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Public Consultation On Copyright

Creative Content Online – Policy/Regulatory issues for consultation

ÍNDICE

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?*

   This is simply an out-to-dated issue. We should turn our TVs on, buy some recent newspapers, and then we will be able to see that **even the strongest DRM defenders** -we are talking about EMI; we are talking about Apple; we are talking about Amazon.com; we are talking about more and more former DRM defenders every day becoming DRM distrustful- **are abandoning DRM**.

So why does European Commission come now to propose the enforcement of a dying *technology*. Its death is not casual; it invades privacy; it shocks the customers experience, reducing their freedom for using the products they bought -it's not a good idea for a EU citizen to buy a film DVD in the US, as it was not going to work in an EU DVD player; just a example of how nonsensical is the DRM idea-; and finally -that's the reason for the former DRM defenders to abandon it- it provokes the retailers to dramatically see their sales falling without control.

A dying *technology* which compromises privacy, because DRM needs to spy your playing devices. Let's going to check Windows Vista EULA:

> Windows Media Digital Rights Management. Content owners use Windows Media digital rights management technology (WMDRM) to protect their intellectual property, including copyrights. This software and third party software use WMDRM to play and copy WMDRM-protected content. If the software fails to protect the content, content owners may ask Microsoft to revoke the software's ability to use WMDRM to play or copy protected content. Revocation does not affect other content. When you download licenses for protected content, you agree that Microsoft may include a revocation list with the licenses. Content owners may require you to upgrade WMDRM to access their content. Microsoft software that includes WMDRM will ask for your consent prior to the upgrade. If you decline an upgrade, you will not be able to access content that requires the upgrade. You may switch off WMDRM features that access the Internet. When these features are off, you can still play content for which you have a valid license

So, to be able to access the contents, one has to allow the DRM tools to survey the entire device; that is not acceptable anymore. Like we are going to state during the answers to this questionnaire: **for the sake of the balance between**

rights, if any kind of measure -meant to enforce any kind of right- **does violate privacy, it becomes unacceptable**.

Finally, online creative content services don't begin nor end in DRM-based ones. You can take a look on Jamendo, for instance, to see by yourselves, members of the European Commission, that neither the iTunes & simmilar services are the only business opportunities around the online commercial exploitation of creative contents. **It is mandatory for the European Commission, who rules for all the EU citizens, to develop rules meant to serve every single EU citizen, and to cover -following the free market spirit that lies in the foundations of the EU- every single business solution**; so let's start forgetting biased solutions that, by the way, are even being left behind by their former defenders, and that are not compatible with civil rights and liberties.

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?*

   As stated in the answer to the former question, DRM systems must disappear from EU and worldwide markets: it cannot be allowed that commercial creative contents, crippled intentionally by traditional entertainment industry, reach the customers. In the same way as nowadays illegal software copying is prosecuted, and there are advertisements against author's rights violations, a campaign to alert EU citizens about their right to acquire fully functional products ought to be done. The only possible label for DRM products should be "illegal".

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?*

   Reducing the complexity and enhancing the legibility of unfair, harmful DRM'ed EULAs as the Microsoft one cited in the previous answer only contributes to make clear their unfairness and their harmfulness.

   We honestly think that you, ladies and gentlemen from the European Commission, should not make such a tricky question, because it lies implicit in that question that DRM should be, and that you are just asking us how to make DRM appear to be good-looking, civil rights & liberties compatible. However, something that is not civil rights & liberties compatible -because violating privacy is not- and that is not good-looking -why Apple, EMI, Amazon.com

and others are slowly abandoning DRM? If it were such a wonder, that companies' behaviour would make no sense-, we are not able to make it appear to be good-looking and civil rights & liberties compatible ... using the truth.

So if the question is if we agree with your proposal, our answer is no, because the development of online creative content services does not rely on DRM at all -you have Jamendo as a pretty good example-.

Another problem with EULAs that the EU Comision should take into consideration is the concept of "Shrink-wrap and click-wrap licenses". The term shrink-wrap license refers colloquially to any software license agreement which is enclosed within a software package and is inaccessible to the customer until after purchase. That kind of licenses should be clearly outlawed.

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?*

   Customers are not going to have their confidence enhanced -whatever the alternative mechanisms were going to be proposed- in systems that restrict their civil rights and liberties for the benefits of traditional entertainment industries' sake, also restricting -and also for the traditional entertainment industries' sake- author's rights.

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?*

   Our stance about this is to not discriminate anyone about accessing DRM systems - directly nobody should use them, as we expressed in our previous answers -whether SME or not-.

