

ECIS' concerns on the impact of the Anti-Counterfeiting Trade Agreement ("ACTA")

We understand that negotiators of ACTA are in the final stage of the negotiation process before concluding the agreement. The European Committee for Interoperable Systems ("ECIS"), which has been defending the interests of its information technology sector members in policy debates affecting intellectual property, competition and interoperability for over twenty years, is concerned about three issues raised by the most recently accessible draft Agreement dated as of 25 August 2010:

1. Interoperability

First, ECIS is deeply concerned about the impact of ACTA on an issue that was the subject of intense controversy in the legislative discussions on Directive 2001/29/EC, the "Information Society Copyright Directive." That Directive in its originally-proposed form would have facilitated the use of Technological Protective Measures ("TPMs") to prevent lawful reverse engineering engaged in by software developers to ensure software programs can interoperate with each other.

As many software developers rely on lawful reverse engineering to achieve interoperability, the proposal's language was heavily criticized. Ultimately, a carefully-crafted compromise was reached among all interested parties (embodied in Recital 50 of the Information Society Copyright Directive) ensuring that it remains lawful to circumvent TPMs applied to computer programs if necessary to facilitate lawful reverse engineering.

It now appears that ACTA could overturn that hard-fought compromise. ECIS would like to engage in a more detailed discussion with you on this matter, but the reasoning behind its concern can be summarised as follows:

- It is often necessary to reverse engineer computer programs in order to ascertain the information necessary to achieve interoperability. Because such reverse engineering requires acts of reproduction and translation that are among the exclusive rights of copyright owners, Articles 5 and 6 of Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (today restated as Directive 2009/24/EC of 23 April 2009) (the "Software Copyright Directive") provide for exceptions to such rights. Those exceptions ensure the lawfulness of reverse engineering, and hence prevent powerful players from hindering competition and innovation. The European Parliament played a leading role in establishing these exceptions, having adopted them on its first reading of the directive.
- It is possible, however, for rightholders to use TPMs to "lock" computer programs in various ways that prevent reverse engineering. Thus it may be necessary to circumvent such TPMs in order to be able to undertake lawful reverse engineering. Therefore, in order not to diminish the effectiveness of the Directive's copyright

exceptions, the provision in the Software Copyright Directive addressing circumvention of TPMs was *made subject to those exceptions*: Article 7 of the Directive states that its anti-circumvention provision is "without prejudice" to the reverse engineering exceptions.

- When the Information Society Copyright Directive was proposed some six years later, its original text did not make clear whether the Software Copyright Directive's anti-circumvention regime or its own anti-circumvention provision (in its Article 6) applied to TPMs used in connection with computer programs. Had the latter applied, it would have prohibited circumvention of such measures necessary to facilitate lawful reverse engineering. This uncertainty was ultimately addressed by the inclusion of Recital 50 of the Information Society Copyright Directive, which was added after an intense battle to ensure that reverse engineering necessary for interoperability was not prevented. Thus, Article 6 of the Information Society Copyright Directive on circumvention of TPMs *does not apply* to circumvention of TPMs used in connection with computer programs.

"Such a harmonised legal protection [i.e., the legal protection of technological measures] does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5 (3) or Article 6 of Directive 91/250/EEC. Articles 5 and 6 of that Directive exclusively determine exceptions to the exclusive rights applicable to computer programs."

In short, because of the special nature of computer programs, the European Union retains a special regime governing circumvention of TPMs used in connection with computer programs, which is *different* from the regime provided by Article 6 of the Information Society Copyright Directive and which clearly does not prohibit circumvention of TPMs preventing reverse engineering.

- Now we come to ACTA. Article 2.18 (6) of the document reportedly representing the draft ACTA text as of 25 August 2010 would require ACTA members to adopt prohibitions on TPM circumvention-related acts that are rather similar to those contained in Article 6 of the Information Society Copyright Directive. *Nothing in this draft ACTA paragraph indicates that such provisions would not apply to computer programs, and were they to do so, reverse engineering (and hence interoperability) could be prevented by TPMs and it would be unlawful to circumvent such TPMS to enable reverse engineering.*
- The EU *has* proposed that ACTA members would have to apply such anti-circumvention provisions only "in appropriate cases" or only "to the extent provided by [an ACTA member's] law." These caveats are welcome, but ECIS has serious concerns about their efficacy in ensuring that the EU's special anti-circumvention regime for computer programs could remain intact. First, these proposals are bracketed in the available ACTA draft, and it is unclear whether such EU proposals would be included in any final ACTA. Second, even if they *were* to be included, ECIS does not believe they provide sufficient certainty that the existing EU regime on

circumvention related to computer programs could remain intact. In light of the critical importance of this regime to fundamental EU policies related to interoperability, competition and innovation, the ACTA text should leave *no doubt* on this score.

*The European Commission has repeatedly confirmed that ACTA will respect the *acquis communautaire*, and will not require the European Union to introduce new legislation. **To meet this promise, the Commission should ensure that explicit language along the lines of that contained in Recital 50 of the Information Society Copyright Directive is included in ACTA.***

2. Scope

Second, while ECIS believes that governments should indeed take the appropriate action to prevent counterfeiting, the Commission appears to be demanding that ACTA covers far more than counterfeiting, in particular by insisting on inclusion of patents. ***ECIS urges the European Commission to ensure that ACTA only applies to acts of counterfeiting and piracy, and that it does not apply to all intellectual property rights.***

ECIS is especially concerned with respect to criminalising patent infringement, as this would have especially serious implications for software development. Although in Europe patents are not permitted for software “as such,” many patents do exist on software technologies, though their validity can often be questionable. European software developers may know of these patents and infringe them in good faith believing that they are invalid, but cannot be certain on this score. The decision on validity rests with a patent office or a court. However, if the consequence of potentially infringing such patents is prison, the developers will be dissuaded from taking the risk and proceeding with the development work. *The impact would be particularly grave in the area of software interoperability, where the lack of a clear interoperability exception to patents has enabled patent holders to threaten developers of interoperable products with lawsuits.* Imposing the threat of criminal sanctions on such developers would aggravate the harm even further. The consequences would be potentially even more drastic for open source developers in Europe who are contributing to a community development project in their individual capacity. *Fear of a criminal conviction could discourage them from making valuable contributions that would otherwise benefit users, the open source community, and ultimately European economic competitiveness in the software sector.*

Criminalising such ordinary product development will threaten the balance in the patent system by encouraging the pursuit and enforcement of weak patent claims. And if the risk of infringing a patent with the ultimate aim of challenging the validity of a patent is so high, innovation will seriously suffer. This would be an unfortunate result for a trade agreement aiming to address counterfeiting and piracy, and intended to foster creativity and innovation.

3. Transparency

Finally, ECIS underscores the importance of transparency in negotiations on a trade agreement with such a significant impact on EU citizens and industry. ***The European Commission and Council should ensure more transparency in the negotiations on ACTA.*** The Treaty on the Functioning of the European Union (“TFEU”) recognises that “*in order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.*” We note that negotiations were not conducted in conformity with these standards of transparency to keep the public informed and to allow for input from businesses and other stakeholders about enforcement practices that

will affect them. On that basis, ECIS calls for the European Commission and the Council of the European Union to ensure that all stakeholders' views are heard and considered in the negotiations process, particularly at this critical stage of the negotiations.
