceptive PR maneuver. I had pointed out to people that those 500 IBM patents didn't truly lower the risk of patent litigation for open-source developers, and raised awareness of the fact that IBM was aggressively lobbying European politicians to legalize software patents.

A Directive in Limbo

While I was waging my PR battle against one of the world's largest corporations, the Greens' Laurence van de Walle talked to four different people in the European Parliament about the status of the software patent directive and received four different answers, most of which were mutually exclusive.

The EU commissioner for information society policy, Viviane Reding, visited the European Parliament's ITRE committee. ITRE stands for "Industry, External Trade, Research and Energy". Reding, who had previously denigrated our anti-software patent movement as being against intellectual property in general (a very uninformed statement), said that the Council didn't really have a common position in place, and that nobody could predict what would happen because this was a completely new situation.

Laurence then asked one of Reding's aides why this really was a "new" situation since Poland had only requested a little more time to draft a unilateral declaration, and there had been another Council meeting the previous day, January 10, at which the Council could have adopted the common position. The reply was that "it would be a strange situation to have a common position with criticism from Poland attached to the minutes of the meeting".

In my view, that particular answer discredited everything Reding and her aides had said because it suggested that they didn't even know the Council's Rules of

Procedure, which expressly allow such statements to be included. Also, at this stage Poland was not even going to be the only country to distance itself from the decision through a statement. Other countries, including France, had already done so.

The next person that Laurence talked to was a Microsoft lobbyist who told Laurence that she thought "This dossier will go back to COREPER". That wasn't a very meaningful prediction, as COREPER could do two completely opposite things: COREPER could put the Council's proposed common position on the agenda of another Council meeting for formal adoption, or it could take steps to have the legislative proposal renegotiated. So this answer from the Microsoft lobbyist was as if you asked someone for a weather forecast, and were told: "There'll be some form of precipitation or maybe there won't."

Laurence also ran into Piia-Noora Kauppi, who at that stage thought the Commission was about to withdraw the directive. We heard from other sources that this belief was shared by quite a few people within the EPP-ED group.

Finally, Laurence talked to the secretary-general of the Greens/EFA group, who had just attended a meeting of the secretaries-general of all parliamentary groups. At that meeting, the working hypothesis was that the Council would adopt the proposed common position either later that week or sometime the following week.

Those four completely different assessments of the situation were symptomatic of the state of confusion that ruled the EU after Marciński's intervention in the Council. In that situation, instability was a good sign for us, but it also meant that we had to make our decisions like a pilot flying in very poor visibility. "Hope for the best and prepare for the worst" had to be our approach. We needed a restart request by the parliament as soon as possible.

The Madrid Mission

Usually it's a treat to escape to the relatively mild Spanish weather during the cold winter months in the south of Germany, but with all that was going on, Miernik had a hard time talking me into a lobbying trip to Madrid. He and Erik were lobbying in the European Parliament, and as I was the only one of our core team who spoke any Spanish, he urged me to join some of our Spanish activists in a meeting with Partido Socialista Obrero Español (PSOE), the center-left government party there.

We wanted to try to reach out to other country governments that were against the Council's proposed common position and might be allies for the Polish government in the Council, and I particularly hoped that we could build more support for the restart initiative.

So on January 12, I flew to Madrid and first met three of our key local activists over dinner: Dr. Luis Fajardo of the Fajardo-López law firm, whose analysis of the Council's Rules of Procedure had encouraged the FFII to try to overturn the Council's political agreement of May 18, 2004; Alberto Abella, then an employee of consulting firm Cap Gemini and author of a study on free and open-source software usage in Spain; and Jesús González-Barahona, an open-source activist and researcher at the Rey Juan Carlos University in Madrid.

Our movement's Spanish chapter had been amazingly successful in 2003 and the first part of 2004. Originally, the Spanish government leaned toward a pro-patent position, mostly because of the influence of the national patent office and Spanish patent lawyers. Step by step, our activists turned the government around. They started locally by convincing the governments of the relatively autonomous Spanish provinces of the benefits of a competitive software market in which open source can thrive and offer a cost-saving solution.

However, after the first reading in 2003 and the Council's May 18 political agreement, when Spain was the only country to vote with a clear No, our movement really didn't have much left to do there. Lobbying had lapsed, now they had to meet new people, such as Sergio Vázquez, a relatively young but influential adviser to Inmaculada Rodríguez, the person in charge of the PSOE's economic affairs policy.

Lacking fluency in Spanish, I found it a strain to join our Spanish friends the next morning. Sergio would have been willing to hold parts of the meeting in English, but once I had said a few words in Spanish, that was out of the question. I had to concentrate hard, since I only understood fragments, but at least I was able to say something from time to time.

I explained the benefits of a new first reading in the European Parliament over a second reading based on the Council's proposed position, and I added some information on the political situation concerning this directive in Germany and other countries. When they wanted to know why the US software industry was doing so well despite the fact that software patents are legal in that country, I had the chance to share some of my knowledge of the US software market and the

way that large corporations there use their patent portfolios to effectively levy a tax on smaller companies by forcing them to pay license fees.

The meeting at the PSOE headquarters was a highly interesting experience, and there was some follow-up communication in the succeeding weeks and months between our activists and Sergio. However, it was apparent that for the very near term we wouldn't be in a position to ask the Spanish government for certain forms of support.

An Uphill Struggle for the Restart

While I was in Madrid, I called Miernik to find out what progress he and Erik were making in the European Parliament. The best news was that former Polish prime minister and then-MEP Jerzy Buzek was being extremely helpful. Buzek had dedicated himself to this cause, and obviously he had the skill and the standing to make an impact. He had governed Poland for a full four-year term, which no other democratically elected prime minister of Poland has managed to do so far. He is a winner and a survivor. He was the chairman of the first national congress of the Solidarność movement. Later he led Poland into NATO and laid the foundation for Poland's accession to the EU, and when he was elected to the European Parliament in 2004, he received more votes than any other candidate nationwide. We needed his skills, and he was receptive to our input and worked very closely with Miernik.

At this point, the Greens were also behind the push for a restart. They knew that the Polish government had tried only to delay the Council's decision, but that there wasn't really much hope of renegotiating the Council's common position. On that basis, the Greens also agreed that the European Parliament should request a restart of the legislative process. On January 13, Eva Lichtenberger and her group's co-chair, Monica Frassoni, wrote an open letter to Giuseppe Gargani, the chair of the Legal Affairs Committee, and asked that he put the request for a restart of the software patent process on the agenda of the upcoming committee meeting on January 19 and 20.

However, what we had hoped to achieve on January 13 was to get the European Parliament's Conference of Presidents to decide to support, in advance, a request for a restart by the Legal Affairs Committee. Under article 55(1) of the European Parliament's Rules of Procedure, a request for a restart on the grounds of interim elections required the consent of the Conference of Presidents in addition to a decision by the committee in charge. The article didn't specify the order in which

those two decisions needed to take place. You would expect the committee to first take its position and then ask the Conference of Presidents for approval, but we wanted to accomplish everything as early as possible since we never knew when the Council would adopt its common position. There were Council meetings almost every week, but the next meeting of the Conference of Presidents was more than a month away.

On the eve of the January 13 meeting of the Conference of Presidents, at first it looked as though we had a majority in place for the restart request. The Conference of Presidents tries to take its decisions unanimously, but if that's not possible the leaders of the parliamentary groups vote, with their votes weighted according to the size of their groups. The center-left PES group, the Greens/EFA, the left-wing GUE/NGL and the euroskeptic ID seemed safe bets, and things looked good for us with the right-wing UEN. However, in the Conference of Presidents the conservative EPP-ED and the libertarian ALDE group can form a majority. They didn't have a majority in plenary, but in the Conference of Presidents MEPs who aren't affiliated with any parliamentary group don't have voting rights, and therefore we needed at least one of the EPP-ED or the ALDE to be neutral or, even better, on our side.

It was quite a setback when we heard a rumor that the leader of the ALDE had been lobbied by Microsoft and was inclined to vote against a restart. We also knew that there were internal pressures on EPP-ED chair Professor Hans-Gert Pöttering from his own German delegation to block a restart. Being the experienced politician that he is, Buzek therefore decided not to push for a decision by the Conference of Presidents on 13 January. If we had lost, it might have been the end of the initiative, and the risk of losing seemed too high at that stage.

There were two disappointing aspects to this. First, we didn't know how much time we had left until the Council closed the window of opportunity for a restart request. Second, we had hoped to get momentum and additional credibility for our initiative by talking to the members of the Legal Affairs Committee on the basis that the group leaders had previously consented to a restart request. However, I remembered Maria Berger saying that the key hurdle would be the committee, and if the committee were on our side, the Conference of Presidents would probably follow suit.

The JURI Challenge

On January 17, 2005, Erik, Miernik and I met at the CEA-PME office in Brussels. Later in the day we were joined by Benjamin Henrion. We had our list of the regular members of the Legal Affairs Committee (JURI) and their substitutes, and we lobbied for majority support for the restart project among the committee members.

Miernik thought that building a majority within JURI was easier than in plenary since we'd have to lobby a smaller number of people, but I looked at the composition of JURI, and it looked unfavorable. It wasn't hopeless, but we knew we'd need all of our traditional allies on our side plus a couple of members of the EPP-ED group. We had virtually no margin of error, and the outcome was going to depend on exactly who showed up on the day of the decision.

The level of attendance in those committee meetings is usually not high, but it's different if there's an important vote. The groups have a maximum number of seats on the committee that's proportional to the number of seats they have in plenary. There are almost always at least a few of the regular members of a committee missing, and when they are, their substitutes can vote instead. If there aren't enough substitutes available, it's even possible for other MEPs from the same group to join and vote on their behalf, but the maximum number of votes per group is always the same.

It's rare to succeed in getting an appointment with an MEP on short notice, and it's even more difficult to do when you want to talk to one about a decision that may come up in a committee when it isn't even on the agenda of the next committee meeting. However, our biggest frustration was that we still hadn't been able to convince French socialist MEP Michel Rocard, the parliament's official rapporteur for the software patent directive. In the meantime, he had gone to Palestine for a seven-week peace mission, and while it's admirable that he took such a risk and made the personal sacrifice, we really wanted him to fight for our cause as well.

Erik called Rocard's assistant, Constance Deler, while I was standing next to him. I had already sent a memo explaining some of our pro-restart reasoning to Deler in December, and never received a reply, although she had promised to forward our message to Rocard. This time, we didn't insist on a near-term meeting with Rocard himself since he was out of town. However, we hoped that we could arrange a meeting with his assistant to inform her of our strategy. We also tried to

set up meetings with Rocard's external advisers in France, but like Rocard's assistant they weren't willing to engage in a constructive dialogue with us.

Right after that telephone conversation with Deler, I told Erik: "I can't believe it. We've now been trying unsuccessfully at different times over the last seven weeks or more to have a discussion with the French socialists about this restart, and they still don't even want to talk about it! I really think it's time to play hardball and show them that they're on the wrong track. We've got to show them that they're about to make one big mistake, and they can forget about winning a second reading this way!"

Erik didn't like the idea, and we didn't talk about it in more detail.

The next morning, I flew back from Brussels because it was too difficult to make any headway there. In the meantime, I had been pondering what to do to get our camp united behind the restart initiative, and I kept coming back to the conclusion that I really had to do what I had said the day before: since all the constructive approaches had failed, the last resort was to provoke a crisis and make it clear to the French socialists as well as a number of people in our camp that we really *needed* the restart request.

The Tall Order

On the basis of reason and logic, we had convinced more and more people that the kind of result they got out of the first reading would not likely be repeated at a second reading. But there were still too many who were dreaming that dream, and underestimating the magnitude of the challenge.

The first reading had taken a lot of time, from February 2002, when the Commission officially presented its proposal, until September 2003. During those 19 months, the FFII and its allies had made a Herculean effort to convince a majority of MEPs to vote in support of amendments that were highly meaningful and much to our liking. Since the European Parliament votes on individual amendments instead of whole texts, no one knew what combination of the proposed amendments would go through. Each of the amendments that were introduced was very strong on its own, and when the vote worked out as successfully as it did, the net result was a package that was almost overkill, especially in psychological terms. It looked like a wholesale assault on the patent system although it actually wasn't.

In a second reading, the European Parliament has a tough timeline: it gets a maximum of four months after receiving the Council's common position. More than 400 of the 732 MEPs of the new parliament hadn't been involved in the first reading, an unusually high number because of the EU extension in between. That was one of the reasons we thought we were particularly justified in requesting a restart based on there having been interim elections.

Our adversaries had the resources to send several lobbyists to each new MEP, while our camp wasn't likely to be able to set up a meeting with even half of them, for a lack of resources. When you add in the requirement for an absolute majority of all members, the second reading was going to be much tougher for us to win in all respects.

However, some of our first-reading heroes – and when I say "first-reading heroes" about people like Rocard, I really mean it in an absolutely positive sense – thought that they could do it again. They wanted a fight, whereas I didn't want to take too much of a risk. They said they could get the new parliament to support the position taken by the old parliament in the first reading, and I didn't see how. It seemed just too difficult a challenge, and the amendments passed at the first reading were so strong that it might be difficult to get a majority of MEPs to support them.

I would have accepted a difference in opinion if it had been based on a rational analysis. However, I didn't want people to put the future of software development in jeopardy for what seemed to me too much like an emotional investment.

It was a sign of the emotional character of their approach that they didn't want to discuss other options with us. The way some people talked about the first-reading result made it clear to me that they were deeply attached to the chess piece I felt we had to sacrifice in order to win. I thought that if we didn't sacrifice it now, we'd lose it anyway. Actually, in procedural terms we had already lost the first-reading result because the Council's position didn't reflect the will of the parliament. The Council had brushed aside the parliament's position as if it were some dust on the floor. Looked at that way, it made no sense to me why someone thought he could preserve the first-reading outcome by continuing a process in which the tide had turned against us.

When I pushed for the restart idea, one of Rocard's external advisers told me that Rocard "was not going to invalidate something that he considers a personal triumph". There was no possibility that I would accept that attitude. With all my

gratitude for Rocard's immeasurable contributions to our cause, falling in love with a chess piece is not the way to win a game.

The Provoked Crisis

I decided to put the chances of our future victory above people's personal triumphs of the past, and also above my own involvement.

My contract was less than two weeks from expiration, and my corporate partners hadn't made any noticeable effort to ensure the continuation of my campaign. I had had a life before the fight against software patents, and I knew I'd have one afterwards. At this juncture, I didn't care too much whether I could still be involved in this political controversy, but I did want to ensure that *everything* was tried so that the parliament would request a restart of the legislative process.

So I did something that one can only do once: I played the Khrushchev card. Back in 1960, the Soviet leader pounded his fists on the table at a United Nations conference, and according to some stories he took off one of his shoes and slammed it on the table. By some accounts, he had actually prepared to do it, and had taken a third shoe with him in a bag. Either way, this unpredictable conduct by someone who had the ultimate authority over a huge nuclear arsenal made the rest of the world nervous.

What I did was to send a superficially polite, but still quite strong email to Rocard's assistant, Constance Deler, saying that there was no way he could fulfill his dream of repeating the first-reading result in a second reading since even I, who by then had become the most-quoted software patent critic, wouldn't defend what I considered "first-reading radicalism". I actually wasn't against the first-reading outcome, but I didn't think that the amendments to the proposed legislation were defensible in a second reading. But in my memo to Rocard's assistant, I purposely made my statements broad and general.

Within minutes of sending that email, I called Erik on his cell phone and said: "Erik, I've got to tell you something. I've now done what I already announced yesterday: I've just sent an email to Rocard's assistant that's pretty strong and aggressive. You don't want to know about it, and if they ask you, you don't want to admit that you know me too well. I'm just an erratic activist who's not a member of the FFII anyway, OK? Believe me, after what I did, they're not going to answer me, but you're now going to get a meeting with Rocard within a week."

Erik was a little bit surprised, and he was in a hurry to get to an appointment. So all he said was: "OK, of course I don't know you."

On that same day, January 18, 2005, I sent an email to an FFII mailing list explaining my "all-or-nothing approach" as I called it in the subject line, going on to say:

> Anyone who is against the restart will be viewed and treated as an enemy if the restart project fails.

A little later, I followed up with this:

> I sent a very clear message to Rocard's assistant (Mrs. Deler) and CC'd Savary's assistant. For your own contacts with them, it's better for you that you just know of the fact that I did send a message, but don't know the content.

It took less than two hours until someone else posted my memo to the mailing list. It was part of my strategy to alert everyone in our camp. I wanted them all to understand that either we'd get a restart or they'd find a second reading even harder to win than some thought.

However, I didn't mean that memo to be distributed too widely, and unfortunately things went completely out of control. Even some of our adversaries got hold of it within days. That wasn't what I wanted to have happen, but I had taken the risk that it might.

Branded a Traitor

The FFII, the Greens and parts of the free and open-source software movement were infuriated. I was considered a traitor for committing what many in our camp thought was sacrilege: questioning whether the first-reading outcome could be defended. It was a particularly sore spot, since an organization that had previously claimed to represent open-source interests had gone on to campaign against amendments to the software patent directive that would have been helpful to our cause. Instead, the organization promoted amendments that were designed to mislead people and were actually toothless for our purposes.

The next day, I had to fly back to Brussels on short notice for a meeting with Professor Hans-Peter Mayer, a German conservative MEP and member of JURI. I had a great, nearly two-hour conversation with him and his two aides in one of

the parliament cafés. Kasia had also had a meeting in that café at another table, and we noticed each other and had just started to talk when I received a call from a French open-source advocate and university researcher who completely flew off the handle.

The guy was so outraged that it took me about five minutes to find out who he was and why he had called. The one thing I knew was that it had to do with that memo to Rocard's assistant. For 40 to 45 minutes, I tried to calm him down and take all the heat that he dished out. He accused me of "betrayal". I tried hard to make him realize that whatever I had done, I had done because I believed it was necessary for our cause.

I don't recall how many people vowed to "destroy" me around then, but I do know that such threats didn't worry me. I wasn't going to retract what I had said any time soon, not even when my three campaign sponsors insisted that I should. I told them the memo to Rocard's assistant had been premeditated. It had been announced 24 hours in advance, and calculated to step up the pressure.

The FFII unsubscribed me from one of its private mailing lists, but we maintained other lines of communication. Hartmut demanded an apology for a passage in my memo to Rocard's assistant that could have been interpreted as disparaging the FFII as "anti-commercial". I was only worried about their running the risk of appearing anti-commercial, even though they actually weren't.

Hartmut, who is an absolutely straightforward and honest man, was especially appalled by the style of my memo to Rocard's assistant. He complained that it was a devious combination of a tempting carrot, suggesting what a successful rapporteur he would become after a restart, with the stick of some subtle threats that I would make him fail otherwise. I had indeed dangled a carrot to sell the restart and wielded a stick at the same time. I knew that I had acted a little bit like the Godfather in the eponymous book and movies, who made every prospective partner "an offer he can't refuse". He always promised a reward for accepting his proposal, but he also never left any doubt that someone who turned down such an offer might one day wake up next to the head of his favorite horse. J.R. Ewing, the likable villain of the Dallas TV series, used that method as well.

On screen this kind of tactic always looks more dramatic than it is in reality, but it's actually a part of daily politics. I viewed our entire camp as a political coalition, and from time to time it's necessary to threaten to break up the coalition if part of it isn't willing to support the general line. It would be preferable if one

never needed to engage in such coercive tactics. It's a last resort, justifiable only under the most egregious of circumstances.

