ECIS European Committee for Interoperable Systems

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Reply to European Commission (the "Commission") Public Consultation

on the review of the EU copyright rules published on 5 December 2013

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PLEASE IDENTIFY YOURSELF:

Name: European Committee for Interoperable Systems ("ECIS") AISBL

Register ID number: 32238324913-44 (http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=32238324913-44)

TYPE OF RESPONDENT

☐ End user/consumer (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student) OR Representative of end users/consumers – *for the purposes of this questionnaire normally referred to in questions as "end users/consumers"*

☐ Institutional user (e.g. school, university, research centre, library, archive) OR Representative of institutional users – *for the purposes of this questionnaire normally referred to in questions as "institutional users"*

☐ Author/Performer OR Representative of authors/performers

☐ Publisher/Producer/Broadcaster OR Representative of publishers/producers/broadcasters – *the two above categories are, for the purposes of this questionnaire, normally referred to in questions as "right holders"*

X Intermediary/Distributor/Other service provider (e.g. online music or audiovisual service, games platform, social media, search engine, ICT industry) OR Representative of intermediaries/distributors/other service providers – for the purposes of this questionnaire normally referred to in questions as "service providers"

☐ Collective Management Organisation

☐ Public authority

☐ Member State

☐ Other (Please explain):

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A. Introduction

ECIS is an international non-profit association founded in 1989, which endeavours to promote a favourable environment for interoperable ICT solutions. It has actively represented its members regarding issues related to interoperability and competition before European, international and national fora, including the EU institutions and WIPO. ECIS' members include large and smaller information and communications technology ("ICT") hardware and software providers. More information on ECIS is available at www.ecis.eu.

ECIS welcomes the discussion encouraged by the Commission's consultation on the review of EU copyright rules, and supports the Commission's goal to understand better the conditions that are currently hindering innovation and the provision of services that benefit consumers.

ECIS has been a champion of interoperability for more than 25 years, helping for example to push through the interoperability provision of Directive 91/250/EEC of 14 May 1991 (today restated as Directive 2009/24/EC of 23 April 23 April 2009) (the "Software Copyright Directive"), and to ensure that interoperability has been firmly on the agenda in the discussions over various legislative debates on intellectual property and ICT-related matters.

Consistent with its long-standing position supporting interoperability as an enabler of vigorous competition on the merits, and of diverse consumer choice, ECIS respectfully submits the need to preserve the carefully crafted and balanced interoperability-related provisions of the Software Copyright Directive. In parallel, and in view of recent technological developments, ECIS cautions the Commission that text and data mining activities should remain outside the scope of copyright protection. Finally, we fundamentally oppose the idea of expanding the copyright levy system to cover cloud computing services.

B. The importance of promoting innovation and growth in the ICT sector by safeguarding interoperability

The Commission noted in its 2010 Europe's Digital Competitiveness Report[1] that while representing five per cent of GDP, the ICT industry drives 20 per cent of overall productivity growth. Additionally, the ICT manufacturing sector, which accounts for one per cent of GDP, is responsible for one quarter of total R&D investment. However, the European Commission's 2012 PREDICT Report[2] prepared by its R&D unit also showed "*a clear leadership of the US*

[1] European Commission, Europe's Digital Competitiveness Report 2010, page 11.

[2] European Commission, JRC and Policy Reports, The 2012 Predict Report: An analysis of ICT R&D in

versus the EU," pointing out that the US clearly leads on all figures when comparing performances.

Data-driven innovation and increased interoperability are widely perceived as the fundaments for the growth of the European information society and, more generally, the European economy. To that effect, ECIS submits it is imperative to maintain the balance struck in the current EU copyright framework between the interests of the various stakeholders at issue in relation to the protection of computer programs. ECIS therefore stresses the importance of safeguarding what has been already achieved (including in particular the exceptions associated with reverse engineering).

Against this background, the exceptions for reverse engineering embedded in Articles 5 and 6 of the Software Copyright Directive should not be compromised in any reform of the EU copyright rules. The importance of safeguarding the carefully struck balance between the various stakeholders' interests was underscored in the legislative debate preceding the adoption of Directive 2001/29/EC of 22 May 2001 (the "Information Society Directive"). The EU legislature made sure that the balance would not be compromised by introducing the 50th Recital of the Information Society Directive, which acknowledged that "*Articles 5 and 6 of* [the Software Copyright Directive] *exclusively determine exceptions to the exclusive rights applicable to computer programs*." Both the Commission and the General Court of the EU in the *Microsoft* case[3] have acknowledged the necessity of balancing intellectual property considerations and interoperability considerations in the software industry, including with respect to non-dominant players.

