

# Creative Content Online in the Single Market

## Response of the Open Rights Group

### Detail of Respondents

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### Response

#### Digital Rights Management

*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?*

DRM has consistently failed to stop unauthorised copying, because it is based on a flawed security model. Instead, by treating customers as criminals, DRM has fuelled the popularity of illicit filesharing systems, and stunted the growth of the legal downloads market. That all four of Europe's major records labels have now chosen to release content without DRM restrictions should be a signal to DG InfoSoc that DRM is not the future of online creative content services.

Even if this were not the case, the feasibility of interoperable DRM is highly questionable. Technically sophisticated users will always be able to crack DRM because DRM always puts the tools to crack it in the hands of the cracker – it cannot do otherwise. Forcing a regime of

interoperability on DRM-providers would mean that DRM-update cycles – a key tool in mitigating against these inevitable cracks – would be slowed. By contrast, the wider availability of information about DRM systems would speed up crackers' abilities to crack DRM. In this regard we note the failure of the Secure Digital Media Initiative (SDMI), a cross-industry attempt to develop technical specifications to protect digital music, which has been inactive since 2001.

We further note a recent communication from Random House with regards to audio books, which indicates that the publisher will no longer impose DRM on its distribution and retail partners. Having conducted significant tests on the effects of distributing content DRM-free, the publisher was able to conclude that making its products available unencumbered by DRM, “will allow for healthy competition among retailers targeting the iPod consumer, without posing any substantive increase in risk of piracy.”<sup>1</sup>

DG InfoSoc should abandon its call for interoperable DRM – it is both infeasible and unnecessary.

*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?*

We support the recommendation<sup>2</sup> made by the UK's All Party Internet Group to the UK Government, that appropriate labelling regulations be brought forward so that it will become crystal clear to consumers what they will and will not be able to do with digital content that they purchase, and we commend this recommendation to DG InfoSoc.

*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?*

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1 See letter to Publishing Partners from Madeline McIntosh, Senior Vice President & Publisher, Random Rouse Audio Group, 21 February 2008, available at: <http://craphound.com/DRMLetter22108.pdf>

2 See “*Digital Rights Management*” Report of and Inquiry by the All Party Internet Group June 2006, available at <http://www.apcomms.org.uk/apig/current-activities/apig-inquiry-into-digital-rights-management/DRMreport.pdf>

End-user licence agreements continue to be a menace to consumers. A recent shopping survey<sup>3</sup> conducted by the UK's National Consumer Council of 25 software products found that 14 of the products contained no reference to the fact that installation requires the user to accept a licence agreement. The National Consumer Council observed “a widespread lack of clear, upfront information, as well as a consistent use of general terms that could be regarded as unfair”<sup>4</sup> across their sample licenses.

The Open Rights Group fully supports all seven of the National Consumer Council's recommendations with regards to end user licensing agreements, and draws DG InfoSoc's attention to three in particular: that providers supply information about the licence and access to the terms of the agreement at a stage before the decision to purchase has been made; that providers ensure that licences are written in accessible language; and that the European Commission bring forward proposals to extend the Consumer Sales and Sales Guarantees Directives to include digital contracts and licence agreements, through the review of the Consumer Law Acquis. Should these recommendations be ignored, we believe it is only a matter of time before the validity of EULAs are successfully challenged in court.

*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?*

Consumers are currently correct to reserve confidence from DRM-encumbered products and services. Recent examples of providers withdrawing support for DRM platforms (Google Video, Virgin Digital) reveal that consumers are not well-served by DRM providers. However, while alternative dispute resolution mechanisms may be desirable, we believe that they will only provide a remedy for a minority of consumers adversely affected by DRM, in particular because dispute resolution will not protect the customer in the event of the close down or bankruptcy of the provider. When this happens, consumers suffer economic loss with which alternative dispute resolution mechanisms are ill-equipped to deal.

