REGUS Business Center
Rond Point Schuman 6, Suite 616
1040 Brussels, Belgium
Tel +32.2.234.7711
www.ccianet.org

Computer & Communications Industry Association

October 08, 2014

Via Electronic Mail

Mr. Giuseppe Casella
European Commission
Head of Unit C3 – DG ENTR
Rue des Nerviens 105
B-1040 Brussels

Re: FORMAL COMPLAINT – Spain's Failure to Notify a Draft Technical Regulation Amending the Country's Intellectual Property Law

Dear Mr. Casella,

I would like to draw your attention to a draft law proposed in Spain which would amend the country's Intellectual Property legislation. Among the many amendments, there is a draft technical regulation which would introduce an ancillary right in favor of publishers for the online aggregation of copyright-protected content. The draft technical regulation is enshrined in Article 32(2). According to the draft, the ancillary right would function under an unwaivable, equitable compensation scheme managed by a collecting society. You can find the draft text of the proposed Article 32(2) attached. For you convenience, it includes a non-official translation of this Article.

We understand that Article 32(2) was inserted by the Spanish government at a very late stage and only *after* Spain notified the draft law to the Commission under Directive 98/34/EC, as amended by Directive 98/48/EC (Notification No 2013/244/E). This, however, does not absolve Spanish authorities from their duty to re-notify as the changes introduced have the effect of *altering the scope of the law significantly* and *add new specifications and requirements* within the meaning of Article 8(1) of Directive 98/34/EC. Accordingly, the Commission did not have the opportunity to scrutinize the entire law in light of its impact on the EU single market.

As Article 32(2) introduces significant new obligations on information society services by specifically legislating for the activities of "electronic content aggregation service providers", Spain is obliged to adhere to the notification procedure set out under Directive 98/34/EC, as amended by Directive 98/48/EC. We think that the proposed provision raises serious concerns as to its compatibility with the single market for information society services. The mentioned provision would restrict the cross-border provision of certain information society services in Spain as the mere accessibility of these services in Spain could trigger a compensation claim in the country. Large-scale geo-blocking of services for Spain could be the result creating a new barrier to the free movement of services.

Furthermore, we have substantial concerns as to the draft technical regulation's compatibility with EU copyright law (Directive 2001/29), particularly as interpreted by the CJEU in Case C-

466/12 *Svensson*. In addition, the proposed law is likely to run counter to key provisions of the E-Commerce Directive (Directive 2000/21) as well as international law obligations contained in the Berne Convention for the Protection of Literary and Artistic Works and TRIPs.[1]

Accordingly, **we would like to file a formal complaint as regards Spain's failure to properly notify the proposed law in its entirety and request the Commission to take further steps with the Spanish authorities**. The European Commission and Member States need to be given the opportunity to scrutinize the proposed law against EU law, including its impact on one of the Treaty's fundamental freedoms.

Please find in the Annex an overview of the proposed legislation with legal arguments explaining Spain's obligation to notify the draft technical regulation contained in Article 32(2).

I thank you for your attention and remain at your disposal for any questions you might have.

With kind regards,

Jakob Kucharczyk
Director, CCIA Europe
jkucharczyk@ccianet.org

[1] See e.g. Xalabarder, R. (2014). *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government – Its Compliance with International and EU Law.* Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596

Annex

In this Annex we outline the main features of the provision at issue and why it has to be notified to the European Commission under EU law.

1. The Intellectual Property Draft Regulation - Article 32(2)

On 21 February 2014 the Spanish Council of Ministers passed a Draft Technical Regulation (the "Draft Regulation") which seeks to establish a payment by aggregators of a non-waivable compensation to editors. This Draft Regulation is contained in Article 32(2) of an encompassing overhaul of country's law on intellectual property and introduces a new compensation right, in effect foreclosing an exception to exclusive rights.