The Darkest Hour Is Just Before the Dawn

Within 48 hours, it looked as though the fight for the restart had been lost, and my involvement in the software patent debate had come to an end.

JURI met on January 19 and 20 without deciding on a restart. Klaus-Heine Lehne, the coordinator of the EPP-ED group in that committee, wasn't willing to let the committee vote on the issue. Lehne was probably afraid that we would end up with a majority, since he would never be able to rely on the absolute loyalty of the other JURI members from the EPP-ED group to follow him in a crucial vote like that. Therefore, he didn't even want the item on the agenda. He was very much in favor of the Council's proposed common position, and as the coordinator of the largest group he was in a strong position to influence the agenda, particularly when his colleague from the ALDE group took the same stance.

Lehne said that he'd support a restart initiative if the Council didn't formally adopt its common position during the remainder of the month. The next JURI meeting was scheduled for February 2, when EU commissioner Charlie McCreevy was due to visit JURI, and the Commission asked MEPs not to decide on the restart request before then.

The Commission had an insidious plan that looked like it was going to work. Under the European Parliament's Rules of Procedure, a restart request can't be made after a second reading has formally begun. In order for a second reading to commence officially, the president of the European Parliament has to make an announcement in the plenary session that follows the receipt of the Council's common position. At that point he has to check one last time whether the parliament wants to request a restart, and if it doesn't, he has to proceed to open the second reading.

The European Parliament usually has one plenary session per month in Strasbourg even though the parliament conducts most of its work in Brussels. The French government's insistence on having the European Parliament in one of its cities four days a month costs European taxpayers hundreds of millions of euros per year. MEPs and assistants have to travel to Strasbourg and rent hotel rooms or apartments, and a long column of trucks has to transport huge amounts of materials in containers.

Occasionally, the European Parliament also holds two-day "mini-plenary" sessions in its Brussels building. They are only half as long as the four-day Strasbourg sessions, but in formal terms they are not restricted. Any business can be conducted in them.

The Commission had pushed the Council to shoot for formal adoption of its common position at the Agriculture and Fisheries Council meeting on the following Monday, January 24. On Wednesday, January 26, and Thursday, January 27, the European Parliament was due to have a mini-plenary, and that's where the Commission wanted the second reading to begin. That would make it too late for JURI to request a restart by the time of McCreevy's visit on February 2.

That plan was a total setup by McCreevy, an Irish politician who wanted software patents legalized. The previous year, shortly before the Council's political agreement, a law took effect that McCreevy himself had sponsored, which exempted patent licensing revenues from corporate income taxes. It created yet another fiscal incentive for companies to locate their European operation in Ireland. McCreevy wanted to lure JURI into a procedural trap, and it looked as though he had succeeded in collusion with the Council on the one hand and with Lehne's support on the other.

On Thursday, January 20, when the Council's agenda became known, I had a telephone appointment with Achim Weiß of 1&1, the largest of my three campaign sponsors. We quickly reviewed the situation, and he asked me whether I thought we still had much chance of succeeding. I told him that we'd be in the second-reading stage within a matter of days, and since the existing sponsors had so far not acquired new ones, we wouldn't have the resources to have much influence on the second reading's outcome. I was also skeptical that I could work smoothly with the FFII, given the fallout from my memo to Rocard's assistant. Achim and I quickly reached consensus that the time had come to fold the campaign.

Poland's Bravery Saved Us Again

Just 24 hours later, the Luxembourgian presidency of the EU (which had taken over from the Dutch on January 1) took the proposed common position on software patents off the agenda of the Council meeting. Unofficially, people said that the item had been postponed by one week, to a Council meeting scheduled for January 31.

McCreevy's shenanigans had been foiled. Even after a Council decision on January 31, the second reading couldn't have begun before the week of February 21, when the next plenary session of the parliament was scheduled. In the meantime, there was going to be a JURI meeting on February 2 and 3, and a Conference of Presidents meeting on February 17. So the European Parliament had one more chance to request a restart before the earliest possible moment that a second reading could begin.

We owed – yet again – this new window of opportunity to Poland. Miernik told the Polish government what was going on in Brussels, especially McCreevy's trickery. The Poles then talked to the government of Luxembourg and successfully demanded that the common position on software patents be removed from the agenda. Otherwise, Poland would have considered opposing the item's adoption in the Council meeting.

While this intervention by the Polish government was less visible than the one in the Council meeting of December 21, it was just as heroic. They were willing to risk having to pay a political price for a second time. Many of us felt ashamed that we needed so much help from one country because we were unable to get other countries to give us a similar level of support.

A journalist later told me that according to a rumor going around in Brussels, the Polish diplomat who was sent to inform his Luxembourg colleagues of his government's request for the agenda change had to cry. Whether that's true is another question, but the situation must have been highly stressful for everyone involved. The software patent item had been placed on the agenda with the consent of the Polish COREPER diplomats, and then the government in Warsaw wanted it changed again. In diplomatic circles, it's probably one of the worst things if diplomats cannot rely on what the diplomats of other countries say their intentions are.

Given the importance of the issue and the special circumstances of McCreevy's trickery to prevent a restart request, I believe that the Polish government did the right thing. Diplomatic accountability is a virtue, but due democratic process is even more important, and through its heroic feats Poland defended democracy.

The Second Wind

Like a sports team that gets a "second wind" after coming back into a game that seemed lost, we were energized by the fact that we had another chance to push

for a restart. We were back in business. There was little more than a week to go until the JURI meeting on February 2 and 3, and we were determined to fight as hard as we could.

Due to the ruptures that my email to Rocard's assistant had caused, the FFII and I worked in parallel rather than in harmony, but there was still a certain degree of communication and coordination.

Over the weekend, I prepared a press release for Monday, January 24, and other materials. I wrote an open letter to the chair of the CDU, Germany's large conservative party, Dr. Angela Merkel. As leader of the conservative group in the German parliament, she had supported a position that was close to ours, but key MEPs of her party, especially Lehne, had become obstacles to our restart initiative.

In order to get our supporters all across Europe involved and show MEPs that many of their voters cared about the call for a restart, I wrote an international lobbying guide, first in English and additionally in German. Of the regular members of JURI, three were German, all conservatives. The lobbying guides contained contact data, background information on the MEPs and their position on the restart initiative, and whatever else I thought would help our supporters to contribute.

The FFII was reluctant to make its supporters aware of my lobbying guides. After my memo to Rocard's assistant, some still feared I was a traitor, and therefore they didn't want to publish documents bearing the *NoSoftwarePatents.com* label or my name. But when I sent them new versions of the documents that mentioned neither my campaign nor me, they used the materials, and many FFII supporters found them useful.

During the week, our restart initiative gained increasing momentum and credibility. *Handelsblatt*, a German financial newspaper, published an editorial to the effect that the process concerning the software patent directive was broken, and that a restart was the only way out of the mess. Fortunately for us, *Handelsblatt* is one of the few media that really carry weight with many politicians.

Our restart project was also taken seriously by our adversaries. The first sign was that a Nokia lobbyist sent MEPs an email in which she spoke out against restarting the process. Within a few days, Ericsson and Alcatel followed suit.

I called on our supporters to launch an "all-out offensive" for the restart. It was now or never in my view, and it took considerable effort to communicate the importance of this to a broader audience. If it had been simply a question of a clear yes-or-no decision concerning software patents, everyone would have understood. However, this was about a procedural move that we believed would greatly increase our chances of winning, so the connection between what we were lobbying for and what we wanted to achieve in the long run was indirect.

We emailed all our supporters. Some of the most valuable help came from the companies that had resubmitted the German government's software patent questionnaire to my campaign. The desires of companies with more than certain number of employees, some with even more than 1,000, made a stronger impression on politicians than if we had "only" been able to mobilize private individuals who might have been misperceived as open-source idealists. I was in contact with some of the most proactive of the entrepreneurs. One of them, Peter Lorenz from the southwestern German state of Baden-Württemberg, called me as often as three times a day to tell me of the latest news and activities.

Activity Without a Formal Agenda

Monday, January 31, 2005, was the Day of the Missing Agenda Items, in the Council as well as in the European Parliament.

Although the Polish government would have accepted a Council decision that week and the Commission considered that day an important deadline (the last opportunity for a Council decision before commissioner McCreevy's visit to JURI), the proposed common position on software patents didn't appear on the Council's agenda. We had heard three days earlier that the government of Denmark had requested that the Council not adopt the common position before the Scandinavian country's general elections, set for February 8, 2005.

We were then wondering whether Lehne, the EPP-ED's coordinator in JURI, was going to stand by his promise and support a restart, as he said he would if the Council couldn't ratify its common position in January. One of our supporters wrote to a mailing list the news that he had talked to the office of the conservative MEP from his geographic area, and later that day one of the MEP's aides had called him back with the assurance that Lehne was now "in agreement" with him. However, that supporter was not personally known to any of our core activists, and even though we assumed that he probably did get that feedback, those statements don't mean much in politics. If everyone who said he was

against software patents were truly against them, we wouldn't have been in our present situation.

Unfortunately, the restart request wasn't on the JURI agenda yet, and the meeting was only two days away. That was the one agenda we did want to ensure it appeared on, unlike the Council's agenda. I phoned Miernik, and he told me that he was in contact with several JURI members who were going to introduce a motion during the meeting. Apparently, the procedure in those committees is less formal than in the plenary, although even plenary motions are sometimes introduced orally.

It still wasn't a comfortable notion. We were beginning to have a credibility problem because we were talking about an item that didn't appear on the agenda, and consequently wasn't even known to the press office of the European Parliament. A week earlier, Ingrid Marson of ZDNet UK, a major IT Web site, had written this to me:

> Am confused. I just spoke to the EU parliament press officer for legal affairs and he said that at the moment parliament is preparing for the 2nd reading. He didn't know anything about it being restarted and said that restarting is not easy to do as it's a controversial procedure. What has actually happened on the restart?

Of all the journalists who covered software patents, Ingrid did more double-checking, sometimes even triple-checking, than anyone else. But other journalists were also skeptical about how realistic our chances were with this obscure restart initiative that we kept talking about all the time.

February's Feverish Start

On the first two days of February 2005, there was a flurry of activity.

On February 1, Bill Gates visited the European Parliament in Brussels. During the same trip he also met with his loyal friend McCreevy as well as the two most important people in the European Commission, its president, José Manuel Barroso, and its vice-president Günter Verheugen.

The EIF had organized a lunch meeting for Gates with a number of MEPs. Participants included the usual friends of big industry but also a few others, such as Piia-Noora Kauppi. Afterwards, the reports were contradictory. Some denied

that Gates talked about software patents. Others, more credibly, claimed that he said something like "Microsoft should say that it's against software patents because if we say we want them, that's considered a negative".

The same day, I issued a press release in which a group of venture capital investors, including Benchmark Capital (eBay's first funder), called on politicians "to strategically approach" the subject of software patents as opposed to letting a directive along the lines of the Council's proposed common position take effect.

Another key player to chime in that day was Mario Ohoven, the president of CEA-PME as well as its German member association BVMW. Representing a large number of small and medium-sized enterprises, Ohoven added significant weight to our calls for a restart.

In parallel, my sponsors confirmed they would continue funding the campaign for at least one more month. Technically I had been working for almost a day without having formally secured the sponsorship. I was particularly grateful to 1&1 for its flexibility: a few days earlier, 1&1's Achim Weiß and I had given up on this fight, but so much had happened in the interim that going forward was the best decision for everyone.

Clash in the Committee Meeting

The JURI meeting on February 2 was scheduled to begin in the late afternoon. I toyed with the idea of traveling to Brussels so I could watch the JURI meeting, but the FFII's lobbyists on the spot, Erik and Miernik, were doing a great job and I believed that I was more useful staying put and trying indirectly to build pressure on the German conservative MEPs in the committee from their own country.

Early on the morning of that important Wednesday, Hartmut posted a message to the private "europarl-help" mailing list: questions that MEPs could put to commissioner McCreevy were "URGENTLY NEEDED" by 9 AM that day. There were rumors that before the JURI meeting McCreevy was to meet key MEPs of the PES, the second-largest group in the parliament. Providing MEPs with critical questions they can ask on such occasions is one of the bread-and-butter activities of pressure groups.

In this situation, it proved to be a good thing that despite the confusion after my memo to Rocard's assistant the FFII and I had kept some lines of communication open. I'm notoriously an early riser, and I was highly motivated to assemble

material that would put McCreevy, whom I considered to be little more than a Microsoft stooge, on the defensive. Others also submitted questions, but mine were the only ones that arrived within the deadline that Hartmut had specified. Even with more time until the JURI meeting, the FFII preferred some of the questions that I had prepared.

In the afternoon, we got news that seemed too good to be true. A journalist who talked to the offices of different MEPs was told by one of Lehne's aides in a disgruntled tone: "It's not improbable that the parliament will ask for a restart. Consequently, there may be no directive in the end, and we're not sure if that's in the interest of all the software developers who now ask for the restart, but if that's what they want..."

When the JURI meeting began, we tried to get the news from Brussels. It was a highly tense situation. The Commission published the manuscript of McCreevy's pro-patent sermon. Then I heard that Rocard gave a very tough speech, strongly accusing the Commission and the Council of ignoring the European Parliament's will. The next piece of good news was that several of the questions I had drafted were actually raised by MEPs and had a powerful effect. There were signs that the situation had heated up – and then there was no news for another 45 minutes.

Finally the phone rang, and the FFII's Jan Wildeboer said: "Florian, do you already know?" – "No, what's up?" – "The motion for a restart request has been near-una..." – "You mean near-unanimously? Near-unanimously what?"

I had to ask that, and frankly, I was afraid that a near-unanimous result would have gone badly for us. Since our own estimates gave us only a slim majority in the committee, a near-unanimous result could have indicated that our camp was about to lose, or that perhaps Rocard had dissuaded the committee from a restart. But after I helped Jan with that difficult word, he had wonderful news: "Near-unanimously carried!"

Conciliatory Tones

After all that had happened, the FFII and I had achieved a major victory together, and in that situation, it was easier than before to mend fences.

At 8:19 PM, I received an email from the FFII's vice-president, Laura Creighton. The subject line of the message was "looks like you won your restart", and the body was "congratulations! Laura". That was too kind of her. After my email to Rocard's assistant, Laura was among the ones who attacked me most

aggressively, and she wasn't enthusiastic about the restart initiative at the beginning (though she supported it later on).

By writing "your restart" to me, she was both right and wrong at the same time. Without my push, it's extremely unlikely that there would have been a restart request. Everything worked out just in time, so if the effort had begun much later the window of opportunity would probably have closed. I also did some of the lobbying and wrote a pro-restart paper that some of our activists used without modification, and some reworked into a derivative version that they finally distributed.

I knew I deserved Laura's congratulations to some extent, but enormous credit belonged to the FFII. Erik and Miernik had done most of the work inside the parliament in the weeks before the JURI vote. And I thought of all those who had gathered the signatures for the original restart motion, which wasn't formally accepted by the European Parliament's Tabling Office but got the ball rolling in political terms. Buzek was one of the speakers in JURI that evening, and he was absolutely right to consider himself a winner.

Miernik's fantastic relationship with the Polish government gave us two windows of opportunity for the restart initiative. When I called Miernik shortly after the restart decision, he was overjoyed. I'm sure he was extremely relieved, having promised the Polish government that he'd make this happen if Poland prevented the Council from adopting its common position.

They say that time heals all wounds. It hadn't been much more than two weeks since my memo to Rocard's assistant. But joint achievements like this accelerate the process of recovery. Some scars would remain, but the gaping wound in the relationship between the FFII and myself had been closed by the turn of events.

I quickly organized a dinner at the Marriott Renaissance hotel in Brussels for two days after the JURI decision, on Friday, February 4, 2005. Kaj Arnö of MySQL AB and I flew in specifically for this, and we met Mark Webbink of Red Hat, who was in Brussels on other business. Some FFII activists were in town anyway while others traveled to Brussels for the dinner: Hartmut Pilch, Erik Josefsson, Jan "Miernik" Macek, Benjamin Henrion, Dieter van Uytvanck, and Bernhard Kaindl. And I was very happy to welcome Stefan Zickgraf, the general manager of CEA-PME, and Alex Ruoff, our primary point of contact at CEA-PME.

Primarily I wanted to use the occasion to introduce the FFII to senior executives from two of my campaign sponsors. I thought putting them in contact with

potential sources of funding was one of the biggest favors I could do for them. The dinner was meant to be a celebration, but I insisted that we were celebrating an achievement, not a victory *per se*. We had every reason to be proud of having made this restart request happen, and it was definitely a major improvement in our position no matter how you looked at it, but it was too early to tell exactly what would happen next.

Restart Lore

In the days and weeks after the JURI meeting, more and more details became known. For instance, no one could remember a committee meeting in the European Parliament when the meeting room was so jammed. Those who didn't get a seat had to stand, which was only a minor inconvenience compared to the fact that they had no access to simultaneous interpretation. Some important speeches, such as that of Jerzy Buzek in Polish, were delivered in languages that only a few could understand.

One of our activists was in the audience and had to leave early, at about the same time as commissioner McCreevy. The activist shared an elevator with McCreevy and a couple of his aides, and the commissioner was very angry about the reception he got from the committee. According to the activist, McCreevy was quite vociferous, apparently because of the prospect that JURI would request the restart.

It proved difficult to find out the precise outcome of the vote. Our best information was that there were 19 votes in favor of a restart, one abstention (Michel Rocard), and one vote against (Brian Crowley from McCreevy's Fianna Fáil party, an FFII ally at the first reading but afterwards turned around by Microsoft and McCreevy).

Miernik told me that there was a very unusual situation, a role reversal: Arlene McCarthy tried to talk Rocard into also supporting the restart request. Usually, Rocard had been the FFII's ally, and Arlene the arch enemy. But a few days before the restart vote, Miernik told me over the phone that based on a conversation he'd had with her, Arlene was more likely to vote in favor of the restart than Rocard. It seems the two always managed to take different positions, one way or the other.

What happened here was not unusual when a debate shifts from the substance of a legislation to a procedural move: The line between the camps may shift, and

different motivations may give way to identical procedural objectives. Arlene wasn't suddenly against software patents, but the restart request was logically in line with her position that the Council hadn't treated the parliament with due respect.

A number of MEPs were instrumental in making the restart request happen, and I can't mention them all because I wasn't even in contact with all of them. Maria Berger made the oral motion that was formally adopted in the JURI meeting, and she had been the first JURI member who became fired with enthusiasm for the restart idea. But back in January, Monica Frassoni and Eva Lichtenberger of the Greens/EFA had written to ask JURI chairman Giuseppe Gargani to put this item on the agenda of a forthcoming committee meeting. I also heard good things about the dedication of Edith Mastenbroek, Andrezj Jan Szejna (a vice chairman of JURI), and Tadeusz Zwiefka.

A few weeks later, one of our activists happened to share a flight out of Brussels with someone who had attended the EPP-ED group's internal preparatory meeting before the official JURI meeting. That's how one of the funniest stories came to our attention: Piia-Noora Kauppi had been a little bit late for the internal meeting, but as the group's shadow rapporteur on this directive, she got to speak shortly after she arrived. She started by advocating the idea of a restart in a very spirited and persuasive manner, and then was interrupted because she was sending coals to Newcastle: Lehne had already said at the beginning of the meeting that there was pressure from Germany, and he made it sound almost as if he had been ordered to support the restart. So Piia-Noora no longer had to do an internal selling job.

