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CCIA's feedback on the European Commission's roadmap on the Intellectual Property Action Plan

The Computer & Communications Industry Association (CCIA) welcomes this opportunity to provide comments.

Innovation is at the heart of the work of CCIA members. Intellectual property, when properly balanced, can incentivize innovation. But over-protection of intellectual property can result in reduced investment in innovation and reduced participation in innovative activities. A balanced approach to intellectual property is critical.

CCIA recognizes the problem of fragmentation in the EU IP system. A Community-wide system for validating and litigating patents has potential to reduce the cost of parallel litigation for all participants and decrease the use of forum shopping tactics. However, a unified system also creates the powerful threat of a Community-wide injunction. Implementation of a unified patent system must ensure that the reward for innovation does not create an environment that blocks future innovation. In particular, CCIA suggests ensuring that the proportionality requirement of the current IPR Enforcement Directive is maintained and strengthened, requiring a showing of irreparable harm before issuing an injunction, and that strong mechanisms to protect against unjustified assertions are provided.

With respect to a European approach to AI and IP, CCIA suggests that the output of an AI system is and should be treated as inherently equivalent to the knowledge of a person skilled in the art. Such a structure appropriately rewards innovation in AI systems without creating a situation in which entities obtain windfall benefits from innovation they did not contribute to.

Further, in relation to copyright, a work produced by an AI algorithm or process, without the involvement of a natural person contributing to the resulting work, should not qualify as a work of authorship protectable under copyright law. Withholding copyright protection from a work resulting from an AI process for which there was no expressive contribution by a natural person is justifiable from a policy perspective; the AI algorithm, and the computer that runs it, does not require the economic incentive provided by copyright in order to create works. Nor is the resulting work original in the sense that it reflects the personality of the author. Indeed, AI is capable of quickly producing an enormous array of works. Recognizing copyright in such output could quickly create a minefield of legal issues, leading to litigation and uncertainty.¹

CCIA is supportive of the European Commission's work and its fight against counterfeiting and piracy. EU citizens increasingly buy online and cross-border. In 2019, 35% of e-buyers made some purchases from sellers in other EU countries, compared with 2% in 2014. Between 2017 and 2018, overall access to pirated content declined by 15% in the EU. The decline was most pronounced in music, at 32%, followed by film (19%) and TV (8%). Online marketplaces work continuously to ensure their users' trust in their services. They take the challenge of addressing the sale of counterfeit and pirated goods online seriously. Firms across the Internet industry have invested heavily in programs to address this challenge and enforce company policies against counterfeit and pirated goods. We believe building on the good cooperation that exists between rights holders and intermediaries continues to be a strong basis for a sustainable solution. The EU IP Action Plan should focus on (1) the responsibilities of actors beyond online marketplaces and in particular (2) the resources needed at the border, in market and through the external action service for prioritized, effective enforcement. The Action Plan should review the current state of play for IP enforcement and those aspects that should be addressed as



counterfeiting and piracy. This review should highlight the limitations and caveats in the existing data sets to ensure those not familiar with the underlying reports understand the terminology and data sets.

CCIA strongly supports systems that will increase the rationality and transparency of IP licensing. The sometimes opaque nature of SEP licensing presents serious challenges to companies attempting to create innovative products using technology that may be covered by SEPs. In addition, CCIA strongly suggests that the Commission interpret the non-discriminatory licensing obligation many SEPs are subject to as requiring licensing to all who request a license. Such a license-to-all system permits manufacturers to dedicate themselves to innovating within their own expertise, while being able to rely on component suppliers, who know their own products, to obtain the required licenses for their products.

CCIA also supports increased transparency of copyright ownership information. The lack of comprehensive, transparent and up-to-date rights management information is a long-standing problem for digital services which seek to clear rights. It is hard to conceive of a “well functioning marketplace” for copyright without access to rights ownership information. Knowing who owns what is an essential first step in the establishment of any market. Any efforts in this area should take into account the needs of end users and commercial users, and not create additional red tape.

CCIA also supports efforts to ensure the availability of IP in times of crisis. Several CCIA members have voluntarily provided a royalty-free license to use their patents for the purpose of diagnosing, preventing, containing, and treating COVID-19. Provisions that permit access to IP are appropriate and necessary to ensure that the IP system does not cripple efforts to avoid or mitigate crisis situations, such as COVID-19.

The tech industry would welcome further cooperation with regional, national or European authorities, based on the country-of-origin, on how to best improve European IP policy in the areas above and otherwise. CCIA would be pleased to provide additional information and to meet with your services if useful.

Respectfully submitted,

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References

ⁱ See Daniel Gervais, *The Machine As Author*, 105 IOWA L. REV 2053 (2020), available at <https://ssrn.com/abstract=3359524>.