As recently noted by the Spanish Markets and Antitrust Commission ("CNMC"), the Draft Regulation was introduced at a very last stage, thereby depriving all competent advisory bodies of the possibility of submitting observations, as is legally required under Spanish law.[2] The manifest lack of transparency in the legislative process is also at odds with the aim and underlying rationale of Directive 98/34/EC as amended by Regulation 98/48/EC, as well as with the system of constructive dialogue and preemptive control that it establishes.

The Draft Regulation is opposed by several publishers and associations of publishers have strongly opposed it.[3] A number of groups in civil society as well as Spanish trade associations

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[2] Report by the CNMC in relation to the Proposal to Amend Article 32(2) of the Bill Amending the Intellectual Property Law (PRO/CNMC/0002/14 *Propuesta Referente a la Modificación del Artículo 32(2) del Proyecto de Ley que Modifica el Texto Refundido de la Ley de Propiedad Intelectual*), 16 May 2014, available at http://www.cnmc.es/en-us/cnmc/ficha(en-us).aspx?num=PRO/CNMC/0002/14&ambito=Informes%20de%20Propuestas%20Normativas&p=0: "*The inclusion of this subarticle in the Bill occurred after the Spanish Competition Authority approved and published [its Report 102/!3] in relation to the Preliminary Bill amending the Revised Copyright Law and the Civil Procedure Law. In this regard, neither this, or, in principle, any other of the government's consultative bodies has had the chance to give its opinion on this right to fair compensation under article 32(2) since it was added after those bodies had received the first version on which they gave their opinion*". (Own translation; underlining added).

The original reads as follows: "*La inclusión de este apartado en el Proyecto de Ley se produjo con posterioridad a que la Autoridad de Competencia española aprobara y publicara el ya mencionado IPN 102/13 relativo al APL de modificación del Texto Refundido de la Ley de Propiedad Intelectual y de la Ley de Enjuiciamiento Civil. En este sentido, ni éste ni en principio ningún otro órgano consultivo de la Administración General del Estado ha tenido la oportunidad de pronunciarse sobre este derecho a la compensación equitativa regulado en el artículo 32(2), en la medida en que la introducción del mismo se produjo con posterioridad a la versión informada por aquellos*".

[3] The Spanish Association of Publishers of Periodic Publications ("Asociación Española de Editores de Publicaciones Periódicas" or "AEEPP"), the largest sector association representing the theoretical beneficiaries of the measure has issued a statement expressing its total opposition to the Draft Regulation. The statement is available at http://www.aeepp.com/noticia.asp?ref=1924&cadena=ley_propiedad&como=1

have also voiced their concerned, noting among other reasons that, as it stands, it would be contrary to EU Law.[4]

The Draft Regulation[5] reads as follows:

> *Article 32. Quotations, reviews and illustration for teaching or scientific research purposes.*
>
> *2. The making available to the public by electronic service providers of non-significant fragments of aggregated content, reported in periodical publications or on periodically updated websites, which have as their purpose informing, creating a public opinion or entertaining, shall not require authorization, without prejudice to the right of the publisher or, where appropriate, of other right holders to receive fair compensation. This right cannot be waived and will be made effective through collecting societies. In any case, the making available to the public by third parties of any image, photographic work or ordinary photograph reported in periodical publications or periodically updated websites will be subject to authorization*
>
> *Notwithstanding the provisions of the preceding paragraph, the making available to the public by service providers that provide search engines to search for isolated words included in the contents mentioned in the preceding paragraph shall not be subject to authorization and fair compensation provided that such making available to the public occurs not for their own commercial purposes and is strictly limited to what is necessary to provide search results in response to queries previously made by a user to the search engine and where the making available to the public includes a link to the original website.*[6]

The Draft Regulation obliges online services to pay "fair compensation" for making available "non-significant fragments of aggregated content, reported in periodical publications or on periodically updated websites, which have as their purpose informing, creating a public opinion or entertaining". It also envisages an exception applicable to news items featuring results to users' queries entered into search engines that are based on "isolated words" provided that the