Looking Ahead In the Light of the Restart Vote

After the JURI vote, there was temporary uncertainty as to whether the Conference of Presidents would have to formally grant its consent. As most of us assumed, that was a necessity for procedural reasons. None of us was worried that the Conference of Presidents would withhold its support for the position taken by JURI, and there was nothing we could do in the short term to stabilize the near-unanimous backing that the restart request had already received. We simply had to wait two more weeks, and react if there were activity on the part of our opponents.

At the celebratory dinner in Brussels, Hartmut and I discussed the three possibilities of what the Commission might do after the restart request was

formally communicated. In his speech in front of JURI, McCreevy had said: "This is the time to keep all options open." In saying that, he referred to restarting, aborting, and continuing the legislative process. A continuance would of course be on the basis of the Council's proposed common position.

Hartmut and I agreed that at any rate we had gained a lot of ground through the restart request. Ideally we would have liked the Council to renegotiate its common position. A restart would have had that effect. A withdrawal of the Commission's proposal, which in formal terms aborts the legislative process without a result, was also intriguing since it would have been a defeat for the attempt to legalize software patents in Europe. But sooner or later, the item would resurface on the political agenda. Hence, withdrawal would basically be a restart with a couple of years or more in between.

What if the Commission were to spit in the parliament's face by declining the request for a restart? Hartmut said: "In a way that could be the best of all scenarios." I didn't view it exactly that way because a second reading based on the Council's common position was still going to be a high hurdle to get across. However, I also believed that there could hardly be a more favorable basis for going into a second reading, since in that situation the parliament would be most likely to make far-reaching amendments to the bill. Alternatively, it could reject it immediately, although outright rejection of a common position of the Council would have been a first. The parliament had no formal basis for forcing the Commission to grant a restart request, but what we had heard was that in the past the Commission had usually accommodated such requests. Therefore, declining the restart request would be perceived by parliamentarians as an absolute affront.

On the basis of that analysis, I was proud of how much better our position was now compared to where we were before I started my campaign. Saturday, the day after the dinner, I still stayed in Brussels, and I took a walk past the European Parliament. As I saw the Spinelli and Spaak buildings, I reminisced about my first visit there the previous April. Less than ten months had passed, but so much had happened.

The restart request was a fantastic turnaround, like a movie plot. We were told that the parliament hadn't used that procedural option in a long time. So we had accomplished something rare and special.

It seemed like a wonderful basis for retiring from the political fight and going back to my computer game development project. If there was going to be a

restart, then there'd be a new legislative process that would take years, and it would have taken the sweetest business terms imaginable for companies to have convinced me to spend so much more time on this. If the Commission was going to withdraw the directive, there'd be a long hiatus. If there was going to be a second reading, maybe I'd consider spending a few more months, but at this time there was no point in making concrete plans.

Whirlwind Trip to Warsaw

On February 7, commissioner McCreevy announced that the Council was going to adopt its common position on software patents on February 17. Four days later, the Council officially denied it. It was neither the first nor the last time that the Commission made a prediction like this that didn't materialize.

The FFII prepared a demonstration in Brussels for February 17, which was going to be an important day anyway: we expected a decision from the Conference of Presidents of the European Parliament, which had yet to formally express its consent for JURI's restart request, and there was to be a vote in the German Bundestag.

The day before, I flew to Warsaw in order to participate in the official presentation of the *thankpoland.info* signatures to the Polish government. Norbert Bollow, who created the *thankpoland.info* Web site, flew in from Switzerland with a printout of the names of well over 30,000 people whose email addresses had been verified. I arrived about an hour earlier at Warsaw's Frederic Chopin airport and waited there so that Władek Majewski was able to meet Norbert and me.

On the way into the city, Norbert told us he was a German citizen but a Swiss resident. We stopped by an office on a university campus so I could check emails, and there it turned out that Norbert had acquired the Swiss obsession with cleanliness: Władek was wondering what was taking Norbert so long in the kitchen and found him trying for ten minutes or more to scrub a coffee mug before using it.

Afterwards we picked up Łukasz "honej" Jachowicz, board member of ISOC Poland and creator of the *7thGuard.net* open-source Web site, and his girlfriend. The five of us had an early lunch in downtown Warsaw, and Łukasz told us that Richard Stallman's visit the previous year had helped draw a relatively large audience to a conference on software patents.

We had our first appointment in the Sejm, the Polish parliament. After we cleared security, deputy minister Włodzimierz Marciński walked by and introduced himself. Norbert later handed Marciński the *thankpoland.info* signatures in book format, along with a bunch of flowers. There was thunderous applause. The EU affairs committee of the Sejm set aisde a few minutes for a ceremony admitting us as its guest. Jerzy Buzek also addressed the committee for a few minutes and encouraged it to get in contact with the EU affairs committees of other national parliaments.

Buzek had flown in from Brussels the same morning, planning to fly back later. When he entered the meeting room, several people shook hands with him, and I noticed that a lot of people looked in his direction. As a leader of the Solidarność movement in the 1980s and a former prime minister for four years, Buzek is one of Poland's most prominent politicians in recent history.

Press Conference at Marciński's Ministry

We then walked over to Marciński's ministry for a press conference in a meeting room with a huge wall hanging of the Polish Eagle. After the end of World War II, my mother's family fled a territory that has since belonged to Poland. Sitting next to a member of the Polish cabinet (an honor I owe to Władek, who suggested that seating order), I realized that Poland and Germany had come a long way, and the same can be said about the relationships between many other European countries.

Marciński, our Council hero, is a mathematician by background, and he took a facts-based approach. However, in his own special way he showed that he appreciated the signatures that *thankpoland.info* had collected from people all over the world as he flipped through the pages and showed Buzek signatories from far-away countries.

Meanwhile we had been joined by Jan "Miernik" Macek. My fellow activists suggested that I make some opening remarks. I said that Poland was "more advanced than most other EU member countries" in two respects: by recognizing that more patents don't necessarily equal more innovation, and by understanding early on that the software patent directive wasn't a specialized subject of peripheral importance, but a piece of legislation that could have far-reaching implications for the future in economic and other terms.

Buzek repeated the words "more advanced", something that the new member countries rarely get to hear. But in this context, I wholeheartedly believed it was true. It's a disgrace that the governments in such countries as Germany left this crucial political decision to public servants who pursued an agenda of their own. That's why on a large German Web site, a reader left a comment after the Polish government's announcement that it would not support the software patent directive: "They should send Zypries [the German justice minister] to Poland for some schooling in how to think." That kind of statement is a good example of how popular Poland made itself among software patent critics all across Europe.

Software Patents in the US

One journalist asked Marciński what would happen if the Commission rejected the European Parliament's request for a restart. He replied: "Then there would be an inter-institutional conflict between the Commission and the European Parliament." On that basis, Marciński, like us, thought the Commission would proceed with caution.

Another journalist who was somewhat critical of the Polish government's stance against software patents asked me: "But if software patents are as negative as you say, why is the American software industry so strong although software patents have always been legal there?"

A very similar question had been asked by someone from the Spanish government party PSOE at the meeting in Madrid the month before. Admittedly, this had become my favorite question because there are so many strong points one can make in response, and you can actually watch the questioner quickly begin to understand.

The scientific approach is to explain that in many industries there is a correlation between the presence of market-leading companies in a country, and a high density of patents, but usually leadership breeds patents, not the other way round. That is what *ResearchOnInnovation.org*'s Jim Bessen had explained at the FFII conference in November 2004 (and on other occasions). The more direct reply is that today's leading software companies grew to a very large size without needing any software patents.

Since Europe has no software giants other than SAP, it made particularly little sense to shape patent policy to suit past winners rather than those that may grow to substantial size in the future.

There are also statistics showing that in recent years, when the USPTO has granted huge numbers of software patents, actual investment in software development has been on the decline, while legal expenses have been on the rise. When Jesús González-Barahona explained that at the meeting with PSOE in Madrid, it had quite an effect.

The Banana Union and the Hungarian Bee-Keepers

The next morning, we gathered at Rond-Point Schuman for a demonstration on a traffic island right across from the main entrance to the Council building. While I was not involved in the organization, I called on my campaign supporters to participate. It was a cold winter day, and the demonstration had been set up at relatively short notice by the FFII. In view of those circumstances, it was a positive sign that there were at least 300 participants, and that there were a number of familiar faces from different European countries, such as Diego Burrun (a software developer from Argentina who lived in Germany) and Dan Ohnesorg from the Czech Republic.

I had suggested the FFII postpone the demonstration after we learned that the Council wasn't going to adopt its common position that day, but preparations had progressed too far. The strongest point they made was this: "With Council agendas you never really know. Sometimes they announce it well in advance and the agenda changes again, and one day they might just take us by surprise. We have to do the demonstration at some point, so let's do it on February 17, when we also expect the decision from the Conference of Presidents."

The roughly 300 demonstrators we had were an acceptable number. One would always want to have larger crowds, but this was enough to be noticeable. On the same traffic island, we found a separate group of about 15 people. Many of our protesters were wearing those yellow "No Software Patents – Power to the Parliament" T-shirts, and the other activists were also wearing yellow clothes, which from a distance made them look like they were part of our group.

We found out why they had chosen the color yellow: they were a group of Hungarian apiarists demonstrating against an EU directive that concerned them, and they had already been there for three or four days in a row. I guess they figured perseverance could be a substitute for numbers, even though it wasn't the best weather for daily outings. They were impressed by the size of our demonstration, and some of them pulled on the yellow T-shirts we gave them.

Benjamin Henrion had organized our previous demonstration in Brussels, but this one was mostly the responsibility of Dieter van Uytvanck. He also played the role of rabble-rouser, using a megaphone and chanting rhythmic slogans like "Software Patents – No! Software Patents – No!" and "Innovation – Yes! Litigation – No!" Dieter was so genuinely passionate about this that he strongly motivated people to participate. With that passion he was even able to work with relatively long and complex wording, which was handed out to the participants:

> The Council can't re-open negotiations because, as a Council diplomat said,
> This is not a banana republic!
>
> The Council can't listen to the national parliaments, because
> This is not a banana republic!
>
> The Council completely ignores the directly elected European Parliament, because
> This is not a banana republic!
>
> When there is no longer a qualified majority in the Council, they schedule the directive at a Fisheries meeting (twice), because
> This is not a banana republic!

The "Council diplomat" who made that comment about a banana republic to two representatives of the FFII was Christian Braun, a diplomat from Luxembourg, which held the presidency of the Council at the time and therefore determined the meeting agendas. He meant to say that the Council had to go forward and adopt the common position based on the political agreement of May 18, 2004. However, the view in our camp was the opposite: we were worried that the European Union would drift toward being a banana republic if national parliaments and the European Parliament were ignored, and if the Council were to formally adopt a common position when there is actually no longer a qualified majority in place, at least not legitimately.

There were some banners at the demonstration with a Banana Union theme: a modified version of the flag of the European Union, with 12 bananas instead of 12 stars, on a blue background. The FFII also gave bananas to demonstrators to fortify themselves.

Flexible Police and Friendly People

From the Rond-Point Schuman, our procession walked down Avenue de Cortenbergh toward the Maison du Grand-Duché de Luxembourg, the permanent representation of Luxembourg to the EU. Just at the beginning of that street, there was a funny incident: someone wearing a white shirt and a tie opened a window in one of the office buildings and applauded us. Probably he had some IT-related job, or had some other reason to know why software patents were a bad thing. Many of us waved to him, and some signed that he should walk down and join our parade, but he decided to stay in the office. It was still cool to see that there was support from the neighborhood.

Another positive experience was the flexibility of the Belgian police who accompanied our parade. Even though we made a couple of stops that we had not properly agreed with them beforehand, they stopped traffic and allowed us to chant outside the Luxembourg embassy as well as another building on the same street, a branch of the European Commission's DG Internal Market, the directorate-general in charge of the software patent directive.

At both of those buildings, we managed to get someone to step outside and listen to us, and to accept a letter from the FFII along with a bunch of bananas. As Erik explained when handing them over, the FFII was "concerned that the EU could turn into a banana republic". The Luxembourgian representation even sent Christian Braun himself, the man who had said "This is not a banana republic". But on this occasion we applauded him anyway.

I didn't participate in the demonstration until it was over. I had to leave early to go back to the hotel and get ready for the press conference, for which I had booked a meeting room at the Marriott Renaissance. It happened to be the same one where the EIF had held its conference in November.

Formally speaking, the FFII was responsible for the demonstration, and the press conference was a joint event, which my campaign paid for and which I moderated. The demonstration seemed to generate additional interest on the part of some of the journalists at the press conference: synergy.

Next Door to the PES

Virtually all the other meeting rooms at that hotel were booked by the Party of European Socialists (PES). The PES is a European party as well as the second-

largest group in the European Parliament, and its members are national center-left parties such as UK Labour, the German SPD or the Spanish PSOE. "Socialists" sounds more leftist in some parts of the world than in others. In the Mediterranean countries, center-left parties have that word in their name, while in Germany, the SPD calls itself a "social democratic" party.

We had already begun serving sandwiches before the official part of the press conference began. We had scheduled the event for the early afternoon to make it possible for journalists to attend the European Commission's daily press briefing before joining us. The meeting of the European Parliament's Conference of Presidents, only a stone's throw from our location, was scheduled to end at 1 PM, so we expected to get confirmation of the Conference of Presidents' consent to JURI's restart request just in time for our official start at 1:30 PM.

We received confirmation from two different sources within a minute of each other. Simon Taylor, the Brussels correspondent for the IDG News Service, got the news in the foyer from Martin Schulz, the chairman of the PES group. At the same moment, Erik received a phone call from an aide to the GUE/NGL group, which is left of the PES. We had been optimistic given the landslide vote in JURI, but it was very reassuring to know that the president of the European Parliament was now going to send a formal restart request to the European Commission.

At about that time, still before our official press conference began, a relatively young aide to the Labour Party walked in. He asked to speak to the organizer – me. He told me he was based in the UK and had traveled to Brussels for the PES meeting. Then he saw the "Software Patents Press Conference" sign outside our meeting room. He admitted that he wasn't familiar with the details of the software patent debate, but he had been hearing about our fight against the Council's common position, and he just wanted to let us know that he was astounded: "You turned an EU decision around in less than a year. There's never been anything like it. How did you do this?"

I told him a little bit about the virtual network that had been built by and around the FFII that enabled us to take political action in many European countries without much administrative overhead. But there really isn't an easy answer to the question of how we did what we did. At the time I didn't know I was going to write this book in order to chronicle some of the events and portray some of the people who were involved.

Pluralistic Panel

There were five of us on the panel. Erik and I represented our activists, and three parliamentarians had accepted our invitation: Jerzy Buzek, Dutch socialist MP Arda Gerkens, and French Green MEP Alain Lipietz. Five nationalities, three shades of the political spectrum, and still all had more or less the same position on software patents.

By the time the official presentation started, the room was crowded and some people had to stand in the back. Jerzy Buzek asked if anyone in the audience was on the other side, and encouraged a debate. In fact, there were a few pro-patent lobbyists. I also knew that the EPO had sent a representative, and unlike the Microsoft-sponsored lobbyists, the EPO had courteously telephoned the day before to ensure that its presence was acceptable. In that situation, with the restart request taking shape, we tried to be hospitable to everyone.

The only logistical problem we had was that our parliamentarians all had to leave, so the panel was gradually emptying out until only Erik and I were left. Our restart hero Buzek was on the toughest deadline, but out of courtesy he stayed on a little while after his own speech. Then Arda explained, at my request, how the Dutch parliament had repeatedly taken initiatives to influence its government's actions in the Council. Only a few weeks before that press conference, a motion she had personally introduced into the Dutch parliament was carried that required the Dutch government not to support the adoption of the Council's common position until the European Parliament was ready to formalize its request for a restart.

Lipietz expressed many opinions similar to my own. A journalist asked him what the consequence would be if the Commission were to reject the European Parliament's request for a restart of the legislative process, and he said: "It would be viewed as an insult to the parliament and would probably result in the rejection of the proposal in the second reading!"

Afterwards, Erik explained that the FFII believes the appropriate form of protection for the rights of software developers must be "fast, cheap and narrow", while patents are "slow, expensive and broad". Erik also made some other good statements.

After the press conference, a number of FFII activists and I stayed on in the room to talk. I left briefly, changed clothes and checked out of my hotel room, and then I brought my suitcase to the meeting room to talk some more to my comrades-in-

arms before going to the airport. I also accepted some telephone calls from journalists, including a reporter from a large Italian news agency who seemed to have been quite impressed by the politicians at our press conference.

Also, I called Jörn Henkel in the German Bundestag to find out how things were progressing with the resolution that was due later that day. He told me that there were delays in the parliament and the decision would not be taken until extremely late, so late that instead of actually delivering their speeches in the plenary of the parliament, the parliamentarians would just file the manuscripts. Fortunately for us, software patents weren't a contentious issue in the Bundestag anyway, since all four parliamentary groups had already agreed on a joint motion, which was carried unanimously that evening.

Concerns Over McCreevy Were Right

At the press conference on February 17, I started to generate awareness of the fact that commissioner McCreevy was going to be a risk factor. As Ireland's former minister of finance, he already had excellent relationships with the country's largest taxpayer, Microsoft. We had seen the disgraceful role the Irish government had played in the EU Council the previous year. And McCreevy himself had been the primary sponsor of a bill that made patent licensing revenues tax exempt.

McCreevy also had the reputation of being a politician who does whatever he wants, without caring about democratic legitimacy as much as he should. On a mailing list, someone posted the story of an incident in Ireland in which a significant amount of government funding had gone into horse breeding simply because McCreevy liked horses.

Unfortunately for us, McCreevy, as the commissioner in charge of internal market policy, was now going to be in the strongest possible position to influence the Commission's official response to the European Parliament's restart request.

I started publishing documents on *NoSoftwarePatents.com* explaining the Irish role in the push for software patents, and the way Ireland benefits from being a low-tax gateway to the EU market for such companies as Microsoft. In order to make those pages easy for people to understand, I may have oversimplified some things. Unfortunately, some people in Ireland, including a newspaper journalist who gave me a phone call, were offended. They didn't believe that I wasn't a xenophobe when I explained to them that I had once advised an American

company to set up shop in Ireland, and that I had always worked very well with Irish industry colleagues.

McCreevy continued to push for a Council decision. On February 24, one of our supporters received an email from the office of German environment minister Renate Künast that said the Council was going to adopt its common position on February 28. However, that announcement was retracted shortly afterwards. We were now close to the next Competitiveness Council meeting, which was scheduled for March 7, so the Council could not have saved much time by adopting its common position at a different, earlier Council meeting.

On February 28, the president of the European Parliament received a letter from the president of the European Commission, José Manuel Barroso:

> Dear President,
>
> Thank you for your letter received 24th February 2005 formally inviting the Commission to submit a new proposal as requested by the Legal Affairs Committee under Article 55 of the European Parliament's rules of procedure.
>
> At this stage in the co-decision procedure, and having supported the political agreement reached in the Council on 18 May 2004, the Commission does not intend to refer a new proposal to Parliament and Council. Indeed the Commission is expecting the Council to formalise the political agreement as a common position as soon as possible, so that discussion may continue during the next phase of the co-decision procedure according to Article 251 of the Treaty.
>
> It stands ready, in the course of the second reading, to review all the arguments and positions expressed and respond accordingly.
>
> I look forward to our further collaboration on this important file.
>
> Yours sincerely,
>
> José Manuel BARROSO

The message was superficially polite, but it was nothing short of spitting in the face of the European Parliament. Barroso failed to provide any actual reason for

declining the parliament's request for a restart, although the inter-institutional agreement between the European Commission and the European Parliament required him to do so.

