

## **Executive Summary**

ECTA's position on the policy and regulatory issues raised in the public consultation on creative content online in the Single Market can be summarised in the following points<sup>1</sup>.

ECTA supports the interoperability of DRM systems. The adoption of interoperable DRM systems – ensuring at the same time that the legitimate interests of the content owner are not jeopardised - would advantage all stakeholders. Right holders would be encouraged to license their content for distribution on-line, adding new revenue streams to their business models. Aggregators and service providers would have more and better quality content available to them and users would enjoy simpler and fairer terms and conditions, also with respect to the use of their personal data.

The most important policy goal, however, should be to discourage the use of DRM systems so that they are only applied where they clearly serve the interests of all parties involved. This principle has already been put into practice in France and even major players are getting increasingly interested in abandoning DRM systems.

As to multi-territory licensing, although ECTA considers that is up to right holders to assess the advantages of direct licensing versus the benefits and related costs of licensing through a collecting society, the existing licensing mechanisms should be improved, also by promoting fair competition in the market for right management ( i.e. among different collecting societies).

Finally, as to legal offers and piracy, we believe that filtering systems are hardly consistent – from a financial and technical point of view - with the normal course of business of broadband network operators. Alternative network operators should not bear the burden of implementing extremely complex technical measures, nor bear the associated high investment costs, which would increase the costs of access to broadband services, possibly extending the digital divide. Instead, we support the idea of voluntary, commercial negotiations between different stakeholders across the value chain to fight piracy and to allow network operators to provide attractive value propositions to customers based on the wide availability of legally licensed content.

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<sup>1</sup> This position represents the views of competitive telecoms operators. It cannot be assumed to reflect the views of operators with non-telecoms interests - in particular broadcasting.

## Digital Rights Management

**1. Do you agree that fostering the adoption of interoperable DRM systems should support the development of on line creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?"**

In order to reply to this question it is necessary to define DRM interoperability. In fact the correct definition of DRM interoperability cannot be restricted to the technological measures through which files featuring different DRM systems are exchanged. If we take into consideration the entire system of content use, which includes publication, distribution and use by consumers, an interoperable DRM system is perceived as such only if all "players" involved may adopt the same with no barriers or other obstacles. Such goal may be pursued through the adoption of market-driven common standards. Indeed, interoperable anti-copy mechanisms (TPM, "*Technology Protection Measure*") are desirable. The up-to-date TPMs are based on the so called "public keys" cryptographic systems. In other terms, the digital content is locked in an encoded "envelope" featuring a public key, available to everyone. However, the content (e.g. the "envelope") can be used by the owner of a "private key" which is featured on the device utilized (e.g. a dvd player) or in the software that makes possible the use of the content or related services. Full interoperability would allow all devices and software to decode all existing encrypted systems, as well as the future ones possibly launched by new entrant companies. Furthermore, interoperability would be useful to mediate the different economic interests of all players (publishers, device makers, telcos and consumers). In fact, a non interoperable DRM system, although justified by the legitimate need to safeguard the content owners against piracy, might in certain situations be exploited by companies that have market power, both toward content owners and/or providers which are not in the position to "round on" the distribution channel. Consumers also have to incur substantial costs to substitute the device through which they make use of the content (also losing, in case of change, their content library). Finally, consumers would be encouraged to use DRM protected files when the full and simple substitutability of the content services and related devices is assured. In this context it has to be noted that open DRM systems, apart from restricting the use of content, are able to identify the end-users and also to trace the relevant conditions of use of the content. This may be convenient, as it enlarges the business models to those different from the "*pay per download*" one, through the adoption of business cases based on the free use of the content containing advertising banners and links. However, in case personal data are not rendered anonymous, fair privacy conditions need to be set. In fact, when an interoperable DRM system is adopted, where not only the contents would migrate from a system to another but also all personal data, full transparency shall be ensured, by introducing the adoption of a labelling system, which elucidates the nature and the technical measures of the content use services and the relevant DRM systems adopted.

**2. Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labeling of digital products and services?**

In line with the paragraph above, ECTA suggests the adoption of a complete and clear informative frame regarding the use of consumers' personal data where "*watermarking*" techniques are not adopted to protect the file from unlawful usage or to facilitate the use of consumers, but to trace the consumer's personal information provided to make use of the digital content.

Generally, such a use is not disclosed, so that the majority of the end-users are unaware that the sharing of a digital content implies also the sharing of the personal data provided. It is therefore advisable to extend the contractual practise to acquire the consent of end-users to the use of their personal data provided in order to use the content on-line services (Through the "*opt-in*" modality). With respect to labelling of digital products and digital services, the same should be accompanied by descriptive sheets, easily understandable to average consumers.

However, where there is no transfer of personal data (for example when personal data is rendered anonymous), or where personal data are only used to facilitate consumer's surfing, watermarking can be an element for the development of new business models.

Information about DRM interoperability itself should be made clearly available to the customers so that they are aware on which device and for what period of time it is possible to use the file.