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[4] See, e.g. http://www.elconfidencial.com/comunicacion/2014-03-18/ceoe-va-a-la-guerra-contra-gobierno-y-editores-al-pedir-la-retirada-de-la-tasa-google_103409/#lpu6MifnjtL2tfU1

[5] The latest version of the Draft Bill Reforming the IPL is available at: http://www.congreso.es/portal/page/portal/Congreso/PopUpCGI?CMD=VERLST&BASE=pu10&DOCS=1-1&DOCORDER=LIFO&QUERY=(BOCG_D_10_388_2650.CODI.)#(P%C3%A1gina2)

[6] In the original: "*La puesta a disposición del público por parte de prestadores de servicios electrónicos de agregación de contenidos de fragmentos no significativos de contenidos, divulgados en publicaciones periódicas o en sitios Web de actualización periódica y que tengan una finalidad informativa, de creación de opinión pública o de entretenimiento, no requerirá autorización, sin perjuicio del derecho del editor o, en su caso, de otros titulares de derechos a percibir una compensación equitativa. Este derecho será irrenunciable y se hará efectivo a través de las entidades de gestión de los derechos de propiedad intelectual. En cualquier caso, la puesta a disposición del público por terceros de cualquier imagen, obra fotográfica o mera fotografía divulgada en publicaciones periódicas o en sitios Web de actualización periódica estará sujeta a autorización. Sin perjuicio de lo establecido en el párrafo anterior, la puesta a disposición del público por parte de prestadores de servicios que faciliten instrumentos de búsqueda de palabras aisladas incluidas en los contenidos referidos en el párrafo anterior no estará sujeta a autorización ni compensación equitativa siempre que tal puesta a disposición del público se produzca sin finalidad comercial propia y se realice estrictamente circunscrita a lo imprescindible para ofrecer resultados de búsqueda en respuesta a consultas previamente formuladas por un usuario al buscador y siempre que la puesta a disposición del público incluya un enlace a la página de origen de los contenidos".*

making available to the public occurs "not for their own commercial purposes" and is strictly limited to what is necessary to provide results in response to users' queries.

The current draft raises many problems as regards its interpretation, and the vagueness of these terms deprives market operators from any legal certainty in relation to the scope of the exception, and therefore of Article 32(2) itself. At first glance, it is clear that its scope is very broad, covering any form or "regularly updated content" (which could be a news publication but equally scientific publications or blogs), and applying irrespective of whether a publisher consents. This means for instance that even if a publisher uses a form of Creative Commons licence, payment will arise in Spain.

2. The Draft Regulation requires notification to the European Commission under Directive 98/34/EC

Directive 98/34/EC[7] on technical standards regarding Information Society Services as amended by Directive 98/48/EC (the "Directive") lays down a procedure for the provision of information, the holding of consultations, and administrative cooperation in respect of new draft rules and regulations capable of affecting the free movement of information society services. The system regulated therein was crafted with a view to eliminating the fragmentation of the internal market[8].

This Directive defines a "draft technical regulation" as the text of a technical specification or other requirement of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation,[9] the text being at a stage of preparation at which substantial amendments can still be made.[10] The consequences of a measure being deemed a Draft Technical Regulation are, inter alia, (i) the need for prior notification[11] and (ii) the applicability of the *standstill* obligation[12]. These obligations also apply

[7] Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations and of the rules on Information Society Services [1998] OJ L204/37.

[8] See recital 8 of Directive 98/48/EC; recital 9 in turn states that "*in order to ensure real and effective protection of the general interest objectives involved in the development of the Information Society, there is a need for a coordinated approach at Community level when questions relating to activities with such highly transnational connotations as those of the new services are dealt with*". (…)*"without coordination at Community level, [the] foreseeable regulatory activity at national level might give rise to restrictions on the free movement of services and the freedom of establishment, leading in turn to a refragmentation of the internal market, over- regulation and regulatory inconsistencies"*.

[9] Technical regulations are defined in Article 1(11) of the Directive as "*technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator, or use in a Member State or major part thereof* (…)".

