



ELECTRONIC FRONTIER FOUNDATION RESPONSES TO THE CREATIVE CONTENT ONLINE CONSULTATION QUESTIONNAIRE

Digital Rights Management

1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online 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?

The Electronic Frontier Foundation (EFF) respectfully disagrees with the Commission's expectation that DRM will support the production of creative content online. Over a decade of experience with DRM shows the converse is true. DRM-encumbered services will not attract consumer patronage and thus cannot compete effectively against unauthorized free online offerings. Consumers perceive DRM-encumbered content as a lesser value proposition than content unencumbered by DRM, even when the latter is more costly. The major music industry has effectively acknowledged that DRM is not needed for the development and maintenance of authorized online content services, as evidenced by the abandonment of DRM on audio CDs by all four major record labels. The Commission's recognition in the Communication introduction that we are at a moment of opportunity for consumers to "find new ways to access, and even to influence, creative content available in the worldwide networks"¹ will not be achievable with DRM regimes that restrict user-creators' ability to access and influence. The Commission Staff Working Document identifies more specifically that a "fundamental shift is underway from passive to active media, with users increasingly creating and distributing their own content."² An online environment of creative content enclosed by DRM is at odds with this vision of interactivity and collaboration. A democratic European culture in which individuals have a fair opportunity to participate in the production and distribution of culture can only thrive in an open infrastructure and will be restrained by automated restrictions on the creative access and use of online media.

DRM in practice has perpetuated the fracture between the copyright industries and their customers. New business models for the distribution of music and movies are emerging that have abandoned their failed experiments with DRM in favor of enabling more access and added features for use of cultural works as the value worth paying for. The anti-competitive tendencies of DRM systems to lock users into their products, a clear concern of the Commission, will not likely be solved by mandatory interoperability of

¹ Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: on Creative Content Online in the Single Market. {SEC(2007) 1710} COM(2007) 836 final, Sec. 1.1

² Commission Staff Working Document accompanying the Communication from the Commission the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: on Creative Content Online in the Single Market. {SEC(2007) 1710} COM(2007) 836 final, Pg. 16.



DRM. Mandatory interoperability will likely disadvantage copyright owners in the arms race of updated security patches and their inevitable reverse engineering. The gap will widen between the DRM protected silos of content and the user created content shared in open online environments and the tensions between them will rise. The Commission has a unique opportunity in this consultation to investigate the relationship between user created content and DRM to safeguard the future of European cultural production.

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 labelling of digital products and services?

With the advent of DRM systems users are taken from a culture where there is freedom to enjoy media anonymously to one where access is conditioned upon revealing one's identity. The lucrative prospects for mining individuals' intimate personal behavior cannot be held back unless there is at least a required transparency to the coded functionality of DRM systems. The problem of privacy invasiveness of DRM systems goes hand in hand with the invisible and automated licensing terms imposed as a condition of access. Visible warnings on the external wrapping of a product with an easy to understand listing of the restrictions placed on the works' use and what devices it won't play on, can be the first step in making consumers aware of their rights and the limitations placed upon those rights.

3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

In order to address the gross imbalance in bargaining power that EULAs create for consumers, a bright line must be drawn on those EULAs which take force without notification in the act of accessing the work. This blind binding of users has encouraged the boldness of manufacturers to insert ever harsher terms overriding the balances of the law. EULA provisions that have been misused to restrict speech and effect anti-competitive behaviour are:

(a) provisions limiting the right to publicly criticize a product; (b) agreement to being surveilled; (c) restrictions on use with competitor's products; terms are subject to change without notice and (d) the prohibition on reverse engineering. [Do you want to insert a recommendation on non-enforceability as remedy?]

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 practices do you identify in that respect?



As long as DRM systems impose unilateral restrictions on access and use, consumers will never gain confidence in the fairness of the transaction or the absence of negotiation of EULA terms. Dispute resolution mechanisms that enable the user to make use of the work and be accountable *ex post facto* for copyright infringement rather than *ex ante* preventing access and use can restore the balancing of rights and thus consumers' confidence. Rather than unilateral restrictions, a bilateral negotiation of terms such as the request for artistic, educational, journalistic, etc. should be available, together with a mechanism for third party agencies to be able to permit DRM disablement for justifiable policy reasons.