In relation to the review of EU copyright rules, ECIS acknowledges that there is another area which requires the Commission's attention and focus in order to prevent copyright from hindering further technological developments and growth of the ICT industry. This area is text and data mining services. In the UK, in the 2011 Review of Intellectual Property and Growth[4] ("2011 Report"), Professor Ian Hargreaves acknowledged that "*the law can block valuable new technologies, like text and data mining, simply because those technologies were not imagined when the law was formed*." ECIS cautions the Commission that text and data mining should remain outside the scope of copyright protection.

As a final point, ECIS strongly opposes the expansion of the copyright levy system to cover

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the EU and Beyond, Authors: Juraj Stančík and Paul Desruelle, page 8.

[3] Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792 – Microsoft), paragraph 745; Judgment in Case T-201/04 *Microsoft Corp v Commission of the European Communities*, paragraph 1337.

[4] Digital Opportunity: A review of Intellectual Property and Growth, An independent report by Professor Ian Hargreaves, May 2011, available at: http://www.ipo.gov.uk/ipreview-finalreport.pdf.

cloud services. The copyright levy system has proven to be highly problematic and inefficient, and has been a source of legal uncertainty and lack of harmonisation. Therefore, we strongly believe that replicating this system in the cloud services sector would harm growth of the sector in the EU, and would result in EU cloud computing services lagging behind their US counterparts.

C. Reply to the questionnaire

ECIS has provided answers only to questions 11, 21 to 24, 26, 53, 55 to 57, and 66.

11. Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

☐ **YES – Please explain by referring to specific cases**
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X **NO – Please explain whether you consider this to be the case in general, or under specific circumstances, and why (e.g. because it does not amount to an act of communication to the public – or to a new public, or because it should be covered by a copyright exception)**

Hyperlinks, links from one resource to another, are a fundamental building block of the web and the Internet. A hyperlink is basically a reference to another resource expressed by the Uniform Resource Locator ("URL") of that resource. When a user selects a hyperlink available on a web page, a web browser sends a request to the web server hosting the resource to which the hyperlink is linked. The request follows the HTTP specification, and includes the address of the resource that contains the link.[5] This can be compared to a footnote in a document, or any other references.

Introducing a requirement to receive authorisation from the rightholder before publishing a hyperlink to the rightholder´s website would have severe negative effects on the development of the Internet – the infrastructure European businesses, governments, consumers and citizens rely on every day.

It is common practice for Internet users globally to share and publish links on services such as Facebook and Twitter, on blogs and more. To make such practice subject to the rightholders' approval would be contrary to widely held public understanding and perception as to what is reasonable and permissible, and would undermine the legitimacy of copyright legislation, and disproportionately interfere with the freedom to share and access information that is otherwise

[5] The Referer request header field as specified in the IETF RFC2616 standard, which is available at: https://tools.ietf.org/html/rfc2616

freely available on the web. If the provision of hyperlinks were to be covered by the rightholder's exclusive right of communication to the public, this would be in conflict with the common perception of what is regarded as reasonable. The law would become out of line with fundamental public perceptions of how society should be governed. Indeed, the ability to reference to publicly accessible information – essentially how hyperlinking operates – is a manifestation of the freedom of speech.

First, a hyperlink is only a reference to a resource on the Internet. When a user selects a hyperlink, the browser connects directly to the server that hosts the resource. The referring webpage that publishes the link is not involved in the transmission between the server and the end user. Thus, the act of hyperlinking cannot be understood in general to be part of the transmission of the content from the server to the end user, and consequently hyperlinking is not an act of communication to the public. On a technical level, this is true regardless of how the hyperlink is construed.

Second, the rightholders have at their disposal a wide variety of tools to control access to the content they make available themselves. In particular:

- The hyperlink will work only as long the content is available at the URL used in the hyperlink;
- A server can easily be configured to redirect any inbound deep links to, for example, the front page of the servers (or any other URL at the rightholders' discretion); and
- Robots.txt is a well-established and well-functioning tool for rightholders to control how spiders and crawlers access their website.

Third, making hyperlinking subject to the rightholders' authorisation is not an appropriate measure to prevent unauthorised use of protected works. Rightholders can request the host provider to block access to infringing material. When the infringing material is taken down, any inbound hyperlinks will not work.