[10] See Articles 1(12) of Directive 98/34/CE as amended by Directive 98/48/CE.

[11] See Article 9 of Directive 98/34/CE as amended by Directive 98/48/CE.

[12] Article 8 of Directive 98/34/CE as amended by Directive 98/48/CE provides that: "*Subject to Article* [4(3) TEU], *Member States shall immediately communicate to the Commission any draft technical regulation* (…) *they shall also*

to any administrative provisions that are adopted subsequently in order to regulate, clarify further, etc. the Draft Regulation[13].

The obligation to notify aims to ensure that the Commission, Member States and, where appropriate, other stakeholders can comment on technical regulations which may hinder trade and the free movement of services in the internal market[14]. The Draft Regulation may encroach on the free movement of information society services in the internal market and run counter to Treaty provisions on free movement of services, as well as to secondary legislation in the field of intellectual property and e-commerce.

The Draft Regulation affects "information society services" within the meaning of the Directive: The services provided by both aggregators and publishers of periodically updated websites fulfill all the requirements necessary to be regarded as Information Society Services. Indeed, they are "*services normally provided for remuneration, at a distance, by electronic means and at the individual request of the recipient of services*" in the sense of Article 1(2) of Directive 98/34/EC.[15] The case law of the EU Courts has established that this definition also encompasses services that are not directly remunerated by their recipients, but through other revenues such as advertising.[16]

The Draft Regulation constitutes a "Draft Technical Regulation" and requires notification:

1. The Preamble of the Draft Bill submitted to the Spanish Parliament states that the measures contained therein have already been notified to the Commission in compliance with Directive 98/34/EC[17]. However, such notification is not sufficient because the

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let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft";

[13] Indeed, Article 8(1) of the Directive specifies that "[w]*here appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation*".

[14] See notably Articles 8(1) and 9(2) of Directive 98/34/CE.

[15] See also Case C-108/09, *Ker- Optika* [2010] ECR I-12213.

[16] See *inter alia* Judgment of the ECJ (Grand Chamber) of 23 March 2010, *Google France*, Joined Cases C-236/08 to C-238/08, paras. 110 and 23. In the same sense, Recital 18 of the e-commerce Directive 2000/31/EC specifies that "*information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data*".

[17] According to the Preamble of the draft Law, "*Las medidas contenidas en la presente ley a este respecto han sido notificadas a la Comisión Europea según lo previsto en el Real Decreto 1337/1999, de 31 de julio, por el que se regula la remisión de información en materia de normas y reglamentaciones técnicas y reglamentos relativos a los servicios de la sociedad de la información, que transpone la Directiva 98/34/CE, del Parlamento Europeo y del Consejo, por la que se establece un procedimiento de información en materia de las normas y reglamentaciones técnicas y de las reglas relativas a los servicios de la sociedad de la información, modificada por la Directiva 98/48/CE*".
http://www.congreso.es/portal/page/portal/Congreso/PopUpCGI?CMD=VERLST&BASE=pu10&FMT=PUWTXDTS.fmt&DOCS=11&DOCORDER=LIFO&QUERY=%28BOCG10A811.CODI.%29#

notified version did not include the Draft Regulation contained in Article 32(2), which was introduced at the last minute[18].

In this regard, Article 8(1) of the Directive makes it clear that "***Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope,*** *shortening the timetable originally envisaged for implementation,* ***adding specifications or requirements, or making the latter more restrictive***".

2. In February 2014, the Spanish Markets and Competition Commission ("CNMC") [19] issued a Report in relation to the earlier version of the Spanish draft IP Law.[20] **After becoming aware that significant amendments had been introduced subsequently in the draft law, in May 2014 the CNMC issued a new report addressing only the proposed new drafting of Article 32(2)**.[21] As explained below, the CNMC's Report concluded that the measure significantly restricted competition in several ways, and called for its suppression or significant amendment.

