



Institute for Information Law  
University of Amsterdam  
[www.ivir.nl](http://www.ivir.nl)

Dr. Jose Manuel Barroso  
President of the European Commission  
1049 Brussels, Belgium

Re: Open Letter concerning European Commission's 'Intellectual Property Package'

Amsterdam, 18 August 2008

Dear Dr. Barroso,

The Institute for Information Law (IViR) of the University of Amsterdam is a leading research institute in the field of European copyright law. In 2006 and 2007, IViR produced two major studies on EU copyright law and policy:

- *The Recasting of Copyright & Related Rights for the Knowledge Economy*, available at: [http://www.ivir.nl/publications/other/IViR\\_Recast\\_Final\\_Report\\_2006.pdf](http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf)
- *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, available at: [http://www.ivir.nl/publications/guibault/Infosoc\\_report\\_2007.pdf](http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf)

Both studies were commissioned by the Commission (DG Internal Market and Services) in December 2005, discussed at great length with Commission officials at every stage of their completion, officially approved by the Commission, and finally published on the DG Market website. Both studies were researched and written by teams of expert researchers in the fields of law and economics that were recruited from IViR and various other European institutes. In addition, the main conclusions of the Recasting Study were discussed with leading European scholars in the field of intellectual property law, prior to its final submission.

Since their completion and publication, both studies have attracted considerable attention in scholarly circles and among stakeholders and continue to play an important role in informing the current debate on the future of copyright law and policy in the EU. It comes therefore as a complete surprise to us to discover that our studies have been almost entirely ignored in the so-called 'forward looking package' on Intellectual Property that the Commission has released on July 16, 2008.

The Explanatory Memorandum that accompanies the proposal for a term extension of the rights of performing artists and phonogram producers, which is the centre-piece of the Commission's package, references at various places studies and data provided by stakeholders, but fails to even mention our Recasting Study, which deals with the topic of term extension in detail and, on the basis of a thorough legal and economic analysis, rejects the main arguments made in favour of an extension. The

Explanatory Memorandum also disregards our critical analysis of the issue of co-written musical works, which constitutes a separate chapter of the Recasting Study.

Amazingly and quite misleadingly, the Explanatory Memorandum states (on p. 6, *in fine*) that '[T]here was no need for external expertise'. This is patently untrue, as the terms of reference of the Recasting Study, which were drawn up by the European Commission (Invitation to tender Markt/2005/08/D), expressly asked for the examination of, among other issues, the need for a term extension and the issue of co-written musical works. The Impact Assessment that supposedly underlies the Commission's proposal also ignores the Recasting Study, except for a single mention in footnote 51, which quotes our study out of context. Similarly, the Green Paper on Copyright in the Knowledge Economy, that covers much of the terrain explored in both our studies, once again ignores the critical findings of our research.

We are, of course, well aware that several conclusions of the IViR studies do not agree with the policy choices underlying the Commission's proposals. And we are certainly not so naïve as to expect that the recommendations of an academic institution such as ours, however well researched and conceived they may be, will find their way into the Commission's policies in undiluted form. What we would expect however is that our work, which was expressly commissioned by the policy unit in charge of these proposals, be given the appropriate consideration by the Commission and be duly referenced in its policy documents, in particular wherever the Commission's policy choices depart from our studies' main recommendations.

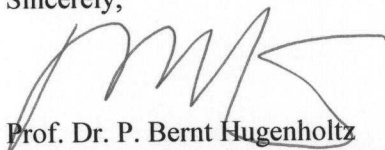
As you are certainly aware, one of the aims of the 'Better Regulation' policy that is part of the Lisbon agenda is to increase the transparency of the EU legislative process. By wilfully ignoring scientific analysis and evidence that was made available to the Commission upon its own initiative, the Commission's recent Intellectual Property package does not live up to this ambition. Indeed, the Commission's obscuration of the IViR studies and its failure to confront the critical arguments made therein seem to reveal an intention to mislead the Council and the Parliament, as well as the citizens of the European Union.

In doing so the Commission reinforces the suspicion, already widely held by the public at large, that its policies are less the product of a rational decision-making process than of lobbying by stakeholders. This is troublesome not only in the light of the current crisis of faith as regards the European lawmaking institutions, but also – and particularly so – in view of European citizens' increasingly critical attitudes towards intellectual property law.

I hereby urge the Commission to fully inform the European Parliament and the Council of Ministers of the findings of our studies in connection with the above-mentioned proposals and to duly and properly reference our work in future policy initiatives.

Copies of this letter will be sent to Mr. C. McCreevy (Commissioner DG Market and Services), the European Parliament and the Council of the EU. This letter will also be publicly posted on our website at [www.ivir.nl](http://www.ivir.nl).

Sincerely,



Prof. Dr. P. Bernt Hugenholtz  
Director, Institute for Information Law (IViR), University of Amsterdam