Finally, it is worth noting that the policy goal on the medium and long term should be to end the use of DRM systems in addition to transparency. Indeed, major players and distributors such as Apple, are announcing that they are going to abandon DRM systems. In France, right holders accepted that principle in the context of an agreement against piracy. In order to provide an attractive and lawful offer, we have to make content available in a way that allows users to use it as freely as possible.

**3. Do you agree that reducing the complexity and enhancing the legibility of end-user license agreements (EULAs) would support the development of on line creative content services? Do you identify any particular issue related to EULAs that need to be addressed? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?"**

The terms and conditions of EULAs, primarily in the interest of content providers and content owners should be simplified. Most of the EULAs contain technical conditions, because these contract models derive from software licenses made for those users who acquire professional

applications. As a consequence, acceptance of the terms of use of digital contents is regarded as a process necessary merely in order to have access to the on-line services. It is evident that the use of “clear and lean” contractual terms, beyond being “customer friendly”, would introduce a high level of legal certainty promoting the fruition of highly innovative digital services.

Moreover EULA should clarify all characteristics of DRM in order to allow the consumer to be informed about the rules associated with the use of the offered digital content, bearing in mind that some unfair contractual terms can be legally prohibited if they cause a significant imbalance in the parties’ rights.

Some digital content formats have embedded capabilities to limit the ways in which digital content can be used reducing the consumer’s choice and generating interoperability problems. Use may be restricted, for example, for a time period, to a particular computer or other hardware device, or may require a password or an active network connection. DRM can also individually identify users and track users’ behaviour presenting a powerful threat to freedom of expression as well as privacy. Such situations can conflict with legitimate consumer rights and privileges.

**4. Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers’ confidence in new products and services? Which commendable practice do you identify in that respect?”**

ECTA agrees with the analysis in the “*Commission Staff Working Paper*” (pages 26 and 27) and suggests that “ADR” clauses are inserted in the terms of use of the digital content services. The above, also to exclude the practice of abusive conditions, such as the forum selection clauses outside the place of residence of the consumers.

**5. Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?”**

ECTA believes that non-discriminatory access to interoperable DRM systems for small and medium sized companies active in the on-line distribution of digital content would improve the market conditions, mainly with respect to full substitutability of the devices necessary to access the relevant services by consumers.

### **Multi-territory rights licensing**

**6. Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?**

The Commission Staff Working Paper on the Cross-Border collective management of Copyright does not express how the Commission intends to implement the policy proposed. The problems

currently faced by all stakeholders involved (right-holders, commercial users and consumers) are pressing and need urgent action from the Commission. Failure to act promptly may hold back on-line services to the detriment of the above mentioned stakeholders. That bearing in mind, a Recommendation of the European Parliament and the Council would not contain compulsory rules and therefore may result in a non efficient means to address the issue of multi-territory rights licensing. Although the process of adopting an “ad hoc” directive might be time consuming we believe it would be more appropriate than to promptly define the matter at stake.

**7. What is in your view the most efficient way of fostering multi-territorial rights licensing in the area of audiovisual works? Do you agree that a model of online licenses based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?”**

ECTA considers that the multi-territory rights licensing may be appropriate to meet the demands of new services by consumers, in line with the ubiquity of such on-line services. However, such system should be driven by rights owners making the choice about how best to license their rights in order to reach their primary and secondary markets effectively. Rights owners should be able to choose a route to market, weighting up the practicalities of direct licensing versus the benefits and related costs of licensing through a collecting society. This is in line with Option 3 in the Commission Staff Working Paper on the Cross-Border Collective Management of Copyright<sup>2</sup>

**8. Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called “Long tail” theory, benefit from multi-territory rights licenses for back -catalogue works (for instance works more than two years old)?**

In principle, ECTA believes that business models based on the “long tail” theory may benefit from multi-territory rights licenses, not only for back-catalogue works, but also for niche audio-visual work created by small and medium producers, who have difficult access to wide distribution. Furthermore, multi-territory rights licenses may contribute to establish a common floor where content purchaser (mainly, alternative network operators and ISP) may pool together in order to acquire content rights at favourable conditions, thus fostering the efficiency of the content on line services’ market.

### **Legal offers and piracy**

**9. How can increased, effective stakeholder cooperation improve respect of copyright in the on-line environment?**

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<sup>2</sup> “In order to create efficient pan-European structures for cross-border collective rights management, three policy options are considered: (...) – Give right-holders the choice to authorise a collecting society of their choice to manage their works across the entire EU (Option 3)”.

With respect to this question, ECTA agrees with the analysis in the Commission Staff Working Paper accompanying the Communication of January 3, 2008 (pages 28 and 29).

In particular, ECTA fully supports the idea that cooperation between stakeholders is the preferred model to enhance education and proper use of protected works in the internet.

At the same time it should not be the task of a broadband network operator to enforce the law as this remains the responsibility of public authorities.

In case of illegal behaviours, there must be a court or public body that formally orders the network operator to send warnings or to disclose data. The warning letter should not be perceived as a letter from the telco and its cost should be compensated.

Proportionality is also important. In some countries there is a huge disproportion between sanction per illegal peer-to-peer and other unlawful conducts.