We later heard different stories about the discussions inside the Commission. It's highly doubtful that Barroso and the other commissioners understood the issue of software patents to any extent. That made it easy for someone like McCreevy to base his reasoning on some of the usual pro-patent propaganda, which seems logical to those who know little more about a computer than how to turn it on, if they have ever even done that for themselves.

One account that I don't want to dismiss completely (although I'm not sure whether to believe it) is that there could have been a restart of the legislative process, but McCreevy was planning to resubmit the original proposal or something materially consistent with it, and the directorate-general in charge of information society policy wanted to demand a new draft but wasn't in the position to get McCreevy to agree to a new approach. One way or the other, there's no doubt that McCreevy was responsible. An email I received from the office of Günter Verheugen, a vice president of the Commission, expressly stated that the Commission had taken that decision as per McCreevy's suggestion.

Outrage Over Anti-Democratic Conduct

The parliament's Conference of Presidents summoned Barroso to a meeting to explain, and he said he didn't have time. Instead he sent McCreevy, who had really been behind the Commission's antidemocratic decision, and the arrogance with which McCreevy talked to the leaders of the parliamentary groups was counterproductive.

Many MEPs issued press releases in the following days that criticized the Commission. Maria Berger especially spelled out things the way they were: she said the Commission would pay dearly for its collusion with Microsoft.

We also knew that some MEPs secretly welcomed the decision but didn't dare speak out in favor of it because it would have meant taking sides against their own institution.

Allegedly, the Commission had told certain people in the EPP-ED group as early as in December that it wouldn't allow a restart on this directive even if the parliament requested one. An EPP-ED aide had told Erik that at the time to discourage our initiative.

It's quite imaginable that the Commission might have told such people as Lehne that it was going to reject a restart request no matter what. Still the Commission and its allies in the parliament would much have preferred that the restart request not be made at all, as they knew that declining that request would put the parliament up against the Commission, and also against that specific legislative proposal. Formally, the Commission had the right to let the process continue against the will of the parliament, but exercising that right came at considerable political cost.

After the near-unanimous JURI request and its unanimous support by the Conference of Presidents, a motion introduced by Buzek had been carried unanimously in the plenary in late February. So the parliament had done everything that it possibly could to lend weight to its desire for a fresh start on the software patents bill.

National Parliaments Weighing In Again

The EU Competitiveness Council meeting was scheduled for Monday, March 7, 2005, and during the week before it, there were some last-minute attempts at preventing the Council from adopting its common position.

National parliaments were generally on our side. Before the German Bundestag passed its all-party resolution on February 17, the Senado, the upper house of the Spanish parliament, had also spoken out unanimously against the Council's proposal. And as I mentioned in the context of Arda Gerkens' participation in our press conference in Brussels, the Dutch parliament had effectively reinforced its July 1, 2004 decision. The Tweede Kamer was therefore the first parliament to have passed two separate resolutions against the Council's common position, and on the Thursday before the Competitiveness Council meeting, there was a third call on the Dutch government. A couple of even stronger resolutions weren't carried, but a moderate proposal went through, and it was still potentially helpful as it called on the Dutch government to support any other country that might request a renegotiation of the Council's common position.

Poland was ready to support whomever else would stand up and question the Council's common position in the meeting. However, Poland was no longer in a position to make a unilateral move, even though Marciński was reportedly outraged over the Commission's having declined the European Parliament's restart request. Poland needed someone else to take the initiative.

We tried to put another national government, such as Spain, in touch with the Polish administration, but it didn't work. We had good access to the decision-makers in only a few countries. In Spain, people were concerned about internal discord. That was how other governments perceived the back-and-forth between the Polish diplomats in Brussels and the government in Warsaw. Therefore, other governments, like the Spanish, didn't want to make a mistake by taking sides.

On the afternoon of Friday, March 4, the EU Affairs Committee of the Danish parliament ordered its government to demand a renegotiation of the Council's common position. The Danish activists had been very optimistic that they could make such a decision happen, as over time the social democratic party, which originally supported the Danish government's software patent policy, had become very critical of the Council's common position. The Danish government was a minority coalition led by the country's conservative party, but since the conservatives didn't have a majority in the parliament they depended on the support of the *Socialdemocraterne*.

The Danish social democrats had been moving closer and closer to our position, and reacted angrily when the Danish press reported in February 2005 that Microsoft founder Bill Gates had issued a threat to the Danish prime minister that unless Denmark supported the software patent directive he would close down a Danish company he had acquired. Even though the report had appeared in a major Danish newspaper and quoted a Microsoft official, Microsoft later denied that Gates had said it. But the denial was half-hearted, since Microsoft had to concede that Gates had talked about some connection between intellectual property rights regimes and the choices Microsoft makes about where to locate its software development.

Since Denmark had joined the European Union, it had always been the custom for the government to obey the resolutions made by the Folketing's EU Affairs Committee. That meant that a Danish resolution could have a far greater impact than anything other parliaments did. But no one could predict what exactly would happen in the Council after that weekend.

We knew that some in the Council wanted software patents no matter what. To others, what was important was sustaining the Council's usual working methods, which dictate that a political agreement must always lead to a formal decision. One of my best contacts in German politics told me that the German diplomats in Brussels were neutral with respect to software patents, but feared that if national parliaments and other influences got in the way of this Council decision, that

would open the floodgates and damage many other legislative processes. I could understand their concern to some extent, but I still believe that national parliaments must have a chance to have their say, since the Council itself "isn't a democratic body", as even an official of the German ministry of justice admitted to Marco Schulze.

While we were well aware of the forces that were going to push for formal adoption, we also knew the pressure parliamentary resolutions were putting on some governments. If anyone made the first move – and the Danish government was now under an obligation to do so – support for software patents was going to fall like dominoes.

The Show Must Go On

On that Friday I received confirmation by telephone for another five-week extension of the campaign. I had already worked a few days beyond the end of February, but I told my sponsors that they'd need to decide whether to add another five weeks before I had to leave for Brussels. The idea of the extension was to gain time in which to structure the financing of the campaign for a second reading in the European Parliament. The latter was becoming ever more likely, even though we hoped that the Danish parliament's decision still might overturn the Council's common position.

There were two reasons for me to go to Brussels: to get the psychology of the meeting, and to get our message into the media, whatever the outcome.

On the morning of March 7, 2005, I walked across Leopold Park to the Council building. A little later, several FFII activists arrived, and we saw some of the pro-patent lobbyists like Nokia's Ann-Sofie Rönnlund and CompTIA's Hugo Lueders pass by. When we identified ourselves at the entrance to the press room, from where the public can watch the public parts of the Council meetings over closed-circuit television, the security personnel told Miernik that he had stayed too long in that room after the Council meeting in December, and warned him that he faced serious consequences if it happened a second time.

After we had taken our seats, the FFII's Dieter van Uytvanck took off his pullover so that everyone could see his yellow "No Software Patents" – Power To The Parliament" T-shirt. It really looked funny, and was typical of some people's critical view of the Council.

A few rows behind me, I saw Simon Taylor from the IDG News Service, who in one of his articles had referred to the software patent directive as "one of the most bitterly contested pieces of legislation in the history of the European Union". I overheard another Brussels-based correspondent tell Simon in the voice of someone with complete conviction: "The directive is already dead. If it doesn't die today, it will probably do so in conciliation, and if not there, then in the third reading."

After a few delays, the screen came down, and on it appeared Jeannot Krecké, Luxembourg's minister of economic affairs, who was chairing the meeting since Luxembourg now held the EU presidency. The first sentence he spoke immediately told the story of what was about to happen: "We are going to adopt this common position today *for institutional reasons*, in order not to set a precedent which might have a consequence of creating future delays in other processes."

Miernik was startled and he immediately reached for his cell phone. Dieter made a gesture of throwing something away to express his contempt for this antidemocratic conduct.

The Danish Hypocrite

Then Denmark's economic affairs minister Bendt Bendtsen spoke up, and claimed that he had tried to execute the resolution of the EU Affairs Committee of his parliament, but that the Luxembourgian presidency had told him that it was "not possible" to downgrade the proposal from an A item, which would be adopted without debate, to a B item, which would have meant a renegotiation. We also saw that Dutch economic affairs minister Brinkhorst was speaking, but we couldn't hear what he said: the screen was temporarily pulled up, and then came back down from the ceiling. Some of us suspected that the interruption was intentional, but I believe that it was just an accident.

Bendtsen's statement was anything but credible. His parliament had given him very precise instructions, and there was no room for interpretation. What his parliament wanted him to do was something any national government is entitled to do under the Council's Rules of Procedure, and the government of Luxembourg had no legal basis whatsoever on which to deny him that right. If he had simply stated in the official part of the meeting that Denmark wanted the item to be renegotiated, then there would have been a domino effect.

Bendtsen's appalling hypocrisy was proven later that day, when the "News from the Conservative Party" section on his home page *bendt.konservative.dk* carried this headline: "En god dag for software-udviklere" ("a good day for software developers")

That headline linked to a statement made by another politician from his party (Gitte Seeberg MEP). Everyone who knows how such Web sites technically work could figure out that it was just an automated news feed. That is, neither Bendtsen nor his webmaster specifically added that headline. It just fed in automatically along with other news from the conservative party. But Bendtsen is politically responsible for what appears on his Web site, and if he stands up in the Council pretending to be disappointed that he can't follow the instructions from his parliament, while his Web site welcomes the Council's decision, that debunks him as a hypocrite. No one familiar with the situation doubted that Bendtsen himself was in favor of software patents.

Danish parliamentarians were still trying to get him to justify his actions in the Council a month and a half later. They were completely contrary to the spirit of Danish political tradition. But Bendtsen stayed in office. The social democrats didn't want to destabilize the country by taking down the conservative-led minority government because of the antidemocratic action of one of its ministers. They wouldn't have gained politically, and in the end they weren't going to threaten a vote of no confidence or some other procedural step just to force the Danish prime minister to dismiss Bendtsen.

A Historic Opportunity Was Missed

At the time of the Competitiveness Council decision, we had credible information that no political agreement of the Council had ever failed to be ratified. When I researched this book, I contacted the Council's information service. The person I talked to was extremely helpful. She asked around in the Council among some veterans of 20 years or more, but again, no one remembered a case in which a political agreement had been overturned, even though the Council's Rules of Procedure would allow it in principle.

Chances are that this was the one case in which the Council came closest to having to renegotiate a political agreement. There were a number of special circumstances that would have justified it, and which in my opinion wouldn't necessarily have created a precedent that would apply to many other legislative processes. The Polish representative in the meeting on May 18, 2004 hadn't

meant to support the political agreement, and his country had just acceded to the EU. There were several national parliaments that spoke out against the proposal, a couple of them even unanimously.

I personally believe that the Council's unwritten rules are too strict. There should be stability in the sense that a political agreement leads to formal adoption after the translations have been furnished, even if the political will changes, but there should be an understanding that the Council will renegotiate a common position if the free will of the governments at the time of the formal decisions means the proposal is far from having a qualified majority.

In our case, half a dozen countries or more added unilateral declarations to the Council's decision distancing themselves from it, and that made the common position a mockery, or an "un-common position" as the FFII began calling it. In such a situation, the Council does itself no favors by adopting a decision "for institutional reasons".

The EU's decision-making processes will be discussed a great deal in the coming years. The proposed EU Constitution would make the EU as a whole marginally more democratic but substantially more powerful. It would still be a lobbyist's paradise. When in the spring of 2005 the populations of France and the Netherlands voted against the proposed Constitution, many in our camp were happy about the setback for the EU. It's not that we're anti-European. On the contrary, our own movement is pan-European, "united in diversity", just like the EU's official motto. However, the legislative process concerning software patents, especially the shenanigans of the first quarter of 2005, showed us the dark side of the flawed EU democracy.

Hopefully the role of the European Parliament and of national parliaments in the EU will be strengthened because of the failure of the proposed EU Constitution. Based on our experience, that will be key. We haven't always been happy with every decision taken by every parliament in the world. For instance, the Portuguese parliament voted down a proposal for a resolution against software patents because it came from a far-left party. However, we generally feel that parliamentarians, far more than public servants, are receptive to the concerns of the citizens, even though we could see that some MEPs position themselves as allies of big industry and act unscrupulously against the public interest.

Here's an interesting tidbit: with all that was going on in the EU and especially in the Council, many Web sites around the world used the term "banana republic" in

connection with the EU Council. Google tracks the words that appear in the context surrounding external links back to any given Web site, or that are used as synonyms for other terms. Based on such statistics, Google decides how to rank Web sites (in order to distinguish the important ones from the irrelevant ones). On March 15, one of us noticed that the Google results page for the term "banana republic" listed *http://ue.eu.int*, the EU Council's Web site, second from the top. More than nine months later, that's still the case.

The Half-Full or Half-Empty Glass

To me, the Council's decision wasn't a huge disappointment. It was a lost opportunity for democracy to prevail over diplomacy, but Krecké's opening statement in the Council meeting was so apologetic that the common position had little credibility left. Plus there were all the unilateral declarations that countries had attached to the common position. The one from the Polish government was especially strong; it had mostly been composed by Józef Halbersztadt.

In my initial press release, I wrote:

> Florian Mueller, who manages the pan-European NoSoftwarePatents.com campaign, was in the Council building today to follow the discussion. In his immediate reaction, he said that "we as the opponents of software patents don't have to talk too much now about the democratic illegitimacy of this proposal because it's so obvious. Even the chairman of today's meeting conceded it."

That comment was misunderstood by some FFII people. It was the rhetorical device of a *praeteritio* (or some use the Greek term "paralipsis"): I only pretended to omit the fact, but by doing so actually made a statement. The press release continued as follows:

> He said the focus would now have to be on the second reading in the European Parliament, and outlined his campaign's strategy: "We have a number of psychological and political success factors on our side. Still the hurdle is very high in a second reading, so as a matter of precaution, we have to take multiple bites at the apple and shoot for rejection and impactful amendments in parallel." The EP will have up to four opportunities to reject the proposal, two in a second reading

(one before and one after the votes on proposed amendments), a third one in conciliation and a fourth one in a third reading.

Based on that text, the IDG News Service even quoted me as if I had proposed to pursue only rejection. It's true that I only viewed the possibility of amending the proposed bill as a way of derailing the legislative process. After the Council formally adopts a common position, the remaining steps in such a process are on hard deadlines, and I didn't see how we could get the Council and the Commission on our side quickly enough.

Even though I had hoped for a better outcome from the Council meeting, my trip to Brussels was still a success in terms of publicity. My comments were quoted in some of Europe's most important newspapers the following day, such as *Handelsblatt* (Germany), *Financial Times* (UK), and *Gazeta Wyborcza* (Poland).

The psychological problem we had with journalists, as well as many of our supporters, was that people thought the Council's formal adoption of its common position was a setback for us. However, it was just routine procedure, and the Council takes about 1,000 similar decisions per year without anyone even talking about it. It would been a historic first if the Council had renegotiated a proposal after a political agreement, and it was already a major success for us that it took the Council almost ten months to go from political agreement to formal decision. A month earlier, commissioner McCreevy had even lamented that the Council was in a totally unprecedented situation.

On March 7, 2005, we had lost nothing, and we were in a hugely better situation than we had been after the Council's political agreement on May 18, 2004. That common position would usually have been like a brand new car coming out of the factory, and it was now going to go to the European Parliament in a demolished state because of our work to destabilize the qualified majority and delegitimize the proposal. The European Parliament's wishes had been disregarded by the other two institutions, which was potentially an even greater advantage for us. Our only major concerns were the hurdle of the absolute majority of the members in a second reading and the huge lobbying budgets of the proponents of software patentability.

The Showdown in Strasbourg

Go Big or Go Home

The basis on which I had extended my campaign agreement with my three corporate partners until early April was that we'd have to raise the funds for a significant lobbying war chest in the event of a second reading. I felt that I had delivered proof of concept for my campaign, and that prospective sponsors should now have the confidence that betting on NoSoftwarePatents was a good way of fighting against software patents. And I knew that the pro-patent forces were going to spend many millions of euros just during the few months that a second reading in the European Parliament was going to take.

The challenge was to build a majority in a parliament with 732 members, and that's why I thought we'd need to be able to pay for wide-scale activities, that is, things that reach many MEPs and their offices all at the same time. I was thinking of display ads, large-scale events, posters and other ways of communicating our viewpoint. Also, I wanted the campaign to be able to afford to fly journalists from all across Europe to Brussels (this is common practice in Europe, though not in the US).

Another important aspect was to demonstrate to MEPs that there was really substantial business interest behind the fight against software patents. The time had come for more companies that were concerned about software patents to put their money where their mouths were. Of course, one can always try to achieve the same political objectives with much less money. However, that would have left me hugely dependent upon volunteers, whose availability is never guaranteed. Also, I no longer considered it reasonable to work in less comfort than my political adversaries.

My position was that the companies, which had revenues in the tens of hundreds of millions of euros each, had to take serious action now if they wanted to prevent the legalization of software patents. Otherwise, if they were going to consider themselves to be incredibly clever for not supplying a reasonable level of funding, I was going to take a similar attitude and focus on my own project.

The key deadline I communicated to everyone was April 11. That was the week that the European Parliament was going to meet in Strasbourg and formally commence the second reading. The pro-patent lobbyists had already become very

active before then, but the week of April 11 was going to be when people made specific plans and the one when the MEPs in both camps needed to know which allies they could count on.

Political Naïveté of Small and Medium-Sized Companies

Even after 1&1 and MySQL AB made a call to action, the entrepreneurs and executives of other companies who could have made my plan work weren't really receptive. They didn't even make time available to discuss the matter. And those who said they weren't ready to support us didn't tell us why: they just said no or didn't reply at all.

There was a combination of different reasons. Companies of that size simply aren't used to spending serious money in order to influence political decisions. I was often amazed at the naïveté of their decision-makers' political understanding: most of them know little more about politics than the average 15-year-old.

One major problem was that most of them thought that smaller companies couldn't even influence political decisions and believed only big corporations had a chance of being heard. I know from my own experience that it's simply not true. There are some politicians and many public servants, especially in the European Commission and in some national governments, who are flunkies of big industry. But there are still enough good people out there who are willing to help the smaller companies. I had seen many open doors that one could walk through, though it takes a certain skill set to be effective when you do.

Other companies seemed afraid that if they took real political action against software patents they might annoy the large players on the other side. They feared they'd be in a worse position to strike deals with companies like IBM, Nokia and Siemens. However, none of my campaign sponsors ever experienced any such problem. Large corporations, except maybe Microsoft sometimes, tend to separate business decisions from political considerations. Also, the alternative for smaller companies is letting the larger ones dictate legislation. Doing so in the case of software patents would make the smaller ones even more dependent on the large ones over time.

It's also a fact that there are simply a lot of free riders out there: people who believe that they don't need to spend money on something that has to be done because someone else will anyway. It would have taken a lot of persuasive effort to make it clear to them that we needed every possible sponsor on board.