Finally, and most importantly, very recently, on 13 February 2014, the Court of Justice of the European Union ("CJEU") in Case C-466/12 *Svensson* held that hyperlinking to websites that are freely accessible to all Internet users does not constitute copyright infringement. The CJEU's judgment that hyperlinks do not breach rightholders' exclusive right to communicate their works to the public is to be welcomed as hyperlinks are indispensable on the Internet for communication of the existence and location of content as we explained above. It also aligns EU law with established case law in other jurisdictions, including the United States. While the CJEU judgment is a significant step forward, it also raises difficult questions for the future that would need to be closely monitored.

As noted above, making hyperlinking subject to the rightholders' authorisation would interfere with European citizens' fundamental freedom of speech, and would have severe implications for the functioning of the Internet as we know it. On the other hand, rightholders already have sufficient mechanisms to control access to their content online. Therefore, we welcome the CJEU judgment in *Svensson*, and we underscore the importance of striking the proper balance between copyright protection and the development of technology with regards to hyperlinking.

21. Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?

☐ **YES – Please explain by referring to specific cases**

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☒ **NO – Please explain**

As noted above, ECIS has been a champion of interoperability, and was heavily involved in the legislative debate that led to the formulation of exceptions to the legal protection of computer programs allowing reverse engineering in order 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 the Software Copyright Directive provide for exceptions to such rights. Those exceptions are the key to the Directive's real impact as they ensure the lawfulness of reverse engineering, and hence prevent powerful players from hindering competition and innovation. The significance and necessity of these exceptions are underscored by the fact that they were adopted by the European Parliament on the Directive's first reading.

First, Article 5 permits black box analysis, which generally involves some of the acts for which only the right holder has the exclusive right. These include for instance displaying object code on a screen or on paper in order to study it. While for certain acts it may be unclear whether they can be considered a reproduction or not, Article 5 permits any acts comprising the process of black box analysis apart from decompilation. For instance, a software engineer is allowed to observe, study, or test the functioning of the program while "loading, displaying, running, transmitting or storing the program." As a result, legitimate interoperable product developers would face no barrier to analysing a copy of the program by observing, studying, or testing the functioning of the program, even if it is in the legitimate possession of someone else, provided that they have been granted the right to use the program.

Article 6 permits decompilation for purposes of developing competing as well as attaching programs. Decompilation is permitted solely if it is the only way to obtain the information necessary to achieve interoperability with other programs.

Both Articles 5 and 6 "*embody a simple rule: Reverse engineering to study functionality is fine,*

but reverse engineering to study program code, internal structure, and other expressive aspects of the literary character of programs is forbidden, except when indispensable to interoperability."[6]

Finally, it is possible for rightholders to use technological protective measures ("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 exceptions of the Software Copyright Directive provided under Articles 5 and 6, the provision in that Directive addressing circumvention of TPMs was made subject to the following exception – Article 7 of the Directive – *i.e.,* the provision in that Directive addressing the circumvention of TPMs in relation to computer programs – states that it is "without prejudice" to the reverse engineering exceptions, Articles 5 and 6 of the Software Copyright Directive.

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 could 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

[6] Pamela Samuelson, Thomas Vinje & William Cornish, Does Copyright Protection Under the EU Software Directive Extend to Computer Program Behaviour, Languages and Interfaces?, page 6, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974890.

Directive and which clearly does not prohibit circumvention of TPMs preventing reverse engineering. It is therefore key that this carefully-crafted compromise is maintained, and that it remains lawful to circumvent TPMs applied to computer programs if necessary to facilitate lawful reverse engineering.[7]

Both Articles 5 and 6 of the Software Copyright Directive provide for mandatory exceptions to the protection of computer programs by copyright. ECIS has not identified any problems associated with the mandatory nature of these provisions.

ECIS therefore opposes any reform which would be a step back from the balance carefully struck in the current copyright rules, and strongly believes that any initiative by the Commission in the field of copyright should avoid altering the mandatory nature of the exception for reverse engineering.

☐ **NO OPINION**

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22. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?

☐ **YES – Please explain by referring to specific cases**

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☐ **NO – Please explain**

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X **NO OPINION**

With respect to reverse engineering, which is the main focus of ECIS, the exceptions provided under Articles 5 and 6 of the Software Copyright Directive are mandatory, and cannot be eliminated by contract. ECIS is of the strong view that this should remain as is.