The right of privacy of the users are essential and need to be preserved.

<b>10. Do you consider the Memorandum of Understanding, recently adopted in France, as an example to be followed?</b>
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The French Agreement is country specific and it is dealing with various items, therefore a general evaluation is not possible. It should be stated at the outset, although we support the idea of cooperation between stakeholders in the fight against piracy, we believe such cooperation should be based on commercial negotiations and not mandated by legislation. In addition, it is regrettable that in France only a limited number of ISPs were invited to elaboration and finalization of the agreement whereas the law will apply to the entire industry. Also because the subject is still on progress and could lead to tougher dispositions than those agreed previously.

Nevertheless - in principle - some of its features are interesting and could be further analysed, assuming operators would be compensated for their costs. From the legal delivering contents point of view, obligations for right holders to open their catalogue to digital distribution & promote interoperability could also be considered positive.

Some aspects are more controversial: the French agreement sanctions the subscriber which is not always the real infringer (e.g. a family, community or collective place where there are many people accessing at the same time)

On top of that, Internet disconnection as a sanction can in most situations be regarded as disproportionate unless the specific illegal behaviour requires such a remedy (for instance: as car accidents occur, you are deprived of driving licence only if you kill somebody!) and in many cases is contrary to human rights and constitutional rights. With respect to this point, it has to be stressed, as multiplay access is driving the European market, Internet disconnection could deprive citizens of their right to benefit, thanks to Universal Service, from telephone service and more worryingly, the opportunity to reach emergency services.

As far as filtering technologies are concerned, it has to be taken into account that such systems are not completely effective and do not provide a full guarantee against non-copyrighted legal content. Above all, it's worth noting that filtering technologies can be easily bypassed just using encrypted protocol.

It must be also noted that filtering technologies would require huge investments by broadband network operators that would substantially increase the cost of access to broadband services, possibly extending the digital divide. For instance, with respect to NGN deployments & specifications of IP traffic which emphasizes local traffic, filtering measures must be implemented not at the network core level but at the nearest end to users, basically at the first IP system level to be effective (in this case, access multiplexer (DSLAM, BTS...) localized into MDF or neighbourhood). Since IP access systems had not been designed to ensure filtering measures, enforcing filtering measures needs investment into dedicated systems in order to improve existing IP access systems. Regarding costs of these filtering systems (40.000 €/ filtering box) and number of access point (more of 30.000 for a country such as France), it represents at European level an annual charge of billions Euros.

Finally, last but not least filtering constitutes a strong attempt to freedom of communication.

At least, such a remedy requires an impact assessment on the basis of technical experimentations and juridical analysis to evaluate if its implementation is proportionate or not compared to the cultural industry's prejudice.

<b>11. Do you consider that applying filtering measures would be an effective way to prevent on line copyright infringements?</b>
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As remarked in the answer to question ten, ECTA does not believe in the effectiveness of filtering measures as too invasive for both network operator and the users, as well as financially heavy.

The downsides of the introduction of filtering measures are extremely relevant:

- a. It has to be stressed that there is no filtering technology proven to be 100% effective in guaranteeing non-copyrighted legal content from being downloaded. On top of that, as there are no ways to make a clear-cut distinction between copyrighted files and illegal ones, in the attempt to block the download of illegal material, the filtering technologies would end up unduly restricting the legitimate usage of Internet blocking the download of perfectly legitimate content;
- b. Filtering technologies are helpless in the presence of encryption. Encryption of P2P traffic is already occurring at an increasing rate; filtering measures will likely only encourage universal adoption of encryption to avoid detection.

- c. Filtering will likely result in a demonstrable risk of degradation of network. For instance, if in response to any filtering measure concerning dedicated ports to P2P, piracy organizations decide to reconfigure their software to use port 8080 (dedicated to e-commerce) or worse port 80 (dedicated to web traffic), the entire IP traffic could be blocked. Even worse, applying massive filtering measures could dangerously affect national security & justice efficiency, by preventing police & justice investigators but also public authorities such intelligence services or customs from effectively carrying out their investigations operations.
- d. risks for privacy are very relevant as these technologies are highly invasive;
- e. furthermore, filtering would dramatically increase the cost of access to high speed broadband and, therefore, affect digital divide. It also has to be considered that there are relevant economies of scale in the introduction of filtering measures and therefore the investments involved would be much heavier for alternative network operators and in general for players with a limited number of customers.
- f. Therefore, besides ineffective, the enforcement of filtering measures would be highly detrimental for the competition and an impact assessment on the basis of technical experimentations and juridical analysis to evaluate if its implementation is proportionate or not compared to the cultural industry's prejudice.

In fact, the legitimate need to protect the economic interests of copyright holders gives no ground to monitor all electronic communications with filtering measures and algorithms. Again, there seems to be a dramatic disproportion in the way peer-to-peer is treated in respect to other illegal behaviours.

ECTA is in favour of a system in which the user is "educated" and encouraged to use legal download due, inter alia, to a richer content library and a range of business model that increase the choice of the consumers reducing the advantages of downloading illegal material.