Generally speaking, the selection process in smaller companies favors narrow-minded people. In a start-up, the most important thing is to be extremely focused on the business at hand and on immediate opportunities. While short-sightedness can lead to mistakes (fighting software patents one by one in the courts is far more expensive than addressing the problem politically), the survival rate of those who are penny-wise but dollar-foolish is still many times higher than that of those who are easily distracted. In large corporations, it's a little different because their executives tend to spend more time with politicians and lobbyists, and therefore understand the need to spend money on lobbying.

Resignation

In late March 2005, I came to the conclusion that those fund-raising efforts weren't going to lead to the desired result in time, that is, by the week of April 11.

I therefore took the difficult decision to resign as campaign manager of NoSoftwarePatents. If companies that said they felt threatened by software patents thought it was wiser not to spend time and money on politics, then I was going to show them how wise I could be.

Fortunately, the FFII was willing to take over the *NoSoftwarePatents.com* Web site. It would have been a shame to close down such a successful campaign site, which had a significant level of traffic due to its tens of thousands of inward links. However, I wouldn't have liked the idea of letting anyone other than the FFII take it over. Managing that site was far more difficult than most people understood by looking at the seemingly simple statements on it. I didn't believe that anyone could stay consistent with my particular campaigning style, but if there was going to be a change, I'd feel better about whatever the FFII would do (or not do) than anything anyone else might do. After all, without the FFII, there would never have been a *NoSoftwarePatents.com* anyway.

I also wanted to strengthen the FFII's position. So on March 30, 2005, we issued a joint press release titled "EU Software Patent Critics United: NoSoftwarePatents.com Will Become an FFII Platform".

In that press release, I reminded people that at the outset of the campaign I had said that I intended to interrupt my own computer game development project only temporarily. In fact, that statement was on my backgrounder page from the first day that *NoSoftwarePatents.com* went live.

I didn't see any point in stressing that I would have considered staying on board for longer if certain requirements had been met. But in private email, I let some people know what the problem was.

Advocating Rejection

In my final thank-you note to politicians and journalists, I strongly recommended that everyone look at the benefits of outright rejection of the Council's common position:

> Finally, let me outline my thinking on what would be a desirable outcome of the process. In a perfect world, the second reading would lead to a clear exclusion of software innovations from the scope of patentability, but from a pragmatic perspective, it would be a major relief if the current proposal simply were to be rejected. There is a high risk at this stage that the Council's common position could get ratified with cosmetic corrections at the most, not because it would reflect the true political will of Europe but because the EU codecision procedure provides very little flexibility once the Council has adopted its common position.
>
> We don't need this directive now. Europe would have various other ways of subsequently dealing with the issue. The Commission wanted to "keep all options open", and that's exactly what a rejection of the current proposal would do in a more positive way. There could be a second try to define an EU directive later, with more intelligence as to the corrupted and defective state of the patent system, and with the more positive forces in the Commission taking charge. There might be national initiatives. Country governments could use their influence on certain patent offices.
>
> A failure of the ongoing attempt to legalize software patents would build pressure on the European Patent Office. It would deter some patent holders, and especially one that appears to be readying for a large-scale attack and supports the Council's proposal, from using their patents in any way that might backfire in European politics. With a directive like the current proposal, it would be open season for unscrupulous players on their competitors, knowing that any revision of such a directive would

take a long time and could be prevented with the help of just a few country governments.

So before we can talk about improvement, let's hope that a deterioration of the current status of software patents can be avoided in the first step. I look forward to seeing you, or hearing from you again, on some future occasion!

Thanks for everything,

Florian Mueller
Outgoing Campaign Manager, www.NoSoftwarePatents.com

It was very gratifying to receive many friendly replies, as well as some that expressed hope of working together again in future. When I stepped down, I certainly did believe that one day I might resume the fight against software patents. I thought that the second reading would at least lead to a result that would force the Council into a conciliation proceeding with the European Parliament, and that would be a possible time for my comeback.

Waning Support for the Cause

I had learned early on that politics is a very volatile business. You can have a majority in favor of something one day, and lose half of it within a few days or weeks. You may hold a decision in your hands that looks final, but someone will try to take what you've got away from you if you don't watch out.

However, I wouldn't have expected the pendulum to swing so rapidly and forcefully against us. On April 31, 2005, the Legal Affairs Committee (JURI) met for its first debate on software patents during the second reading. Rocard presented his views, which were the same as in the first reading. Piia-Noora Kauppi was also in favor of clearly excluding computer programs from the scope of patentability. In the role of shadow rapporteur, she had to take an approach that was compatible with the ideology of the EPP-ED group. The Greens/EFA and GUE/NGL were on our side as always. But those who opposed significant changes to the Council's common position had a majority.

That same committee had voted 19-1 in favor of the restart less than three months earlier. Of course, one has to take into account that the near-unanimity in favor of the restart had been an arm wrestling result: the fists go down on the same side of the table, whether one of the combatants is 10 percent or 100 percent stronger.

The 19-1 result included many votes from MEPs who actually wanted software patents to be legalized, but voted our way to come out on the winning side. Still it was shocking for me to read the transcript of that first debate.

A month after my resignation, I contacted my past campaign sponsors as well as other companies of a similar size, and presented a proposal for getting involved again in the nine weeks leading to the plenary vote, which had been scheduled for July 6. That didn't work out, and after another disappointing JURI debate in late May, I gave up all hope that something positive for us would come out of that committee during the second reading. Even so, I made a new proposal: to come back on June 20, the day of the JURI vote on this directive, in order to try to help get a better result in plenary than in the committee. At the first reading, a majority of JURI had also been on the pro-patent side, and the plenary, which takes the final decision, then sided with our camp. Back then they had three months, and now there was going to be less than three weeks.

The second comeback proposal didn't work out either. However, that didn't shatter my confidence. On June 17, the Friday before the JURI vote, I was contacted by *Managing Intellectual Property* magazine, a monthly publication with about 10,000 readers, three-quarters of whom are senior counsel of multinational corporations. The magazine told me that I had been nominated as one of the "top 50 most influential people in intellectual property", a list that is published annually. It felt great to be recognized by a publication aimed at an audience that we counted among our opponents in this debate.

The Message of the Pro-Patent Camp

The pro-patent forces claimed that they didn't want patents on pure software, but on "computer-implemented inventions". Since software is the only thing that one can implement in a computer, this description was just an attempt to mislead people. The claim that only software with a "technical effect" should be patentable didn't really mean a restriction either: any software has a "technical effect" of some sort. But the suggestions made by Rocard and others for drawing a clear line between computer software and software-controlled technical devices were opposed by the pro-patent lobbyists and their political allies.

The debate was highly technical and legalistic. The European Parliament always votes on individual amendments, and each amendment can only modify one article of a bill or replace a term throughout a legislative text. There is a tug-of-war over each word of every amendment.

The pro-patent lobbyists ideally wanted the parliament to make no changes to the common position. However, as they realized that the parliament wouldn't want to reduce itself to irrelevance, they signaled that they could live with amendments as long as they weren't substantive.

The daily mantra of the proponents of software patentability was that there is no (or much less) innovation unless the investment in such innovation is protected by patents. However, that is only one way to look at it, and the inflationary state of the patent system has recently become an impediment to innovation in many fields. A competitive market is indispensable in order to force companies to truly innovate. Also, it's an over-generalization to look at the motivation to innovate from the perspective of a *homo economicus* when there are actually amazing intellectual achievements that have nothing to do with economic incentives.

The pro-patent camp tried to position itself as a representative of virtually all business interests, making the FFII out to be a part of "the open-source community".

Videos, Trucks, Ice Cream, and Pat Cox

The large corporations pushing for software patents tried every lobbying trick in the book.

Siemens sent Dr. Kai Brandt, one of the heads of its patent department, to Brussels for an extended period of time. He showed a presentation on a portable computer, which included an animation that illustrated the way a computer tomographer works: A patient on a stretcher slowly moves through a circular X-ray, and a computer then interprets the raw data that the X-ray delivers and displays a three-dimensional graphic of the patient's body that the doctor can look at from all angles and at different levels of detail.

To someone with no or little technical knowledge, it looked highly impressive. If Siemens goes on to claim that only the Council's common position would allow patents on such inventions, it makes parliamentarians feel bad about the idea of restricting the scope of patentable subject matter if doing so was going to make a tomographer non-patentable.

However, Siemens didn't tell MEPs that it usually doesn't obtain a patent that covers an entire computer tomographer. Instead, there are multiple patents per product, which is why Siemens files more than 5,000 new patent applications every year. A lot of the functionality of a computer tomographer is pure computer

software: three-dimensional graphics are used in Computer-Aided Design (software used by architects and engineers) and games. It is nothing specifically tomography-related.

All we asked was to make a distinction between patents that cover an achievement in the realm of natural science, such as better X-ray technology, and one that relates to general-purpose computing functions. Siemens itself says that about 50 percent of its patents are now software-related. Most of them monopolize very broad and general functions.

Scania, a Swedish truck manufacturer, sent a "demonstration truck" that parked in front of the European Parliament and was equipped with various devices to show MEPs and their aides how many "computer-implemented inventions" you'll find in a modern truck. Another automotive company wrote letters to MEPs to the effect that its business depended heavily on the ability to obtain software patents, yet when the FFII looked it up in a patent database, it turned out that this particular company held only one or two software patents at the time, and that most of its applications had been rejected for being non-technical.

One day in June, an email went out to the offices of all MEPs which said:

> Dear Members and Assistants,
>
> Yes its true! If you go down to Place du Luxembourg from now until 3pm, you can collect your free ice cream and support the Computer-Implemented Inventions Common Position!
>
> Hope to see you soon.

And it was signed by someone with the following title:

> Assistant to Malcolm Harbour MEP
> Member of the European Parliament for the West Midlands, UK.

ZDNet UK, a leading IT-focused Web site, reported the story and quoted this explanation from Hugo Shanahan of the Microsoft-sponsored Campaign for Creativity: "We were working with an assistant from Malcolm's office – he wasn't in the loop and wasn't aware of the message being sent [from his email account]."

On another occasion during the second reading, EICTA organized a conference to underscore the relevance of patents to innovation, and it was moderated by Pat

Cox, a former president of the European Parliament who later became a lobbyist (working especially for American companies) and an adviser to EICTA on the software patent directive. Pat Cox is Irish.

Big Business Playing the SME Card

The pro-patent lobby didn't just spend far more money than it had on the first reading. It also modified its strategy by laying a great deal of emphasis on claiming that small and medium-sized companies (SMEs) needed access to software patents.

For many MEPs, the protective instinct for SMEs was a reason to vote against software patents. They received innumerable emails and letters from smaller companies that urged them to do so. It was predictable that the proponents of software patents would try to counter the perception that all those companies had created.

The EIF conference in November 2004 was the first indication of that new strategy. The panelists were a hand-picked group of smaller companies that said they needed software patents. A couple of months later, in the heat of the push for the restart, Miernik reported that he had talked to liberal MEPs from Poland who were suddenly unsure of whether they should still support our initiative, as they had been told that software patents "are good for SMEs".

In the second reading, statistics were presented that "most patents" belong to SMEs, but the alleged percentages of patents held by SMEs was far below the percentage of jobs.

The FFII kept a tally of which SMEs lobbied the European Parliament for software patents. At closer look, some had very simple products and needed trivial patents to force customers to license them. There were also some university spin-offs, and companies that seemed economically dependent upon large corporations like Microsoft or whose boards included executives from that sort of company.

Since I wasn't actively involved at that stage, I couldn't leverage the survey the German government had conducted the previous year, whose results it had finally published after my campaign had built some pressure. Almost all small and medium-sized companies that participated in the survey were against software patents. Obviously, there are exceptions to every rule.

In late June 2005, two watchdog organizations named LobbyControl and Corporate Europe Observatory wrote to the EU's anti-fraud commissioner, Siim Kallas, and called for more transparency concerning the financing of the Campaign for Creativity, which was lobbying MEPs for software patents. It pretended to represent "artists, musicians, designers, engineers and software developers". However, the campaign was run by a professional lobbyist who declined to specify his sources or amount of funding, but Microsoft and SAP as well as CompTIA (an association that always sides with Microsoft) were clearly the largest organizations among the list of campaign sponsors.

In the US, it would be much more difficult for large corporations to have PR and lobbying firms set up organizations that claim to represent smaller players. American transparency regulations require the disclosure of sources of funding, but, at least at this stage, the EU has no such rules in place, and professional lobbyists fight hard to prevent any similar initiative from succeeding in the EU.

The Defeat in JURI

On June 20, 2005, the European Parliament's Legal Affairs Committee (JURI) held its second-reading vote on the software patent directive. While JURI had the power to take a definitive decision on whether to request a restart (subject to the consent of the Conference of Presidents), the committee had only a preparatory role for the plenary vote in this case. However, the decisions taken by a committee always serve as a beacon for the plenary. The plenary vote was scheduled for July 6, 2005, two weeks and two days after the vote in JURI.

According to reports from people who were there, the room was packed with pro-patent lobbyists. There were also more MEPs than could vote. The maximum number of votes for each group is proportional to the number of seats the group controls in the plenary. So the breakdown was: conservative EPP-ED 11, center-left PES six, 3 libertarian ALDE 3, Greens/EFA two, and one each for right-wing UEN, euroskeptic ID, and MEPs who are not a members of any parliamentary group.

Only the regular members of the committee have a guaranteed right to vote; if there are more MEPs from the group present than their group has votes, the coordinator of the group gets to decide who else has voting rights. In this case, Lehne had ensured that almost everyone who voted on behalf of the EPP-ED group was on his side, that is, would vote in favor of software patents. I heard that Jerzy Buzek also wanted to vote, and Lehne refused him permission.

The procedure in the European Parliament is to work article by article from beginning to end of a legislative proposal, voting along the way on the proposed amendments relating to each article. If an article has more than one proposed amendment, then the one most different from the proposal (in this case, the Council's common position) is voted on first. If it is accepted, the vote moves on to the next article. Otherwise, the other proposed amendments are tried until one is adopted. If none is adopted, the parliament proposes no change to the respective article.

We needed the amendments proposed by Michel Rocard to go through. That way, the Council's proposal to legalize software patents would have been turned into its opposite, a bill that would abolish software patents in the EU more clearly than ever. However, very few of Rocard's proposals were accepted, far too few to meet our needs. Several very important amendments were rejected by 12-13 (and one abstention) or 13-13 (a proposed amendment cannot be carried with a tie; it must have a majority). The 13 votes against Rocard's line usually came from nine of the eleven EPP-ED members (all but Piia-Noora Kauppi and Barbara Kudrycka), plus all three ALDE members (under the leadership of Diana Wallis from the UK Liberal Democrats), and Francesco Enrico Speroni from the ID group.

Finally, there was a vote on whether to accept or reject the overall result of the committee vote. Sixteen MEPs voted to accept, and only ten to reject. That 16-10 vote was misinterpreted by some journalists. If MEPs voted "for" the JURI position, that didn't necessarily mean that they were for software patents – only 13 took that position in the voting on individual amendments. It just meant that rather than rejecting the bill at this stage, they thought that the legislative process should continue. The proposal could still be rejected at a later stage (usually in a third reading). Ten of 26 members saying that the whole bill should be dumped was already a fairly high number, given the fact that the process was just in the second reading.

However, let there be no doubt: JURI dealt us a severe blow on June 20, 2005.

The JURI Aftermath

After the JURI vote, the pro-patent lobbyists and politicians were very happy. EICTA expressed hopes that MEPs would support the JURI position in plenary and thereby allow the legislative process to be resolved quickly. EICTA would have accepted the Council's common position with JURI's amendments as the

final outcome of the legislative process. Arlene McCarthy welcomed the JURI decision and presumably gloated over Rocard's defeat. The Campaign for Creativity viewed the JURI vote as "not a bad outcome", but still urged MEPs not to support any amendments to the common position, not even the ones JURI had agreed upon.

For our camp, the JURI amendments were certainly not enough to make the bill acceptable. There were still too many loopholes for software patents in the text even though JURI had agreed on some changes that looked as though they would restrict the scope of what could be patented, and the FFII thought that JURI had even enlarged some of the loopholes.

What none of us could predict was what the Council would have done if the plenary decision had come down in 100 percent agreement with JURI. Most people in our camp thought that in this case the Council would simply have accepted the directive in its own second reading as EICTA suggested. However, we had previously seen internal Council documents that showed the positions of the public servants who represented their countries in the software patent working group. The people from the patent system seemed to be hypersensitive to any changes to the common position. Possibly some of them were worried that the European Court of Justice, which would have had the ultimate authority in interpreting the directive, might use some of the more restrictive wordings to disallow many software patents.

There was clearly a high risk that software patents would become legalized in the short term. We needed a fundamentally better outcome in the plenary. We did the math. In a way, JURI allocates votes to the political groups the same way the plenary does, but there were differences within the groups. In JURI, all members of the center-left PES followed the rapporteur from their own group, Rocard. We figured that parts of the PES were going to support software patents in the plenary, especially the British and German delegations under the influence of Arlene McCarthy and Erika Mann. Within the conservative EPP, we had a "dissident rate" of about 20 percent in the committee, and no assurance that it would be much higher in the plenary. In ALDE, we thought there was roughly an even split between the two camps, while ALDE's committee members were 100 percent against us, so there we had a lot of room for improvement.

As always in such situations, there was some finger-pointing. A few people blamed Piia-Noora Kauppi, but the FFII later apologized for any misunderstandings that had arisen. In my opinion, the very close outcome of the

JURI vote was an avoidable defeat because if the companies that oppose software patents had listened to me, we could have delivered a business-oriented message and gained one or two more votes. However, after the first two debates in JURI, in which some MEPs took the position that almost all companies want software patents and only "programmers" oppose them, things looked even worse.

Piia-Noora tried to introduce some compromise amendments right before that JURI meeting in order to make her proposals more palatable to conservative MEPs. That was a great idea, but unfortunately Rocard, who in his role as rapporteur on the directive had the procedural right to decide on the admissibility of such last-minute amendments, didn't support her.

Throughout the second reading, Rocard had explained his anti-software patent position from a philosophical angle. He talked about the need to separate the material from the immaterial world and similar concepts. Even though almost everything he said was right, he simply didn't deliver the message in a way that would appeal to many right-wing, "pro-business" politicians.

Up to that point, Rocard had been absolutely adamant about the original set of first-reading amendments: he wanted to push those through a second time. However, that made him predictable. When he published his report (that is, the rapporteur's position paper), EICTA was ready with a detailed response in eight languages only a day or two later. The pro-patent lobbyists had had plenty of time between the first and second readings to prepare to discredit that particular proposal.

The Comeback

A few hours after the disaster in JURI, Erik called me and said that there was still hope for the plenary vote. There would be a new set of amendments as a joint compromise proposal by Rocard, Buzek and Czech conservative MEP Zuzana Roithová. The amendments would be designed to be more palatable to a parliamentary majority than the first-reading amendments.

I didn't have to remind Erik fact that I had long foreseen the need for a new set of amendments. That was a key part of the disagreement between me and other activists after my January memo to Rocard's assistant.

It seemed as though the plenary vote on the amendments was going to be too close to call. In view of the absolute majority of the parliament's members that we required in a second reading, we were going to need each and every vote if we

were to push those amendments through. Or, at least, we'd need enough of them so that the Council wouldn't be able to accept the parliament's second-reading position and would have to go into a conciliation proceeding, in which all the possibilities would open up again.

