

The Joint Committee on Statutory Instruments
House of Commons
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Secondary Legislation Scrutiny Committee
House of Lords
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Dear Mr Patrick, et al

RE: EUROPEAN COMMISSION STUDY INTO TEXT AND DATA MINING

Having written to the Committee twice in recent weeks on the subject of the Statutory Instruments pertaining to copyright exceptions we are reluctant to trouble you yet again.

However, one week ago the European Commission Directorate General for the Internal Market published a significant study and report which we believe has major implications for the UK government's legislative proposals. Therefore, we wish to bring this to the attention of both Committees as a matter of urgency, in the hope that Members will have the opportunity to consider it in the course of their deliberations in the coming weeks.

The analysis and report is provided by De Wolf and Partners, and is entitled "A Study on the Legal Framework of Text and Data Mining". The lead author is Jean-Paul Triaille, partner at De Wolf and Partners. It was commissioned by DG Market as part of its on-going review of the copyright acquis and in preparation for the publication of a White Paper anticipated for June 2014. A web-link to the report is at:

http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf

One of the terms of reference of the study is: *"to assess whether text and data mining activities...could be covered by the current exceptions and limitations to copyright and / or to the sui generis [database] right."*

In short, the report finds that under current European law it is not possible to create an exception for text and data mining, and that in order to make these acts permissible an amendment to the Information Society Directive would be required. It directly follows, therefore, that no Member State can introduce an exception for text and data mining under the scope of the current Directive. However, this is of course precisely what the Government is currently intending to do.

Whilst it is the case that this is merely a report to the Commission and does not have the status of Commission policy let alone a court judgment, it is highly significant for three reasons. First, DG Internal Market commissioned the report with the express intention of assessing whether text and data mining exceptions are currently permissible and finds that they are not. The findings are therefore not incidental or tangential but are aimed at and strike the very heart of the policy matter under consideration in the UK.

Secondly, at no stage in its deliberations – from the Hargreaves Review onwards – has the UK Government commissioned anything approaching as detailed a study as the De Wolf paper. In other words, there is no countervailing expert analysis for the Government to call upon.

Finally, and perhaps most importantly, in the Explanatory Memorandum to the Statutory Instruments the UK Government explicitly states that “*the exception contained in new section 29A is limited to non-commercial research, in accordance with Article 5 (3)(a) [of the Information Society Directive].*” (7.10.1).

However, the De Wolf study very clearly demonstrates how this Article cannot sustain a text and data mining exception. It states: “*the copyright exceptions in the InfoSoc Directive are limited “solely for scientific research” which may be seen as excluding projects where, in addition to a scientific research objective, there may be other ancillary objectives.*” (p116)

Also, De Wolf recommends that a new exception provision should clarify that it would not just serve “*to illustrate scientific research*” but would apply more broadly in cases of “*scientific research*” (p116). Due to the differing language versions of the Information Society Directive significant doubt remains whether Article 5(3)(a) can be relied on at all to undertake TDM.

As the Committee will be aware the proposed exception set out in the relevant Statutory Instrument does not stipulate “*scientific research*” but instead says merely “*research*”. It follows that the Government’s intent is wider in scope than is permitted by the Information Society Directive.

In the UK, Article 5(3)(a) has been interpreted in a way that limits the requirement “*for illustration*” to “*teaching*” and does not also limit the purposes of copying under the exception solely for scientific research. Significant doubt remains over the correctness of this approach and a clarification through an interpretative document from the Commission or as a result of an CJEU ruling on referral may be necessary to clarify this point.

We acknowledge that the De Wolf study is merely one legal opinion. However, we would also contend that it is a highly expert opinion and one which is bound to carry significant weight within the European Commission, both in terms of its deliberation of developing policy and in its consideration of the behaviour of Member States with respect of existing policy and law.

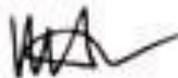
Again, we hope that the Committee will be able to give full consideration to the implications of this new report and that in its conversations with Government seek the full confidence of Ministers and officials that the UK Government is not standing into danger of acting in breach of its obligations under European law.

Yours sincerely



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