The consequences of the lack of notification: Should Spain enact the Draft Regulation without notifying the draft to the Commission and respecting the standstill obligation, the new legislation would be unenforceable against third parties in the Spanish legal system.[22] Any attempt to avoid notification would be in **direct violation of Article 8(1) the Directive.**[23]

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[18] The original version of the Law notified by Spain to the European Commission is available here: http://ec.europa.eu/enterprise/tris/pisa/cfcontent.cfm?vFile=120130244ES.DOC. As explained, the amendment to Article 32 of the Spanish IP Law was only included in the legislative project at the very last minute (at the stage of deliberations of the Council of Ministers). Further information on the notification of the previous version of the Draft Bill to the European Commission is available here: http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?fuseaction=pisa_notif_overview&iYear=2013&inum=244&lang=EN&sNLang=EN

[19] Spanish Law also provides for a mechanism for the prior assessment of national regulations which may have an impact on competition and market regulation.

[20] See Report IPN 102/13, available at http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=198995&Command=Core_Download&Method=attachment

[21] The CNMC's Report is cited *supra* in footnote 5. Page 5 of the Report states that "*The inclusion of this subarticle in the Bill occurred after the Spanish Competition Authority approved and published [its Report 102/!3] in relation to the Preliminary Bill amending the Revised Copyright Law and the Civil Procedure Law. In this regard, neither this, or in principle any other of the government's consultative bodies has had the chance to give its opinion on this right to fair compensation under article 32(2) since it was added after those bodies had received the first version on which they gave their opinion*". (Own translation; underlining added).

In the original: "*La inclusión de este apartado en el Proyecto de Ley se produjo con posterioridad a que la Autoridad de Competencia española aprobara y publicara el ya mencionado IPN 102/13 relativo al APL de modificación del Texto Refundido de la Ley de Propiedad Intelectual y de la Ley de Enjuiciamiento Civil. En este sentido, ni éste ni en principio ningún otro órgano consultivo de la Administración General del Estado ha tenido la oportunidad de pronunciarse sobre este derecho a la compensación equitativa regulado en el artículo 32(2), en la medida en que la introducción del mismo se produjo con posterioridad a la versión informada por aquellos*".

[22] Indeed, as held by the ECJ in the *CIA* Judgment, Articles 8 and 9 of Directive 98/34/CE lay down an unconditional and precise obligation on Member States to notify draft technical regulations prior to their adoption.

Endorsing the apparent view of the Spanish authorities regarding the lack of obligation to notify the measure in question would set a precedent that would seriously undermine the effectiveness and future application of the Directive. Indeed, accepting any such reasoning would open the door for Member States to circumvent the obligations of transparency, notification and prior scrutiny of technical regulations which would have an impact on the internal market simply by introducing post-notification amendments to their draft technical regulations. In fact, in a recent communication over a copyright regulation, the Commission has clearly stated that such a draft regulation must be notified when its content has significantly changed.[24]

The Court considered that the Directive is to be "*interpreted as meaning that breach of the obligations to notify constitutes a substantial procedural defect such as to render the technical regulation in question inapplicable to individuals*". Case C-194/94 *CIA* [1996] ECR I-2201, paras. 44 and 45. For examples of the application of this case law by national courts, see e.g. the Judgments of the Paris Court of Appeals of May 25 2012 (*eBay)* and of the French Council of State of June 10 2013 (*AFNIC*).

[23] As stated in recital 5 of Directive 98/34/CE, "*it is essential for the Commission to have the necessary information at its disposal before the adoption of technical provisions* (…); *consequently, the Member States which are required to facilitate the achievement of its task pursuant to Article* [4(3) TEU, former Article 10 EC and 5 EEC] *must notify it of their projects in the field of technical regulations*". Article 8(1) of the Directive also refers to Article [4(3)] as the provision under which Member States are required to pre-notify their draft technical regulations.

[24] TRIS/(2013) 03174. Ref. Ares(2014)75822 – 15/01/2014.