It was the umpteenth now-or-never situation in the fight. And we'd have to struggle to avoid a definitive defeat.

With software patents looming so large, a level of support from companies enabling me to justify my return to the fray suddenly appeared. By then it was too late to plan any large-scale activities, but I was going to be back on the front lines. The pro-patent forces stepped up their lobbying pressure even further after the JURI vote, and our camp also needed everyone in Brussels (for the week of June 27) and Strasbourg (for the first half of the week of July 4).

First and foremost, I owe it to MySQL AB that my comeback worked out. That company made the largest commitment this time round, and MySQL AB's vice-president Kaj Arnö personally spent a lot of time persuading other companies to support the effort.

Within a few days, we had lined up a list of corporate supporters: Materna GmbH, a German telecommunications hardware and software manufacturer with more than 1,000 employees; 1&1 Internet AG, which had sponsored the NoSoftwarePatents campaign; GMX GmbH, a large email company affiliated with 1&1; CSB-SYSTEM AG and CAS Software AG, two German customer relationship management software companies; Opera ASA, a Norwegian company (developer of the Web browser of the same name); Benchmark Capital (eBay's first funder); and Danny Rimer of the Index Ventures fund (an early investor in Skype and a Skype board member at the time).

On this basis, I was confident that I could again become active as a representative of business interests rather than being perceived as an open-source campaigner. So on Sunday, June 26, 2005, I flew to Brussels, almost four months after my last visit there for the EU Council's adoption of its common position.

The Smoking Gun in the Hotel Room

I had just returned to Brussels and checked in at my usual hotel. Before I had finished unpacking my bag, I was already looking for pro-patent advertisements in the hotel-supplied copies of EU-focused newspapers and magazines. I knew

the pro-patent forces were placing a lot of advertisements in those publications, and I wanted to see them.

There were a few such ads, but the one that immediately got my attention had the title "SAP comments on importance of the patentability of computer-implemented inventions". I couldn't believe my eyes: there was a full-page ad in English and another in German, and the text left no doubt that SAP considered "computer-implemented inventions" to be general software concepts and software-driven business methods – not computer-controlled anti-lock braking systems or tomographers, or whatever else the pro-patent lobbyists were always falsely claiming were their priority. Here are some particularly useful statements from SAP's ad:

> More than 6,500 software developers work in the European SAP Labs, helping enterprises around the world to improve customer relationships, enhance partner collaboration and create efficiencies across their supply chains and business operations.
>
> Innovation must be secured by adequate levels of intellectual property protection in Europe. Copyright does not provide adequate protection for information technology solutions in Europe. Therefore, adequate patent protection in Europe is critical to SAP's global competitiveness.
>
> "At a time when the Lisbon Agenda is aiming to transform the European Union into a dynamic knowledge-based economy, Europe should not be lowering its intellectual property rights standards. It is innovation that provides SAP and our more than 700 independent software vendor (ISV) partners with a competitive advantage in the global market place", said Henning Kagermann, CEO of SAP AG.
>
> For these reasons SAP fully supports the Common Position, because it creates a fair and constructive framework for European IT innovators, such as SAP and its more than 700 ISV partners, to remain competitive in the future. It also provides SAP with the legal foundation to continue doing what SAP does best: developing distinct solutions to drive innovation and enable business change, thus addressing the needs of

> small and midsize businesses as well as the needs of global organizations.

This was a silver bullet. Siemens and some other companies, even Microsoft to some extent, could claim that they needed patents for software-driven hardware products, such as computer tomographers and mobile telephones. EICTA ran a pro-patent ad in the same newspaper that showed a washing machine. SAP, however, is a pure software company. Its products are used for accounting, billing, and other functions of what is called enterprise resource planning and customer relationship management. That's just software. If a proposed law allows the kind of software that SAP develops to be patentable, then virtually every type of software could qualify for patentability under that same legislation.

It was now easier than ever to contradict all the politicians who claimed that pure software and business methods would not be patentable under the Council's common position. This evidence was going to make it much easier to debunk these pathological liars in a way that anyone could understand, even someone who's not an expert in computer software or patents. In the build-up to the plenary vote, we had to talk to many MEPs who weren't specialists in this topic. We needed something simple to prove that we had been right all along, and that the common position would have to be either heavily amended or rejected.

I encouraged all the FFII activists who were already in town to obtain or make a copy of that SAP ad, and to take it with them to all their meetings with MEPs. I believed that we could get even more mileage out of it by attacking those who misinformed colleagues and voters, but I wanted to take at least one more day to think about how best to proceed.

Pow-wow in the Parliament

On Monday, June 27, I issued a press release to inform the media of my comeback and walked over to the parliament in the late morning, at a time when a whole group of FFII activists was going to get their weekly badges. Just past security control in the accreditations center, I recognized Dr. Kai Brandt from Siemens. He didn't seem particularly surprised to see me there. Both camps were mobilizing all their troops.

In that phase of the second reading, our activists gathered daily in the European Parliament at about noon. In the first couple of months of the second reading, Erik had been the only lobbyist from our camp who consistently worked in the

parliament. Others only came for short visits. But at this stage the FFII had well over a dozen people in town.

We first met in a conference room in the parliament, and after a while had to move out and continue the discussion in a quiet area that is only used for special events. Some were sitting on chairs, others on the floor, and some had to stand.

The meeting was chaired by Laurence van de Walle and Kasia Matuszewska. I finally met Antonios Christofides, who had been involved in the push for a restart, but who had visited Brussels at a time when I wasn't there. Since then, Antonios had become the coordinator inside the parliament. If anyone needed to touch base, he or she called Antonios, who provided whatever assistance was needed. I got the impression that he knew how to stay calm even in the heat of the lobbying war.

The next major deadline was two days later, at 6 PM, when proposals for amendments had to be filed. All the amendments JURI had adopted would be automatically put up for a plenary vote, but any other amendments anyone wanted to propose had to be formally introduced by a political group, or alternatively by a minimum of 37 MEPs from one or more groups.

By the week after JURI, the set of 21 compromise amendments was in place. The parliamentary groups that strongly supported our cause, especially the Greens/EFA and GUE/NGL, were going to introduce the amendments. We also knew that the PES was going to support its member and rapporteur, Rocard, by joining in. However, it would have been politically difficult to ask right-wing MEPs to vote for left-wing amendments. Since some would be uncomfortable with that, it's preferable for the same set of amendments to be introduced by several parliamentary groups in parallel, or if that's not possible by 37 MEPs from the same group or at least the same part of the political spectrum.

In the actual vote, all the amendments that are worded identically are automatically summarized by the parliament's administrative services.

The plan hatched by the FFII and its political allies was highly ambitious: not only did they want to get the necessary 37 signatures from the ranks of the EPP-ED group's 268 members, but they also wanted to put together a separate list of 37 signatures from MEPs of the ALDE group, which at the time had only about 80 members. I thought that was too daring, but Laurence was convinced that it could be done, and that it would add political value if we had a separate ALDE

list rather than asking ALDE MEPs to sign a joint list with members of the EPP-ED.

One of the benefits of having many signatures for such amendments is that those who introduce the amendments also make a strong commitment to vote for them. If they don't stand by the amendments they propose to the plenary, people won't take them seriously in the future when they make other suggestions.

A Lot of Lost Ground...

In my first meetings with MEPs and MEP assistants on Monday and Tuesday, I began to realize that we had lost a lot of ground. The many millions of lobbying euros of our adversaries had clearly had an effect. A devastating one, it seemed.

I was shocked that even the most easily refutable untruths had made their way into the minds of MEPs and their aides. A typical example is the claim that European companies that sell into the US market would be disadvantaged compared to their American competitors if there weren't software patents in Europe. At first sight that claim may seem to make some sense, but if you think about it, there's nothing to stop any European company from filing for software patents in the US, regardless of what European law says. Conversely, if European law allows software patents, that's not a privilege reserved to European companies but an option available to companies from all over the world. Given that the software industry is dominated by the US, that means that foreign players get the bulk of those patents.

However, politicians heard the same story over and over from large corporations, from industry associations and from some pro-patent SMEs (which aren't representative of SMEs in general, since most of them oppose software patents). Eventually, some of them started to believe that there was some truth to that claim, even though there really wasn't.

MEPs and their aides were bombarded with position papers from companies and associations, more than they could possibly read. And every day every MEP's office received requests for meetings with pro-patent lobbyists.

We didn't know the exact number of pro-patent lobbyists in Brussels, and the number varied from week to week, but there were definitely many dozens of them making their way around the parliament, up and down, left and right. It was mayhem.

...And a Few Glimmers of Hope

But I could also see some encouragement. Some of the people in our camp who had been less active in the past or were recent recruits were now doing a great job in the parliament.

Hartmut had already told me that there was a significant uptick in activity among Spanish supporters, which neither of us could explain. Alberto Barrionuevo had emerged as the leader of the Spanish resistance movement against software patents, and when he spoke to politicians, he was able to show them a long list of official supporters including companies and organizations.

Felipe Wersen, a resident of Sweden and fluent in four or five languages, had already been in Brussels for about a month by the time that I returned. I had previously only seen him in the FFII's Internet chat.

The most remarkable progress of all was made in the UK. Only six months before, around Christmas, I had received a call from Gavin Hill, the UK-based film producer who had interviewed Hartmut and me in front of the European Patent Office. He thought that there was lot of untapped potential, that is, that we could get many more British politicians on our side if only we were to make a serious campaign effort there.

He firmly believed that, but I said that I considered the UK to be "strategically lost". The UK government was staunchly in favor of software patents and allowed its patent office to use taxpayers' money for propaganda purposes. The three largest parties – the Conservatives, nominally left-wing Labour, and moderate Liberal Democrats (affiliated with the libertarian ALDE group) – all supported software patents in the European Parliament.

However, by the time of the second reading vote, that picture had changed considerably. Rufus Pollock, a top math student at Cambridge University, was in contact with very helpful politicians within the Conservative Party (primarily Scottish MEP John Purvis) and the Liberal Democrats (Andrew Duff MEP). The euroskeptic UK Independence Party was on our side anyway. Rufus and Gavin had done a fabulous campaigning job. I also saw several good quotes from Rufus in the English-language press during the second reading.

Hardball Time Again

With so little time left until the second-reading vote, I didn't see how we could have gained much ground with the 49 German conservative MEPs. There were a few, such as Ruth Hieronymi and Karl-Heinz Florenz, whose support we felt we could count on. One of those, Armin Laschet, was in the process of becoming a minister of the German state of North Rhine-Westphalia. And there were some, such as Rainer Wieland and Professor Hans-Peter Mayer, who played a constructive role even though they weren't exactly on our side. But almost all of the others seemed set to follow their colleagues Wuermeling and Lehne, who essentially supported the Council's common position and tried to make Piia-Noora Kauppi's life as hard as they possibly could.

Of those many German conservative MEPs, very few sided with Wuermeling and Lehne because they actually wanted software patents to be legalized. Niebler was one of them: she participated in the second-reading vote in JURI even though she wasn't a regular or substitute member of the committee, just to help Lehne get his way. Professor Kurt Lauk, a board member and the recipient of stock options from the US software company Veritas, was also a true proponent of software patents. At one hearing, he predicted that the Council's common position would take effect as an EU directive, and that the European Parliament wouldn't make any major modifications to that proposal.

An unknown but significant number of other MEPs within the party occasionally confided that they disliked the Wuermeling-Lehne position, but they weren't in a position to stand up and challenge their party's "experts" on this issue. Software patents are a tricky subject, and it takes an enormous amount of work as well as both technical and legal understanding to be able to compare the implications of one legislative proposal with another.

I could understand the difficulty of challenging the self-proclaimed experts. However, one thing I couldn't condone: virtually all of the German conservative MEPs sent out the same mendacious statements to voters who contacted them about software patents. The form letters said they were against software patents and that the proposed legislation wouldn't allow pure software to be patented, but neither of those things was true. We couldn't expect them to take any particular position, but at the very least they owed truthfulness to the citizens they are supposed to represent.

The SAP ad that categorically admitted that the directive was about pure software patents gave us the ammunition to rock the boat. It enabled us to point out to the non-specialist German conservative MEPs that by following Wuermeling and Lehne they were grossly and obviously misinforming their voters. I wanted to shock them into action, not because I believed that they were ill-willed but because this was the time for them to come clean and accept responsibility. If they wanted to prevent software patents from being legalized, all they had to do was pull out the SAP ad to prove that the party's "experts" had been wrong all along.

I suggested to Hartmut that we issue an open letter to all German conservative MEPs referring to the SAP ad and calling on our entire supporter base to contact their MEPs immediately. Hartmut agreed that we had little to lose at that stage, and supported the idea of the FFII calling on its supporters. But we jointly concluded that the letter itself would preferably be coming from a group of regional SME organizations that opposed software patents because we hoped that conservative politicians would be sympathetic to the concerns of SMEs.

That's exactly how we proceeded. On Monday, June 27, I called Johannes Sommer, who had been the initiator of the regional SME initiatives against software patents. We had been in contact since the previous summer. I drafted a letter, which the heads of the SME organizations slightly modified. It was a rather strong message because we had to make it clear to the recipients that they'd have to either do what they said (that is, support amendments to the bill that would clearly exclude software from the scope of patentability), or they'd have to admit their true intentions.

I wrote an email intended for the supporters of the FFII and the NoSoftwarePatents campaign, which the FFII's Holger Blasum then sent out. We additionally got publicity on some German-language Web sites, which was helpful since Germany was close to the official start of a national electoral campaign.

Oliver Lorenz, who had meanwhile formed the European Media, Communication and IT Association (EMCITA) in Berlin, and I were also going to support that letter officially. I didn't mean to hide behind others. However, Oliver and I were in Brussels at the time and couldn't provide a signature in time, and the other signatories understandably didn't want to send out the letter without signatures. So it went out signed by the heads of the regional SME initiatives.

That small campaign had immediate impact. German conservative MEPs and their aides told us they had all noted a major increase in messages from constituents. And the fact that SAP openly advertised the intentions behind the software patent directive really made people think.

An Evening on the Place du Luxembourg

In the evening of Tuesday, June 28, Oliver Lorenz and I met in one of the street cafés on the Place du Luxembourg, next to the European Parliament, in order to bring each other up to date as to the situation in the parliament, and to talk about what best to do next on the lobbying front. We had both had a tough day.

Oliver wasn't overly optimistic, and I had a strong feeling that we were on a losing track. The large EPP-ED group was going to tell its members to support only the JURI position in the plenary vote, which was probably not enough to prevent the legalization of software patents. One MEP assistant who supported our fight in many ways told me confidentially that "The others have more lobbyists, they have better lobbyists, and they are probably going to win next week".

In one of the other cafés, Oliver spotted Toine Manders, a Dutch MEP from the ALDE group. Manders was a lawyer by profession, and a specialist in intellectual property. He had been a proponent of software patentability throughout. Oliver had already seen him in the parliament that day, and picked up a surprising but seemingly irrelevant piece of news: Manders had convinced the ALDE group to officially introduce a rejection amendment.

In a second reading, the European Parliament has up to two chances to reject the Council's common position: if a parliamentary group or a list of at least 37 MEPs proposes rejection, then that's called an "amendment" (although one can argue about whether that's really the right word). If a rejection amendment has been proposed, it's voted on before any other amendments that could change the actual content of the bill. After all the proposed amendments have been voted on, there may be another vote on rejection if the rapporteur asks for it (regardless of whether someone has filed a rejection amendment).

The Greens/EFA had proposed outright rejection of the bill from the outset, and at this point, the leftist GUE/NGL and the euroskeptic ID group had also introduced such an amendment. Laurence van de Walle commented on a private mailing list that Manders' proposal for rejection, which we looked at as a possible

tactical move, could make the idea of completely rejecting the bill more palatable to the right wing. But it still seemed like a long shot, given that the parliament had never before rejected a common position of the Council. If directives had died before, it had been at a later stage (during or after conciliation).

I was about to go back to the hotel when the Green MEP Eva Lichtenberger walked by. We invited her to take a seat, and had a good conversation. She said that the votes on the various proposed amendments would be very close the following week, and that it was still impossible to predict the outcome. Eva didn't deny that the massive lobbying campaign of the pro-patent side had left its marks.

When I started back to the hotel for a second time, around midnight, I saw Erik. He was on the phone and had a pile of documents with him. He was visibly exhausted, and profoundly worried. We were 18 hours away from the filing deadline for amendments. It looked as though the FFII could obtain some more signatures from the EPP-ED group so that 37 MEPs of that group (led by Buzek and Roithová) could introduce the new compromise amendments, but the FFII didn't have even half of the necessary signatures within the ALDE group.

Well past midnight, Erik and I met two people working for Google at a nearby café: the company's European lobbyist, Patricia Moll, formerly of Microsoft, and Luuk van Dijk, a Dutch anti-software patent activist. The FFII trusted Google, but I wasn't exactly sure what to think. I was wondering how Patricia could criticize software patents to MEPs now when she had previously worked with Microsoft and, presumably, lobbied for patents. Google's priority also seemed to be the right to access documents on the Internet even if patents stood in the way. However, even most of the pro-patent camp was prepared to concede an interoperability exemption if in return they could just get software patents legalized through an EU directive.

The Point of Inflection

Wednesday, June 29, was the day on which things took a positive turn. In the morning, I was still very pessimistic. I thought that the FFII was too ambitious about the new set of amendments. The content was much more moderate than the first-reading legacy that Rocard had tried to defend in JURI, but it seemed that the FFII was running out of time to gather enough signatures within the ALDE group.

I contacted Kaj of MySQL AB and suggested that we abort the mission because it seemed too difficult to make an impact at such a late stage. Kaj convinced me to try one more day, and that day was the one on which some very positive things happened.

Even though the last of the 37 signatures from within the ALDE group was only collected at 5:55 PM, five minutes before the filing deadline for amendments, the FFII succeeded in that most difficult task. There were also well over 40 EPP-ED MEPs who, together with a few members of the right-wing UEN group, introduced that set of amendments. And the same package was also filed by four groups: PES, Greens/EFA, GUE/NGL, and ID.

That achievement was really a lobbying masterpiece for the FFII and, especially, for Erik. After all that had gone wrong in JURI, there was now a counterproposal to the Council's common position on the table, and it had support all across the political spectrum.

The other big breakthrough on that Wednesday was the news, which I heard from the assistant to a German conservative MEP, that there had been some "compromise" between Piia-Noora Kauppi, Wuermeling, and Lehne. We didn't get details until the following day, when we learned that Piia-Noora and Lehne had jointly introduced a proposal for a new Article 2(ba) of the proposed directive. That was a simple but important sentence:

> (ba) a "field of technology" is a field of applied natural science;

It sounds obvious, but it was a significant breakthrough. The Council's common position had many loopholes, and several of them boiled down to the fact that the proposed text didn't define the words "technical" or "technology". Defining "technology" as above wouldn't have closed all of the directive's loopholes, but it could have given a powerful device to any judge who wanted to invalidate a patent on the grounds that it didn't relate to a technical invention.

The pro-patent forces would have preferred to use a broader term than "applied natural science", such as "applied natural or engineering science", which could then be taken to mean that anything a "software engineer" (another term for "computer programmer") develops is technical. Another such term, which is attributed to Lehne himself, is "applied exact science". Mathematical logic, which is what computer programs are all about, is also an "exact science". One could even argue that some trivial elements of astrology are an "exact science".

