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Executive summary:

We strongly encourage the Commission to take regulatory steps to foster interoperability and prevent access barriers, vendor capture and discrimination of hardware platforms. DRM might lead to a balkanization of the single market and foster undue control over supply channels and discrimination. Thus DRM solutions may eventually exclude SMEs. Strong consumer rights and standard license models will set the ground for technology providers and rights-holders to provide adequate solutions for an emerging pan-European single market of content.

Creative Content Online Consultation

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?

In many fields DRM seems to be not mature enough for mass deployment. Market acceptance of DRM is currently low. Even Steve Jobs of Apple voiced strong DRM skepticism:

...DRMs haven't worked, and may never work, to halt music piracy. Though the big four music companies require that all their music sold online be protected with DRMs, these same music companies continue to sell billions of CDs a year which contain completely unprotected music. ...So if the music companies are selling over 90 percent of their music DRM-free, what benefits do they get from selling the remaining small percentage of their music encumbered with a DRM system? ... If anything, the technical expertise and overhead required to create, operate and update a DRM system has limited the number of participants selling DRM protected music. If such requirements were removed, the music industry might experience an influx of new companies willing to invest in innovative new stores and players.

source: <http://www.apple.com/hotnews/thoughtsonmusic/>

We observe DRM as a technological means that might lead to a fragmentation and and balkanization of the single market and foster undue control over content supply channels. Thus DRM may eventually exclude SMEs, providers from third nations and certain consumer groups. Discrimination may affect providers and users of content negatively.

We strongly encourage the Commission to take steps to foster interoperability of DRM solutions. Regulatory action for more interoperability and promotion of open standards has been the most

effective instrument to build market confidence.

DRM solutions need to fully comply with the requirements of the WTO TBT.

We believe that a dialog with users that face discrimination through DRM such as visually impaired users may lead to improvements of the underlying technology.

A particular field of concern which affects users of the Linux and FreeBSD operating systems is the unavailability of DRM encoding for owners of DVD devices to play legitimately bought DVDs on their machines. Although the DVD DRM protection is recognized as ineffective in some member states there are questions regarding the legality of the *libdvdcss* library that hinder mass market desktop adoption of the Linux platform in particular. *libdvdcss* is a simple library designed for accessing DVDs like a block device without having to bother about the decryption. The European legislator would be well advised to harmonize the legality of the *libdvdcss* use to ensure greater market confidence and acceptance of DRM solutions in open source communities. Supported platforms of the *libdvdcss* library are Linux, FreeBSD, NetBSD, OpenBSD, BSD/OS, BeOS, Windows 95/98, Windows NT/2000, MacOS X, Solaris, and HP-UX.

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?

Naturally DRM limits the ability of consumers to control their equipment and content. Consumers must be made aware in advance that their rights are restricted. They should enjoy the right to return defective drm-protected content and devices they purchased. This would ensure sufficient market pressure for interoperability. To make this happen a set of requirements or principles needs to be defined which individually address cases of discrimination. For instance the principle of *platform neutrality* addresses the discrimination of alternative hardware platforms. The DRM protection of DVD discriminates the Linux platform a known infringement of the principle of *platform neutrality* that leads to market distortion.

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?

Class action should be provided for continued application of provisions that were ruled unenforceable. EULAs often contain these *mala fides* restrictions of rights and are abused as tools of vendor capture.

A policy option is provision of standardized model EULA by public authorities, for instance the EUPL process of DG Informatics IDABC program as best practice.

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?

We believe a dialog between consumer offices and manufacturers would be helpful to promote mutual understanding.

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?*

Discrimination of market players and particular hardware platforms is a serious concern. Preemptive competition policy measures are needed, either regulation or soft law/dialog.

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?*

A territorial price differentiation contrasts the objectives of a common European single market. It is the competence of the Commission to propose new instruments for the promotion of multi-territory rights licensing and the prohibition of technical barriers to cross-border services.

7) *What is in your view the most efficient way of fostering multi-territory 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?*

In the context of DRM regulation a single market principle could overrule artificial technical single market barriers enabled by DRM. The WTO Technical Barriers to Trade (TBT) agreement requires a better implementation in European legislature.

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)?*

Anderson's eclectic teaching is worth to get considered. Esp. we should bear in mind that the current copyright practice does not take into account any asset depreciation of copyrighted content as sound accountancy practice usually applies it to conventional assets. Forced price differentiation for back-catalog works by collective societies could contribute to a better functioning online market for immaterial assets as well as help to address the problem of orphaned works. Here collective societies need to better adapt to online markets. Flexibility of pricing schemes is key.

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

The respect for copyright is a cultural issue and it is clearly beyond the competences of the public authorities to change the preferences of the general public. We see a clash of amazing cultural developments driven by technological changes which would result in adaption of copyright practice and law. The question what kind of copyright practice is desirable for the online environment is open and no stakeholder can claim to have an applicable solution. Paternalistic awareness-raising efforts on behalf of certain stakeholders (that simply want to overcome Schumpeterian competition) are of little use to embrace environmental change.

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

No, not at all. ISPs as carriers should not be involved.

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

Filtering Technology would conflict with the freedoms of unhindered information and communication as a fundamental human right protected by constitutional law. For good reasons it is considered criminal in many member states to block electronic communication. The EU is not well advised to step into Chinese footsteps and create precedence for online communication censorship through carriers for the sake of the financial benefit of the content industry and its inability to adapt to market environmental change.

The prevention of copyright infringements here means to clamp down potentially unlawful action by means of filtering. It is a fundamental principle of a *rechtsstaat* that potential illegal activities cannot be restricted in advance. In the context of copyright infringements decisions about the lawfulness of infringements are subject to private law and ultimately civil court proceedings. Enforcement of individual copyrights is in the hand of authors as holders of their rights and their legal representatives. These decisions cannot be exercised by technical means on behalf of them without prior authorization.

Only a court can determine if a certain use violates rights. It is unavoidable that legitimate uses would get restricted, too.

ESOMA mission

Europe's software industry, especially as SMEs and free and open source teams, is well-known for its ability to compete on a global market. We seek to sustain the health of this industry by promoting best practice:



- *Copyright, trademark, and trade secret* as the best forms of ownership for the IT sector, as compared to software patents.
- *Open standards* as the best basis for innovation and competition, as compared to closed and licensed standards.
- *Competition* as the best basis for market growth, as compared to monopolies.

We want information technology rules :

- Fair to the public. They must be made by elected lawmakers of democratic European Union.
- Fair to innovators. They must allow patents only where needed to spur innovation.
- Fair to all industries. They must adapt to the fast-growing diversity of technology and business.
- Fair to a free market. They must ensure that patent monopolies are narrowly focused.
- Fair to small businesses. They must provide affordable, fast, narrow and predictable rights.
- Fair to open research. They must protect the independent creation of original works.

Our constituencies consist of European SMEs and independent professionals in the ICT sector from across Europe.