*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?*

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<sup>3</sup> See Belgrove, C *Whose licence is it anyway? A study of end user licence agreements for computer software* Published by the NCC January 2008, available at [http://www.ncc.org.uk/nccpdf/poldocs/NCC195rr\\_whose\\_licence.pdf](http://www.ncc.org.uk/nccpdf/poldocs/NCC195rr_whose_licence.pdf)

<sup>4</sup> *ibid*, p2

While we commend DG InfoSoc's regard for SME's, we observe that open standards are the most efficient way to preserve and foster competition in technology markets. This is a good reason for DG InfoSoc to support the market pressure that is already driving content-providers towards open standards and away from services encumbered by DRM.

In particular, open standards allow smaller markets to be served, such as those consumers who require assistive technologies to access content. DRM prevents those consumers that need to (and are permitted under law) from using assistive technologies to access content online. DRM not only prevents the use of subtitling facilities, but also: Flash filtering for epileptics; audio reprocessing for the hard of hearing; dyslexia-friendly subtitling; vision-impaired friendly subtitling; vision-impaired navigation facilities for DVDs.

## **Multi-territory rights licensing**

*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?*

We note the continued reticence from existing member-state level collecting societies to support this option and we understand that as long as national collecting societies continue to vary widely in their efficiency and quality of governance, progress towards multi-territory rights licensing will be slow. Should legislation be considered, we suggest that it focus on transparency and better governance of collecting societies, as this stands to benefit both creators and technology innovators.

*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 licences 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?*

We believe that the online environment will present content providers with multiple markets for their work, and counsel against making any hard and fast distinctions at this stage. Although we note the view that local competition across collecting societies could cause an undesirable downward spiral in the value of music, we would like to see more qualitative and quantitative investigation conducted into a wholesale market for rights. In particular we note that music and recordings are often undervalued, and collecting societies are under-incentivised to create new value for artists, for instance by exploring the licensing of innovative distribution mechanisms such as peer-to-peer filesharing. In this respect, the

greater efficiency and innovation created by a more open market for collecting societies could potentially lead to more revenue for artists.

*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)?*

We have not seen enough evidence to state whether long tail models would benefit more from multi-territory rights licenses.

## Legal offers and piracy

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

In an independent review of the UK intellectual property framework of 2006, Andrew Gowers observed that “Copyright in the UK presently suffers from a marked lack of public legitimacy. It is perceived to be overly restrictive, with little guilt or sanction associated with infringement.”<sup>5</sup> In order for the public to respect copyright in the online environment, it is up to legislators to maintain the balance that is inherent in copyright law between, on the one hand, restrictions sanctioned in the interests of rightsholders interests, and, on the other the interests of consumers and follow-on innovators to be free from restrictions.

This should be achieved through a number of channels. At member state level, legislators can examine and where necessary sanction the expansion of exceptions to copyright law, as the UK Intellectual Property Office are currently doing with their investigation into exceptions for the purpose of format shifting, archiving, or creating parody or pastiche<sup>6</sup>. At EU level, new exceptions, such as one for transformative use put forward by both Gowers and, in recent months, by DG InfoSoc<sup>7</sup>, should also be considered, to better reflect consumers interaction with content in the online environment.

Crucially, the expansion of copyright term should be approached with extreme caution, as if

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5 See para 3.26 of *Gowers Review of Intellectual Property*, December 2006, available at: [http://www.hm-treasury.gov.uk/independent\\_reviews/gowers\\_review\\_intellectual\\_property/gowersreview\\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm). Note that the UK Government accepted all of this review's recommendations.

6 See UKIPO, *Taking Forward the Gowers Review of Intellectual Property: proposed changes to copyright exceptions*, January 2008, available at <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf>

7 See Murray, Jim, *Commissioner Reding answers European consumers' questions*, BEUC in Brief No 60, July 2007, available at <http://docshare.beuc.org/Common/GetFile.asp?PortalSource=483&DocID=10095&mfd=off&pdoc=1>

proposed without compelling economic evidence, it will only serve to reinforce the stereotype that copyright law is drafted and enforced for the sake of rightsholders, rather than for the sake of the creative economy as a whole. We agree with the Adelphi Charter on creativity, innovation and intellectual property<sup>8</sup> that "there must be an automatic presumption against creating new areas of intellectual property protection, extending existing privileges or extending the duration of rights. The burden of proof in such cases must lie on the advocates of change."