There were a couple of reasons why the EPP-ED group had started to support the "applied natural science" definition. With the FFII having built so much support for the 21 compromise amendments across all parties, Lehne and Wuermeling apparently became nervous that large parts of their group might support far-reaching amendments to the Council's common position. They hoped that by making this kind of concession they could prevent a landslide in favor of the FFII's proposal. Also, there was internal pressure within the EPP-ED group and particularly the German delegation. One report had it that Professor Hans-Peter Mayer pushed strongly for a definition of the term "technology".

With all that going on, Hartmut convinced me that there was still hope. I stayed involved because now we had to build broad-based support for the 21 amendments.

"We're Not Lobbyists As Such"

Lobbying for those 21 amendments was a stressful but definitely interesting time. With the EPP-ED group behind it, the definition of the term "field of technology" was virtually certain to go through, probably near-unanimously. It was an improvement over the JURI position. But the more of the set of 21 amendments we could get passed, the stronger our position would be later in the process.

The following Monday, July 4, I flew to Basle, Switzerland, checked into a hotel there, and took a train to Strasbourg, France. During plenary weeks every decent hotel in Strasbourg and its vicinity sells out. There was no choice but to commute more than an hour in each direction every day.

Upon arrival, I met a whole group of FFII activists in the accreditation center. Many of them had been there before for the final lobbying push ahead of the first-reading vote in September of 2003, but this was my first time in Strasbourg. Benjamin Henrion suddenly asked me whether I wanted some ice cream, and pointed out Malcolm Harbour, the MEP from whose office the emailed offer of free ice cream had gone out in June. Harbour was getting some lobbyist access to the parliament building.

Andreas Trawöger from Austria offered to help me when I was distributing letters and copies of an article from German newsweekly *Der Spiegel* to the pigeonholes on the different floors of the EP building. There were also some mailboxes in a central location, but the pigeonholes seemed to be the fastest way

to distribute those materials to the floors. Andreas already knew the building, and that really saved a lot of time.

I had been back in this fight for only a week, and my phone was ringing continuously because there were so many things to be done in these last couple of days before the vote. It was great to be able to provide material to MEPs and assistants while they were preparing speeches for the plenary debate the following day, and to have other productive conversations.

In the evening, we had a meeting in a conference room close to Laurence's office. We were briefly joined by David Hammerstein, a Green MEP from Spain (who had grown up in Los Angeles). Kasia and other Polish MEPs' assistants also took part. In Strasbourg, it was particularly noticeable that the Greens and some Polish politicians were our closest allies at the time.

As we went through a long to-do list, someone mentioned this: "Our allies in the ALDE group, you know, Andrew Duff and all others who signed the 21 amendments, are going to have a meeting now, but just among themselves, without lobbyists". In reply to that, Jan "Miernik" Macek uttered the *bon mot* I took for the title of this book: "We're not lobbyists as such!"

Everyone had to laugh. Laurence smiled, but stopped quickly because she wanted to move on to the next item. Miernik didn't seriously intend to join the internal meeting of that group of ALDE MEPs. It was just funny that he used the same "as such" excuse as the patent system, which grants patents on computer programs and then says that they are not patents on "software as such". And in our case there was actually some truth to the disclaimer, because we weren't lobbyists of the usual kind, not like the mercenaries that worked for the other side. In our group, I was the closest to a "lobbyist as such" because I charged companies money for my services, but unlike the professional lobbyists I was a real stakeholder who, as a software developer and entrepreneur, felt personally affected by the software patent directive.

Signs of Surrender

We were in the middle of our internal meeting and talking about such things as how to approach unaffiliated MEPs. Most of them aren't members of political groups because they're not particularly well-liked by others. Miernik, however, was planning to talk to the Polish Self-Defense Party (Samoobrona), which the media sometimes refer to as the "radical farmers' party".

Then Marek Stavinoha, a Slovak aide to the far-left GUE/NGL group, came in with some extremely interesting news: rumors were flying that the EPP-ED group was inclined to vote to reject the Council's common position!

This seemed too good to be true, so most us reacted with disbelief. But our source kept insisting. I was baffled: the GUE/NGL group was politically the furthest away from the EPP-ED of all the parliamentary groups in the parliament. Why would they be in a position to know?

We agreed not to bank on the EPP-ED's intention of aiming for rejection, but we had to ask ourselves what we would do if this new information turned out to be true. Rufus had kept a "master list" showing the position of each different national delegation within every political group, and he said: "Actually we'd now have a chance at a good directive because we have a clear majority in favor of the most important amendments." But I cautioned everybody that the parliament could only craft a proposal, and the Council and the Commission would have the final say: "Maybe you can get a good directive from the parliament, but there's no chance of one in the near term from the Council and the Commission."

Laurence said, "For once I agree with you" because we had temporarily disagreed about our strategy. We both strongly advocated going for it if there was any chance to get the Council's common position rejected. Theoretically, we could have tried to oppose the rejection initiative, but it would have been a high-stakes gamble, and even if the European Parliament had supported all 21 of our preferred amendments, there wouldn't have been enough time during a second reading in the Council (three to four months) or a conciliation proceeding (six weeks) to build a qualified Council majority. Our ability to influence the Council depended on initiatives taken by national parliaments, and most of them couldn't do so quickly enough to indirectly (through their national governments) influence the outcome of the fast-paced home stretch of the codecision procedure.

Practically speaking, it would have been very difficult for us to lobby against rejection. The three groups that most strongly supported our cause – Greens/EFA, GUE/NGL, and ID – had filed rejection amendments. Those groups could hardly change their stance now just because the EPP-ED was going to vote their way. That would make their rejection amendments look like pure protest without a real intention. Together with the EPP-ED and half of the ALDE group, the Greens/EFA, GUE/NGL, and ID would form a majority.

After we ended our meeting, Eva Lichtenberger told us in the corridor that she had heard directly from Wuermeling that he was advocating outright rejection of the common position within EPP-ED. That was corroborating evidence. Eva, Laurence, and I all felt the same way: rejection would be great, and the only risk involved was that this might be a tactical move to weaken support for the 21 amendments. What if rejection unexpectedly failed to achieve an absolute majority of the parliament's members? So we decided to support rejection, but to continue to lobby for the 21 amendments. We didn't want to be lured into a trap.

Plenary Debate

The next morning, I wanted to start by listening to the plenary debate in order to get a feel for the new situation. On arrival in Strasbourg, I got stopped at the entrance to the European Parliament because in a hurry I had taken the badge for the wrong week: instead of taking the one I had received the day before, I had taken the one from the previous week. Fortunately, the accreditation center still had all the data in the computer and the badge was reissued quickly, so I only missed a small part of the plenary debate.

The plenary hall in Strasbourg is called the Hemicycle. The seats for spectators are high up, and escalators lead to the entrance. I saw plenty of familiar faces from both camps. The plenary debates in the European Parliament are different from those in national parliaments. Speakers get about two minutes each, which means you get a large number of very general, superficial statements from many different MEPs. Since the political groups in the European Parliament are heterogeneous, only one or two speakers per group would not be truly representative.

Some of the pro-patent MEPs were spreading the usual propaganda. Sharon Bowles from the UK Liberal Democrats, a patent attorney by profession (as is her husband), had just become an MEP shortly before to replace Chris Huhne, who had been elected to the British national parliament. In her first speech ever in the European Parliament, Bowles made her mark with a wholesale assault on Rocard's proposed amendments: "If you wished to construct a series of amendments to cripple and disperse Europe's industry – large and small – you could not devise anything more mischievous. I'm sorry, but for the real world of industrial technology, your blunderbuss amendments are simply not good enough."

I was particularly interested to hear Wuermeling's speech, given what we had heard the previous evening. He said: "I am slowly getting the impression that this dossier isn't really ripe for a decision, and we should actually give thought to whether we should suspend the legislative process for now by rejecting the common position. I think this might perhaps be the most responsible decision that we could take at this stage."

The claim that the software patent issue wasn't "ripe for a decision" was another way of saying that he didn't think he could get the decision he wanted, or at least that he was worried that it might go in the wrong direction. I find it hard to believe that he wanted to take a "responsible decision", since he made that statement after working for years toward the far-reaching legalization of software patents in Europe. But no matter what his motivations were, he was suggesting a procedural move I was happy with.

The Irish independent MEP Kathy Sinnott was the one who surprised me the most, and the most positively. In her speech, she showed that she had been listening to both sides and thinking carefully about what her own position should be. Ultimately she decided to side with the young people who told her that software patents would not be the right choice to ensure the future of innovation. Ciaran O'Riordan, an Irish activist from the Free Software Foundation, later told me he was equally surprised.

Shortly thereafter, Charlotte Thornby-Nielsen, a Sun Microsystems lobbyist, told me that the EPP-ED was holding a press conference to talk about rejection. She knew that I was in favor of that plan. She was also kind enough to walk me to the escalator and tell me precisely how to find the room in which the press conference was taking place.

The Death Knell for the Directive

In the elevator down to the press conference room, I ran into Toine Manders, the Dutch MEP who had introduced a rejection proposal on behalf of the ALDE group. If he hadn't done so, the EPP-ED group might have been ideologically inhibited from voting for rejection proposals from two left-wing groups and the euroskeptic ID group.

Manders and I were somewhat aware of each other's activities. But on that Tuesday, our past battles against each other were far behind, and we were almost talking to each other like long-time buddies, standing at the back of the

overcrowded press conference room. After all, we now shared the same goal. Chances are that of all the people there, we two were the happiest about the amazing turn of events.

The speakers at the press conference were an EPP-ED press officer (in the role of moderator); JURI chairman Giuseppe Gargani; the EPP-ED's coordinator in JURI, Klaus-Heiner Lehne; and the EPP-ED's shadow rapporteur on software patents, Piia-Noora Kauppi. Lehne and Piia-Noora were doing most of the talking.

They explained that at the group meeting that evening they were going to propose that the EPP-ED group vote to reject the Council's common position. Formally, the group would have to have an internal vote, but they were confident that their recommendation would be adopted. Consequently, an absolute majority for rejection seemed probable.

Lehne said they planned to support the rejection proposals of "the libertarians, the Greens and the post-communists", the latter being his way of disparaging the GUE/NGL group. The choice of words reaffirmed my thinking that the ALDE group's initiative was very important, and Manders would have wanted Lehne to give him more credit in his speech at the press conference.

Piia-Noora's position different slightly from Lehne's. She said she was reasonably confident that rejection would get a majority, but if it didn't she personally was going to vote for several more of the 21 Rocard-Buzek amendments than the EPP-ED group officially recommended.

Lehne's Sideline

Earlier that Tuesday, *The Wall Street Journal Europe* had published a picture of Lehne on the front page, with the headline, "Politics, Business Overlap in the EU". The article talked about Lehne's role in the push for software patents and mentioned that he was employed by the law firm Taylor Wessing as the head of the firm's "regulatory affairs department", which is effectively a lobbying job.

In the US, such a conflict of interests on the part of a parliamentarian would be illegal. There are cases in which members of national parliaments in EU member countries have had this kind of tie with special interests, but sooner or later the press tends to report it, which in turn leads to a public outcry. However, the European Parliament draws very little media attention in MEPs' home countries, and that's why they can get away with such questionable conduct.

During the second reading, the FFII became aware of Lehne's job as a lobbyist and drew attention to it. Initially, only some IT specialist media reported it, and FFII activists were often criticized for raising the issue of Lehne's sideline by other German conservative MEPs. Hundreds of MEPs have other jobs, and most of them are on the payroll of law firms. However, most of them don't advertise their services as lobbyists. Also, there's a difference between being a partner in a law firm before being elected and, like Angelika Niebler, keeping the door open to return later, and joining a practice after many years in the European Parliament, which is what Lehne did.

It's not necessarily unethical for a parliamentarian to have a second job. Unlike public servants, who spend their whole lives in politics, parliamentarians are supposed to be citizens who temporarily represent part of the population. They have no certainty of being reelected, and they may have to go back to their regular job after only a few years.

Unfortunately, large corporations can influence political decisions by hiring parliamentarians who additionally work as lawyers. There was no evidence that Lehne's clients included companies that wanted software patents legalized, but there is no doubt that Lehne's employer, the firm of Taylor Wessing, had such clients.

It's also interesting that Taylor Wessing hired Andreas Haak, formerly an aide to the EPP-ED group, to work under Lehne in the regulatory affairs department, which was formed for the two of them in 2003. As late as mid-2005, Haak was still listed on the European Parliament's Web site as an accredited assistant. The status of a parliamentary assistant gives someone a wide array of privileges, including the right to give up to nine visitors a day access to the parliament. Later, another MEP told me that Haak's continued presence in the Web site listing was just an oversight on the part of the parliament's administrative services.

The EPP-ED's Official Reason for Rejection

Getting back to that press conference, Lehne outlined convincingly why he wanted to reject the Council's common position. However, none of the reasons he cited explained why he had changed his mind over the previous few days. If he had decided on rejection earlier than that, he certainly would have filed a rejection amendment in the EPP-ED's name by the filing deadline the previous Wednesday. But he hadn't.

Lehne went on to claim that it would be preferable to harmonize European patent law in general before specifically addressing one "sector". This is an argument that could have been brought up at any time during all the years of the legislative process. A lot of fighting could have been avoided.

Lehne also revealed that he had asked the presidency of the Council whether the common position still had a qualified majority and that the presidency had said it probably hadn't. That, of course, is a matter of perspective: we would say it never had one. Everyone knew that the March 7 adoption had overridden some countries' fundamental objections. The public servants who represented their countries in the Council's patent law working group are from the patent system, and we saw internal documents that showed how those people blatantly ignored the positions taken by their national parliaments.

The Council's working group looked at the amendments that had been proposed during the second reading in the European Parliament, and refused to accept any of the ones we valued. For a while, it even seemed as though the Council might talk to the parliament before the second-reading vote in order to discourage MEPs from supporting the unwanted amendments, but Rocard wasn't going to let them do that.

Still, I think Lehne was right that the Council couldn't have supported the common position a second time. There was enough political pressure in several countries to block such a move. But that didn't give us a victory: we were even further from having a qualified majority in favor of our ideas than the other camp was.

Lehne said that as early as February he had recommended to EU commissioner McCreevy that the legislative process be aborted. That must have been shortly after the restart vote in JURI, to which he also alluded. Piia-Noora spelled out quite clearly that the parliament felt mistreated by the Commission and the Council when they declined its restart request.

During the press conference, Lehne also mentioned what I believe was actually his primary reason for going for a rejection of the common position: "Rocard's followers probably have a majority, although it may not be the level of a majority that is required in a second reading." Lehne predicted that the plenary would first vote on the Rocard amendments, and while he thought that most of the amendments would fail to achieve the support of an absolute majority of all of the parliament's members, he expected their supporters to then vote for the JURI

position as a fallback. Lehne said the outcome of the second reading would require the legislative process to go into conciliation, and at that juncture, "Rocard's followers would only need a majority of the votes cast and would then be able to vote the bill down anyway".

He also talked about "chance results", in which only some of the Rocard-Buzek amendments were adopted, which would make the proposal inconsistent. That is, of course, always a risk, as the European Parliament votes on individual amendments rather than coherent legislative texts.

At any rate, there was no doubt that the other camp was worried by the level of support the 21 Rocard-Buzek amendments had. The previous week, just before the UK assumed the EU presidency, some of the large corporations had written a letter to British prime minister Tony Blair stressing that they'd rather have no software patent directive than one that restricted the scope of patentability compared to the EPO's practice. In other words, they weren't going to accept any noticeable change from the Council's common position. In internal discussions, Lehne, Wuermeling and other pro-patent MEPs actually cited big industry's desires as an argument in favor of rejection. While I'm sure that this was not really a factor for Piia-Noora, she fortunately seized the opportunity to try to finish off the legislative process.

Disgruntled Pro-Patent Lobbyists

After the EPP-ED press conference, I thought it was practically a done deal that the Council's common position would be rejected. François Pellegrini, an assistant professor at a French university and an expert whom Rocard held in high regard, was also in favor of rejection. When I saw him in Laurence's office that morning, he thought Rocard also would support that procedural move.

However, the pro-patent camp wasn't particularly excited. I was talking to Stefan Krempl, who reported for the German IT Web site *heise.de* and a couple of leading newspapers from Strasbourg, when I saw EICTA's Mark MacGann coming out of the room where the press conference had been held and pointed him out. Stefan went over to ask MacGann a question, and when he came back, he said: "He doesn't seem too happy."

Later, MacGann walked by, and as he recognized me, we quickly shook hands. We simultaneously said "Long time, no see," because we hadn't met in more than six months, even though obviously we had been hearing and reading about each

other's activities the whole time. I then asked him how he felt about the outlook of rejection, and the only positive thing he said was "I'm gonna get my life back".

Shortly thereafter Hugo Lueders of CompTIA, which is mostly a front for Microsoft, claimed he was "concerned for Europe". The EU Constitution had been voted down by the French and Dutch populations, and he disliked the idea of another legislative initiative going down the tubes.

The Naval Battle

In the ensuing hours, I talked to a number of MEPs or their assistants, and placed countless phone calls in support of the rejection proposal. After a few hours, any of us who were still trying to talk to politicians realized that the bill's fate was certain. No one was interested in discussing the proposed amendments anymore.

During the day, James Heald, a former representative of the FFII in the UK, characterized the situation accurately: "This is a directive that has ceased to be." Outside Laurence's office that afternoon, Oliver Lorenz asked me: "What do you think of this? Doesn't it rock?" – "Yeah, it does!"

That day, several non-governmental organizations were demonstrating against software patents outside the parliament. Benjamin had been the primary organizer for the FFII.

Sometime during the day, the demonstrators spotted a yacht next to the bridge connecting the two main buildings of the European Parliament in Strasbourg, the Bâtiment Louise Weiss and the Bâtiment Winston Churchill. The bridge goes over a channel of the Ill, the river that winds through Strasbourg. It is a high-traffic bridge. Those who work in the parliament frequently have to run back and forth between the two buildings. The yacht, which stayed near the bridge, had been hired by Simon Gentry's Campaign for Creativity, and it sported a huge banner that called on MEPs to vote for the "CII Directive" ("directive on the patentability of computer-implemented inventions") and claimed: "Patents = European Innovation"

Four of our demonstrators immediately hired a rowboat, which they rowed out next to the yacht. There they ran up a banner that read "Software Patents Kill Innovation".

People inside the European Parliament who saw the scene from the bridge were amused, but they also admired our camp's quick-wittedness. One MEP said: "That round certainly goes to them", and by "them" he meant our side.

It certainly summed up the differences between the two groups of lobbyists. On the one hand there was the yacht, probably quite expensive to rent, an attempt by a lobbying entity to do something extravagant with Microsoft's and SAP's money. On the other hand there was that little rowboat, which cost a negligible amount compared to a yacht, but had a lot of effect. And the people in the rowboat were genuine believers in the cause they promoted, not mercenaries.

"On Va Rejeter"

On the evening of Tuesday, July 5, all the groups held meetings in the European Parliament. All groups decided to support the rejection amendments that had been filed. The largest groups alerted the press, and the news agencies immediately reported that the European Parliament was set to "reject the software patent directive". I got a phone call that evening from Germany and heard that the story even made the headlines on the teletext pages of one of the largest German TV stations, during prime time. That would have been unimaginable even a year before, and it shows how interest in the issue of software patents grew over time.