23. Should any new limitations and exceptions be added to or removed from the

[7] Recently, in Case C-355/12 *Nintendo v PC Box,* the CJEU held that for a rightholder to rely on a TPM would need to prove that (a) the use of the TPMs is proportionate, (b) other TPMs allowing software not originating from the manufacturer to run on the consoles could not reasonably be used, and (c) the TPMs do not have any commercially significant purpose other than to circumvent the technical protection. Moreover, the question whether the protection of video games falls within the scope of protection afforded to computer programs, or whether video games are protected under general copyright law as audiovisual materials is the subject of Case C-458/13 *Grund and others*, which is currently under consideration by the CJEU. Developments on this front should be carefully monitored in order to ensure that software developers can circumvent TPMs applied to computer programs if necessary to facilitate lawful reverse engineering.

existing catalogue? Please explain by referring to specific cases.

[Open question]

The market for text and data analytics software relies on text and data mining. Certain questions exist about whether text and data mining may involve some interference with the exclusive rights of a copyright holder. Article 5 (1) of the Information Society Directive provides for a mandatory exception with respect to temporary copies. Nevertheless, there is a view from some quarters that data and text mining may still infringe copyright calling for significantly tighter controls on what is permissible under European law with respect to text and data mining.

Data and text mining, or data analytics, is the computer-based extraction of excerpts of data from digital content. Its goal is to discover hidden facts or patterns and subtle relationships in data and inferring rules and behaviours. A key element is the linking together of the extracted information to form entirely new, hitherto unsuspected facts or new hypotheses to be explored further. The potential and benefits of text and data mining are very significant. McKinsey International reports that the power of "big data" in the sphere of public sector information alone could create Euros 250 billion annual value to Europe's economy.[8] It is the view of ECIS that text and data mining does not conflict with a normal exploitation of the work due to its "non-consumptive" nature. Indeed, as Professor Ian Hargreaves noted in his Report, the fact that this use "*happen*[s] *to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect.*"[9]

ECIS cautions the Commission that text and data mining should fall outside the scope of copyright protection.

24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

☐ **YES – Please explain why**

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☐ **NO – Please explain why**

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[8] McKinsey Global Institute: Big Data: The next frontier for innovation, competition and productivity, May 2011, available at: http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation.

[9] Digital Opportunity: A review of Intellectual Property and Growth, An independent report by Professor Ian Hargreaves, May 2011, available at: http://www.ipo.gov.uk/ipreview-finalreport.pdf, page 47.

X **NO OPINION**

26. Does the territoriality of limitations and exceptions, in your experience, constitute a problem?

☐ **YES – Please explain why and specify which exceptions you are referring to**
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……
☐ **NO – Please explain why and specify which exceptions you are referring to**
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X **NO OPINION**

We have no opinion at this time, but reserve the possibility of commenting on views expressed in the consultation period.

53. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced obstacles, linked to copyright, when trying to use text or data mining methods, including across borders?
(b) [In particular if you are a service provider:] Have you experienced obstacles, linked to copyright, when providing services based on text or data mining methods, including across borders?
(c) [In particular if you are a right holder:] Have you experienced specific problems resulting from the use of text and data mining in relation to copyright protected content, including across borders?

X YES – Please explain

See our answer to question 23.

☐ **NO – Please explain**
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☐ **NO OPINION**

55. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?

[Open question]
As explained in the answer to question 23, ECIS cautions the Commission that text and data mining should fall outside the scope of copyright protection.

57. Are there other issues, unrelated to copyright, that constitute barriers to the use of text or data mining methods?

[Open question]

See above.

66. How would changes in levies with respect to the application to online services (e.g. services based on cloud computing allowing, for instance, users to have copies on different devices) impact the development and functioning of new business models on the one hand and rightholders' revenue on the other?

[Open question]

ECIS is of the opinion that cloud computing services should not be subject to copyright levies.

Applying copyright levies would have adverse consequences for the development of cloud services in Europe, and on innovation in general. The market for cloud services is global, and imposing a levy would put European cloud services on an unequal footing compared to cloud services provided in the United States or in Asia.

Second, imposing copyright levies may cause imbalances even within the EU. Imposing such levies would also hamper the digital single market, and would be at odds with the EU Treaties and the Commission's objectives. Copyright levies are raised on a national basis by collecting societies whereas cloud services are global. As proven in other circumstances in which copyright levies are imposed, the lack of harmonisation as regards the amount of levy charged across Europe would affect competition on the merits within the internal market. It is therefore unlikely to be any benefit from extending a system that has been proven highly problematic to cloud services.

Finally, the imposition of a copyright levy on cloud services would raise the cost for the provision of these services, which are on a number of occasions available for free. This would reduce the competiveness of the economy, especially vis-a-vis the United States, which would have no such impediments, and disrupt new and innovative business models that have the potential to generate growth.