In this regard we note Commissioner McCreevy's recent proposal to extend the copyright term in sound recordings, and draw DG InfoSoc's attention to the compelling evidence<sup>9</sup> that demonstrates that such a move would discourage innovation, stunt the reissues market, and irrevocably damage future artists' and the general public's access to their cultural heritage. We further note that some of this evidence<sup>10</sup> was commissioned by DG Markt itself, and question the Commissioner for the Internal Market's subsequent proposal to extend term. We call on DG InfoSoc to speak out against this proposal. Doing so would be an important victory for the public legitimacy of copyright law.

Beyond the role of legislators, we believe that, as in the past, the inherent flexibility within copyright law should be exploited by content providers and innovators to deliver content online through new distribution channels, including peer-to-peer filesharing. We regret the lack of imaginative thinking to date with regards to legitimising peer-to-peer and using its popularity to leverage money for Europe's artistic community through new licensing practice. In this respect, the willingness of legislators to act in the interests of incumbent distribution channels – potentially delaying innovative licensing practice that could reach new markets and gain new income for artists – cannot be ignored.

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

Absolutely not. The actions described in the MoU recently adopted in France are flawed in at least three aspects. Firstly, they are disproportionate. The sanction of disconnection would

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8 See <http://www.adelphicharter.org/>

9 See *Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings*, Centre for Intellectual Property and Information Law University of Cambridge, available at [http://www.hm-treasury.gov.uk/media/B/4/gowers\\_cipilreport.pdf](http://www.hm-treasury.gov.uk/media/B/4/gowers_cipilreport.pdf) and *The Recasting of Copyright & Related Rights for the Knowledge Economy*, iVIR, available at [http://www.ivir.nl/publications/other/IViR\\_Recast\\_Final\\_Report\\_2006.pdf](http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf)

10 See *The Recasting of Copyright & Related Rights for the Knowledge Economy*, iVIR, available at [http://www.ivir.nl/publications/other/IViR\\_Recast\\_Final\\_Report\\_2006.pdf](http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf)

undoubtedly target not only the illicit activity, but a far wider range of activities, including civic engagement, commerce, legitimate access to media and more general communications. Not only this, but the sanction is likely to be imposed not just upon the infringer, but on the infringer's entire household. This could disadvantage innocent parties such as children accessing educational resources or spouses running businesses from home.

Secondly, they lack consumer safeguards. In particular, it is as yet unclear how consumers who are falsely accused under the schemes described in the MoU would seek redress and restitution.

Thirdly, they are technically infeasible. It is inevitable that, once the procedures described in the MoU come into existence, technically sophisticated illicit filesharers will simply encrypt their traffic in order to mask its content and origin. Subsequently, these technically sophisticated users will develop interfaces allowing non-technically sophisticated users to take advantage of these techniques. Thus not only would the procedures be rendered ineffectual, but the practice of illicit filesharing would be driven further underground, and the tension between consumers and rightsholders would be further exacerbated with consequent effects on the perceived public legitimacy of copyright law.

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

Absolutely not. Any filtering measures would be as technically infeasible as IP address-based sanctions, and would result in the same sequence of events detailed above.

Further, such methods are likely to fall foul of Article 15 of the E-Commerce Directive, which states: "Member States shall not impose a general obligation on providers... to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."<sup>11</sup>

## **About the Open Rights Group**

The Open Rights Group is a grassroots digital rights advocacy group based in the UK. It aims to increase awareness of digital rights issues, help foster grassroots activity and preserve civil liberties in the digital age. It is funded by individual donations and small grants.

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<sup>11</sup> See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:NOT>