In formal terms, what the European Parliament may reject at a second reading is not the directive itself but the Council's common position. The vote is against a specific proposal, not against the idea of having an EU directive that deals with a certain topic. But practically speaking it's the end of a legislative process, as Rule 61 of the European Parliament's Rules of Procedure says in its third paragraph:

> If the common position of the Council is rejected, the President shall announce in Parliament that the legislative procedure is closed.

A situation that had been very confusing was now going to have a fairly simple resolution: no software patent directive. On Monday afternoon I was still telling a couple of journalists how careful we'd all have to be in interpreting the outcome of the second reading. I said that most probably some good amendments would go through and others might not, and it might take some time to understand which way the legislative process was tending. The key question in that scenario would have been whether a conciliation proceeding and subsequent third reading were likely. I also cautioned them all against making the same kind of mistake in

interpreting the final vote for or against the proposal as some had with the vote at the committee level. All of that complexity had vanished into thin air.

On the morning of Wednesday, July 6, I sent out a preliminary press release on a tentative basis so that journalists would have my comments already to hand. It was really necessary because many had already written their articles and were just waiting for confirmation from Strasbourg to file their copy.

Our protesters were still outside the parliament, although they had also heard the good news. Some of them greeted Rocard as he walked by. The former prime minister of France smiled and saluted them: "On va rejeter!" The informal French sentence can be translated as "we're gonna reject".

I sometimes felt he was too adamant about holding on to the first-reading amendments, but with the 21 amendments introduced shortly before the second-reading vote, he had made the right move at the eleventh hour. All in all, he deserves a lot of credit for the resistance he mounted to the push for software patents. Rejection wasn't his original idea. However, if his proposed amendments had been adopted, the net result would probably have been the same, but it would have taken more time and been less dramatic.

The Moment of Truth

There was no rational reason to doubt this was going to work out well for us, but as the great moment approached, I was nonetheless slightly uneasy. When the Council met on December 21, 2004, adopting the common position had also looked like it would be a mere formality – until Marciński stood up.

Today's vote was scheduled for noon, and by then the Hemicycle still looked empty. A debate over the fight against poverty was going on with only a few dozen MEPs in attendance. Given the rule that the European Parliament needs an absolute majority of its members at the second reading, I couldn't stand not seeing many hundreds of MEPs in the room. A couple of months later, I had a nightmare that the Council's common position had become law because there wasn't a high enough level of attendance in the Hemicycle for the vote. But in reality, fortunately, the room filled up within minutes.

The public gallery was also crowded. I'm not sure if there was even one empty seat in the end. From up there, it was still possible to recognize individual MEPs even without looking at the seating plan. Several MEPs from the Greens/EFA

group were wearing the FFII's yellow "No Software Patents – Power to the Parliament" T-shirts, and so were a few people up in the public seats.

Rocard made a short speech before the vote, rightfully blaming the impending rejection on the Council and the Commission. Then the chairman of that part of the session, European Parliament vice-president Gérard Onesta, started the voting procedure.

The scoreboard in the Hemicycle looks very much like the ones you used to see in soccer stadiums, and three numbers appeared on it representing the three rejection amendments that had been introduced by the Greens/EFA, GUE/NGL, and ALDE groups. The chairman reminded MEPs that this was an electronic roll-call vote, and called on them to vote. There was silence for a few seconds, which seemed like an eternity. Everyone pushed a button.

Then the scoreboard displayed the result in a very large size: 648!

The landslide figure provoked audible astonishment, and roaring applause from many MEPs and some of us in the gallery. Rufus, a few seats away, clenched his fists.

The chairman announced that the "amendments" (which were proposals for rejection) had been adopted, the common position had been rejected, and the legislative process had been terminated.

There were 14 votes against the amendments and 18 abstentions. Later we learned that three MEPs had formally changed their votes, so the final tally was 651 for rejection, 12 against, and 18 abstained. One way or the other, it was reportedly the new high score for legislative votes in the history of the European Parliament.

After the vote, EPP-ED chairman Hans-Gert Pöttering asked the Commission's representative, Benita Ferrero-Waldner, whether the Commission was serious about not submitting a new proposal for the directive even though the parliament had asked for one. He was apparently referring to the restart request as well as an inter-institutional agreement between the European Commission and the European Parliament. Greens/EFA co-chair Monica Frassoni pointed out that it would be unreasonable to interpret the parliament's vote to reject the Council's common position as a call for a new proposal. Commissioner Ferrero-Waldner then said that the Commission would submit a new proposal if the parliament requested one.

Rushing Home

The vote and the subsequent exchange of words had taken slightly longer than I expected. Still, by dashing out of the European Parliament building and getting a taxi to the Strasbourg railway station I was able to catch a train to Basle in time for a flight four hours earlier than the one on which I was originally booked. It was a great feeling that we had achieved such a wonderful result, but I figured it wasn't going to get any better if I stayed longer.

In an elevator Benjamin quickly gave me directions. I hadn't even left the building when the cell phone rang: Marco Schulze calling me to say, "We have won!" He was also in Strasbourg, but didn't know that I was too. Nevertheless I really appreciated his call, after all the lobbying that we had done together.

The train had barely departed from Strasbourg when I received a text message that said the first news agency had already sent out the news over the wires. I also sent text messages to many people saying, "Mission accomplished! Directive rejected by a landslide of 648 out of 680 present."

During the train ride and afterwards I gave a couple of telephone interviews, and talked to some of our political contacts. Everyone agreed it was a remarkable success for our movement, and some already wanted to talk about what might happen next in the area of patent policy.

That evening, the FFII organized a celebratory dinner in a Strasbourg restaurant.

The Historic Dimension

In a press conference after the vote, the president of the European Parliament, Josep Borrell, attributed the near-unanimous rejection of the Council's common position to the fact that the Commission and the Council had previously ignored the parliament's request for a restart: "We advised them to withdraw [the bill]. Now we've met again. They didn't want to withdraw it – 648 [votes] against [the common position]."

That was a correct portrayal of what had happened. In a way, the parliament's rejection of the Council's common position could be seen as compulsory execution of the restart request, which itself had been a preemptive strike against the common position more than anything else. Certainly many in the parliament who liked the idea of hitting back at the Commission (and to some extent the Council) for not having accommodated the parliament's request for a new

proposal. However, if those who wanted to legalize software patents had been confident they'd get their way, they would have ignored the inter-institutional power struggle. When they saw how much support the 21 amendments had, they remembered that the parliament had been able to reach agreement on a procedural decision once before, the restart request in February.

Borrell described the decision as "another milestone in the history of a parliament" that takes charge, and explained that the parliament had previously rejected three proposed directives that had come from conciliation committees: in 1995 on biotechnology patents, in 2001 on public purchase offers in the event of company takeovers, and in 2003 on port services. However, July 6, 2005, was the first time the European Parliament ever rejected a common position of the Council without even going to conciliation. Since the introduction of the conciliation procedure in 1993, parliamentarians had often disagreed with the Council's common position, but they had always voted in favor of continuing the legislative process to try to find a solution.

The rejection of the software patent bill made history in other respects. It was probably the first time in the EU, which *The International Herald Tribune* dubbed a "lobby-cracy", that a grassroots movement like ours managed to block a piece of legislation that was supported by many large corporations and the industry associations they control.

There's also no other case in recent decades in which the proponents of extending intellectual-property rights suffered such a resounding defeat. In the 1970s, 1980s, and 1990s, there was a simple philosophy in politics: "Intellectual property has to be treated like any other property." Many legislative initiatives succeeded on that basis. There were other controversial issues, but the failure of the proposed software patent directive marks an inflection point. After that bitter fight, the patent system is no longer sacrosanct, and the pretext of intellectual property and the protection of investment in innovation is no longer sufficient justification for legislative proposals. Politicians now understand that ill-conceived intellectual property rights can run counter to the basic idea of intellectual property, and may actually deprive true innovators of fair rewards for their work.

The historic mind change is also reflected in a passage in the coalition pact that the German conservatives and social democrats made later that year: "The trend of sealing off markets, among other things by means of patent law, must be countered through international agreements."

Spin-Doctoring Abounded

Officially, the pro-patent forces welcomed the rejection of the Council's common position. They said that no directive was still preferable to a bad directive, which is exactly how we viewed it. Some of the proponents of software patents may indeed have feared that continuing the legislative process could lead to a conciliation proceeding that, under pressure of severe time constraints, would result in a "compromise" that would have restricted the scope of patentability. However, we thought the risk was hugely greater that said "compromise" would only contain toothless definitions and effectively legalize software patents. Our opponents had the Commission and almost all of the Council on their side, so I'm not sure they would really have had much to fear.

One lobbying entity tried to position the rejection of the common position as a vote against the 21 Rocard-Buzek amendments. However, even a pro-patent MEP like Lehne had said (in the EPP-ED press conference the day before the vote) that those amendments appeared to have majority support. He only doubted that the majority was an absolute majority of all of the parliament's members. Frankly, I'm not sure that anyone could tell what the outcome would have been if the proposed amendments had been put to a vote. In the European Parliament, there are MEPs from roughly 200 political parties, most of which have only one or two MEPs. And even within the same parties, the positions were inconsistent. I personally would have considered it risky to decline the rejection offer. All the fear, uncertainty and doubt that the pro-patent lobbyists had spread might have prevented more MEPs from supporting our amendments than expected.

The European Parliament has two opportunities to vote on a proposal for rejection during a second reading: before and after voting on the amendments that change the bill's content. In this case, rejection went through right away, so the amendments were never put to a vote. If the European Parliament had first adopted the amendments and then voted to reject, I could see why that rejection might also have been a vote against the 21 amendments, but not as things were, given that the rejection was carried first and was embraced by all of our political allies.

Obviously, the 648 votes in favor of rejection were the total of two camps that had opposite motivations for voting for rejection. Half were against software patents. The other half was in favor but couldn't get its way and ultimately decided to go for rejection. That way, everyone seemed to come out a winner. It was, like JURI's restart vote in February, arm wrestling: the fists come down on

one side of the table. It looks like a clear result and doesn't reflect the struggle that it took to get there.

Some MEPs, especially those from the inner core of the pro-patent camp, later claimed that there had been an excessive number of amendments on the table – almost 200. So many would have made any result unpredictable. That, however, was just a silly attempt to mislead those who didn't know better. It's true that well over 150 amendments had been introduced, but only if you count every one of the six separate filings of each of the 21 Rocard-Buzek amendments (PES, Greens/EFA, GUE/NGL, ID, and one list with signatures from EPP-ED and UEN MEPs as well as another list with signatures from ALDE MEPs). If two or more amendments are identically worded, then they are combined for the vote, just as the three rejection amendments were voted on as if they were one.

For many of the directive's articles, the only alternative to the Council's original text would have been one of the Rocard-Buzek amendments. For some, the plenary might also have reaffirmed one of the JURI amendments. The only article that actually had multiple variants was the clause granting an exception from the patent regime to let companies ensure interoperability, but that was a secondary issue at best.

In any case, the European Parliament has had sessions in the past when more than 1,000 amendments were voted on. That number would, again, have been consolidated by combining the amendments with identical wordings, but it would have taken a few hours of voting. That's all there is to it.

Millions Down the Drain

Two days after the vote, Hartmut and I issued a joint press release to counter the spin-doctoring of the pro-patent camp. We pointed out that our adversaries had spent many millions of euros, probably tens of millions, over the years. They wouldn't have done so only to walk away empty-handed.

They said that the parliament had decided "wisely", but there's no question that they wanted something more in exchange for their lobbying money than the *status quo*, that is, a legislative environment in which many software patents can be invalidated by national courts on the basis of Article 52 of the European Patent Convention.

Later that month, the High Court of England and Wales declared a software patent invalid, and in its ruling the judge wrote:

> The Commission wanted to harmonise the law by defining the line between inventions that are properly patentable and mere computer programs. Although not strictly relevant to what I have to decide, I must admit I watched developments with some anxiety. Had the proposal succeeded it would have entrenched a test involving 'technical contribution' and 'technical features' that I suspect is too vague to be workable at the margin. On 6 July 2005 the proposed directive was defeated in the European Parliament and it will not be re-introduced.

The above reasoning confirms that we weren't the only ones who feared that the rejected proposal, or anything similar without fundamental changes, would have strengthened the legal position for software patents in Europe.

One of our activists was sitting close to EICTA's Mark MacGann in the public gallery of the Hemicycle during the European Parliament's second-reading vote. At the moment of the vote, MacGann reportedly sighed: "All that for that!"

All those millions of euros, all that hard work, all that stress and personal sacrifice – and the European Parliament voted the Council's common position down. For the others, it was an unsatisfactory outcome, even though they denied it in public. For us, it was a major defensive victory that could prove to be a turning point in intellectual property policy.

The proposal that had been technically voted down would have been exactly to the liking of our adversaries. About half of those who voted against it were actually in favor, but only because they couldn't push the Council's position through the way they wanted.

We later heard rumors about the circumstances under which the pro-patent forces decided on their strategic retreat. Apparently, there was also some discord between the large corporations that had been walking side by side. Some accused IBM of having deserted them. I don't think IBM ever exactly supported us, but it's true that IBM's position had gradually become somewhat more moderate, unlike that of Microsoft and others.

Winners and Losers

Our adversaries didn't get the result they wanted, and the rejection of that particular bill was better for us than for them. They had many advantages: patent professionals in control of the Council's patent policy working group, virtually

inexhaustible resources, and opponents who aren't lobbyists by profession. They had won in the committee, less than three weeks before the plenary vote, and none of them talked about rejection then: they all wanted a directive based on the Council's common position. So it's fair to say that the others lost.

However, it's also frightening how far our opponents actually got. They had the Commission and most of the Council on their side, and about half of the parliament. We scored a draw that constituted a defensive victory, and we can be proud of it, but we have to be realistic: they missed their objective by a hair's breadth.

Software patents are definitely not in Europe's economic interest, except maybe short-term for Ireland with its low-tax and no-tax deals that attract large patent holders to settle there. Therefore, it's bad that almost half of the European Parliament, and a majority of JURI would have supported legalizing software patents. When the issue of software patents resurfaces on the political agenda – and it will – we'll have to do better.

Nevertheless it's been gratifying to receive recognition for our efforts against software patents. Less than two weeks after that historic vote in the parliament, I received *Managing Intellectual Property*'s list of the "top 50 most influential figures in intellectual property", and saw myself listed there along with the Chinese vice premier Wu Yi, US Senator Orrin Hatch (Republican, Utah), and other luminaries.

In September, the IT Web site *Silicon.com* counted me among the 50 Silicon Agenda Setters, the people who in the opinion of *Silicon.com*'s editors have most strongly influenced the agenda of the IT industry. The next day, the FFII and NoSoftwarePatents jointly received the CNET Networks UK Technology Award in the Outstanding Contribution to Software Development category. As Rufus and I walked to the stage, we received the loudest applause of all the winners, and several of the other attendees later approached us and thanked us for our work.

That same month I was listed among the "EV50 Europeans of the Year" by an EU-focused newspaper, the Economist Group's *European Voice*. A distinguished jury had selected me, and I won the "Campaigner of the Year" category against five other contenders, most notably the two rock stars Bono and Bob Geldof as well as female rights activist Ayaan Hirsi Ali. Bono's band U2 was by far and away the world's most successful tour act during that year (with revenues in excess of $260 million according to *Billboard* magazine). The thought of having

beaten such a superstar in a popular vote over the Internet, even though his band's official Web site and many independent fan sites called on people to vote for him, is mind-boggling.

Previous Campaigner of the Year award winners include Pope John Paul II (2002) and then-president of the European Parliament Pat Cox (in 2003). That was quite a recognition for the opponents of software patents, especially since Rocard won the MEP of the Year award. In his acceptance speech, Rocard made humorous references to the fact that Microsoft was one of the sponsors of that award series (and he could also have mentioned that another sponsor and co-organizer, the PR and lobbying firm of Burson-Marsteller, had ties with companies that support the patentability of software, such as Microsoft and SAP).

All the information we had indicated that I also received by far the most votes in the overall "European of the Year" category. However, the organizers gave that award to Luxembourg's prime minister Jean-Claude Juncker. He would have been a very respectable choice for a jury to make, but no details of the voting were disclosed, so we will never be able to find out what happened. Still, we've achieved more than I would have imagined possible at the outset.

I made it very clear on every occasion that I would have preferred it if these honors had been all bestowed jointly on me and the FFII, as was the CNET UK Technology Award. Although it's immodest of me to say so, I know that I had a prominent role in the fight against software patents, and I also believe that sometimes I took the right initiatives at the right time. But without the FFII I would never have become involved, let alone succeeded.

If there had been an award for non-governmental organization of the year, I would absolutely have recommended the FFII. Its founder and long-time president Hartmut Pilch was taking serious political action against software patents before I was even aware of the problem we had in Europe. For a "Lobbyists of the Year" award, I would have proposed Erik Josefsson and Jan "Miernik" Macek. Miernik received the Polish Cross of Merit in November of 2005, as did Władek Majewski.

I can continue listing people who deserved awards. The "Political Adviser of the Year" was Laurence van de Walle, who in some internal FFII mailings was referred to as "Madame La Présidente" during the second reading. And we would need many awards for all the politicians who defended our cause. In a way, we only helped them help us.

The number of people with whom I should share the awards and honors is huge. All the people who wrote letters to parliamentarians or made other contributions to the fight were part of our movement, and can consider themselves winners.

What's Next?

By rejecting the Council's common position on software patents, the European Parliament prevented the ratification of the EPO's flagrant law-bending. However, the situation is still a paradox: software patents aren't allowed under applicable law, but the EPO and some national patent offices continue to crank them out. Then, when rights-holders try to sue "infringers", many of those patents are invalidated and others are upheld. There are differences between countries, but also within countries, and sometimes even between judges in the same court. One way or another, the situation will have to be resolved one day.

The pro-patent forces have now failed in two attempts to legalize the EPO's disgraceful practice: they failed at their Plan A, getting the European Patent Convention modified, and then again with Plan B, the "directive of the European Parliament and the Council on the patentability of computer-implemented inventions".

Since the vote on July 6, 2005, there have been indications that the pro-patent camp will try again, maybe even pursuing two routes in parallel. In November 2005, he *EU Reporter* quoted a senior Microsoft executive as saying that Microsoft is "keen to have software patents on the EU agenda".

The pro-patent camp might give Plan B a second try. There's a precedent: after the 1995 failure of the biotechnology patent directive, also known as the "gene patent directive", a new proposal was made. Initially, the Vatican, Greenpeace and some agricultural associations had opposed the legislation. But when the Commission reintroduced the bill, their resistance faded, and the directive that ultimately took effect was materially consistent with the one that had originally been rejected. The second time, pharmaceutical giants such as SmithKlineBeecham spent far more money on lobbying, and Simon Gentry, who later created the Campaign for Creativity to advocate software patents, played a key role.

In the months after the second reading, I talked to several MEPs, the more experienced of whom predicted that the software patent directive would be proposed again by the Commission sooner or later.

Our adversaries may prefer a Plan C: the European Patent Litigation Agreement (EPLA). The EPLA would create a new European Patent Court whose judges would be appointed by, and dependent upon, the same people who govern the EPO. Given that office's preferences, this new court would almost certainly decide to allow software patents.

As Thomas Jefferson once said (allegedly), the price of liberty is eternal vigilance.