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?

Non-discriminatory access is one half of a solution to opening up closed technological infrastructures that would otherwise facilitate anti-competitive behavior. Without a reliable and transparent means to ensure reasonable pricing, discrimination will simply be justified by cost. DRM solutions are inherently discriminatory by restricting access and use of works with only those technological devices that abide by the terms of the DRM, regardless of whether or not they are reasonable. Competition in the market of digital content distribution will be able to flourish once the barriers and chokepoints of control are opened.

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 issue of multi-territorial licensing and its implications for a single market cannot be extracted from the investigation of the costs resulting from the market dominance of national collection societies and their unchecked control over pricing at the national level. Evidence-based research on the valuation of works and the relative distribution of profits should be consulted in consideration of fair solutions. EFF supports the reduction of transaction costs that would make more works accessible to more people.

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 licences for back-catalogue works (for instance works more than two years old)?

Multi-territorial licensing may facilitate the wider dissemination of works. The implementation of robust exceptions on and limitations to copyright may be more significant in enabling the novel and innovative ways to gain benefit from published works.

Legal offers and piracy



9) *How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?*

The balances struck in the different stages in the historical development of copyright law, always responding to new technologies, must be carried on to the online environment. The continued ratcheting up of exclusive rights to copyright holders are perceived as corporate giveaways when not accompanied by coherent and meaningful exceptions enabling dissemination and use by the public.

The laws of copyright must be interpreted more consistently with the online experience of information production, rather than as a means to perpetuate incumbent business models. For example, the transient reproduction of digital copyrighted material when accessed in computer memory can technically be viewed as an act of copying, but it also constitutes the basic means of communication in the digital environment. The sense of responsibility and fairness in regards to copyright amongst the general public and particularly the millennial generation growing up on the Internet will follow when consideration of the public interest is respected in the bargain of copyright.

10) *Do you consider the Memorandum of Understanding, recently adopted in France, as an example to followed?*

The MoU recently adopted in France is a threat to the open architecture of the Internet. The explosion of innovation and expression that the knowledge economy has witnessed in so short a time has been built on top of networks designed to facilitate the flows of information and knowledge, not to set up checkpoints. Such a strategy moves the locus of policymaking away from judges and legislators, and places it in the negotiation between copyright holder and ISP, whose business interest encourages an overbreadth of blocking traffic.

It is a disproportionate reaction to the complicated shifts taking place in the distribution models of copyrighted works, which includes legitimate behavior as well as unauthorized copying. Liability is being imposed on the Internet Service Providers (ISPs) and Internet intermediaries due to the frustration of an industry, not a result of deliberative policymaking. For individuals, the proposed penalties of ostracism from the Internet signify yet another attempt that overestimates the effectiveness of deterrence while forsaking the moral grounding and legitimacy of the law.

11) *Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?*

There have been attempts to apply filtering measures in different contexts on the Internet for a long time. This implementation of automated systems to exercise the judgment once reserved for judges and legislators in matters of copyright infringement will never be effective at preventing online copyright infringement without having to clock a lot of perfectly legal traffic that may have some shared characteristics with files programmed to be searched, but are being used in a legitimate way protected by law. The



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intended targets of these extraordinary measures on the population at large, will likely move further underground with encryption techniques that evades the filters.

About EFF

The Electronic Frontier Foundation is the leading civil liberties organization devoted to protecting individual rights in the digital world. Founded in 1990, EFF actively encourages and challenges industry and government to support free expression, privacy, and balanced intellectual property rights systems. EFF is a non-profit organization with offices in San Francisco, and Washington D.C., in the U.S.A., and Brussels, in Belgium. EFF has over 12,000 paying members, an electronic newsletter readership of over 50,000 people, and maintains one of the most-linked-to websites in the world (<http://www.eff.org>).