*Mul*ti-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?*

   Certainly, harmonizing State members' laws on author rights regarding multiterritorial licensing seems necessary to us. However, whether to address this issue through a mere recommendation or through a directive is also a crucial issue.

The private copying levies, which is an issue to be discussed in a different consultation, shows the troubles caused by such heterogeneous application of EU rules -we in Spain know something about those troubles, as we are one of

the State members suffering the worst effects of private copying levies-. Of course we don't mean to compromise each State member ability to establish its own rules; the question is if we want fully operative multiterritorial licensing, maybe it would be needed to put together all the State members, agree on a common basis -of what really matters about this issue- and make it rule at every State member through a small-sized, issue-prioritized directive instead of a broad, tough, big recommendation.

It is also interesting what appears in the briefing about this questionnaire: "*there is a need to improve the existing licensing mechanisms to allow for the development of multi-territory licensing mechanisms,* ***for instance by promoting fair competition on the market for rights management***". This is a very, very essential issue; we in PIRATA defend -as we, like in France and other EU countries where traditional RMOs (Rights Management Organizations) make their will even against their associates' will, know very well the typical abuses of traditional RMOs- that a rights management model where authors are forced to transfer those rights under harmful conditions to their own interests must be rejected; instead, we introduce the absolute obligation of bringing authors the right to choose between self-managing their own performance rights or choosing to work with one of several performance rights organisations. So, for competitiveness' sake, we think it's needed to define quite well the EU market for rights management, allowing

- Self-management: author's rights belong to authors and to no one else; if some authors wants to individually manage their rights by themselves, they should be able to find that choice written and secured within the EU laws
- Free RM market:
    - anyone, being or being not an author, should be allowed to create RMOs
    - RMOs should be treated like any other intermediaries within any other economic markets; culture must not be an excuse for RMOs to work outside the law -and they do it, and it has been proven, when for instance in Spain some RMOs have demanded SMEs (which were not using creative contents of authors associated to those RMOs) to pay the usual fees for usage of associated authors' contents; laws are for everyone, so RMOs working outside the law must be severely punished-
    - authors should be protected like customers of any other intermediaires within any other economic markets; RMOs must be at their associates' service, and not the opposite, thus signing with a RMO must not cancel the authors's right to decide about their rights on the creative contents; nowadays, as signing with a RMO means to make that RMO become the rights holder, it happens the opposite, and it must end inmediately to only return the right to decide to the authors

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 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?

The only primary-secondary model that seems to fit with the EU free market principle is the one which defines the whole EU as the primary multiterritorial market, and each State member as the secondary multiterritorial market. If we define an intermediate different secondary market consisting on only some State members, we think we wouldn't be solving the issue, but redefining new territorial author's rights boundaries while keeping alive the main trouble that you in the European Commission are willing to solve.

It would happen because as you state in the briefing about this questionnaire], "*as a result of copyright territoriality, a content service provider has to obtain the right to make content available in each Member State. The costs incurred, may be detrimental to the exploitation of a vast majority of European cultural works outside their national markets*"; so defining secondary markets larger than State members but smaller than the whole EU would just slightly diminish that extra costs, not really reducing it to minimal or even non existing levels.

We also should not forget the copyleft -and simmilar (i.e.: Creative Commons and others)- licenses. It is quite essential to make those licenses be operative in the primary -the whole EU- multiterritorial market, because otherwise, copyleft authors will when they choosed such licenses would be undermined exactly because of the troubles shown by the European Commission in the quotation from the former paragraph.

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)?*

Of course they do. One of the biggest troubles within the actual author's rights model is that, during the period -actually 50-70 years after its fixation/publishing- when author's rights over the phonograms/audiovisual works are still in force, most of those works really disappear from the market, are not made available to the public, despite the Universal Declaration on Human Rights clearly states in its article 27.1 that "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts [...]". We in PIRATA know that private copying exists, and that existing copies from those back-catalogue works would may be -depending on laws about filesharing- available even if nobody were going to retail copies of those works, in some cases; however, how would it be possible when no single copy is available to be shared -specially we have in mind pretty old works from 50's, 60's and even older; there are to many creative contents shelved in who knows where-? Every single already published creative content, as stated in the UDHR, should be put available to anyone.

So it's mandatory for the EU to make those back-catalogue works available for everyone before their passing to the public domain, because EU citizens are not responsible for the traditional disappearance of those back-catalogue works; and clearly we agree that promoting the long tail model, through setting the conditions to make easier to the business created upon that model to work and take advantage from the benefits of the fre EU market, would nonetheless help retailers to find new business oportunities, and help citizens to really have their right to enjoy the arts.

Legal offers and piracy

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

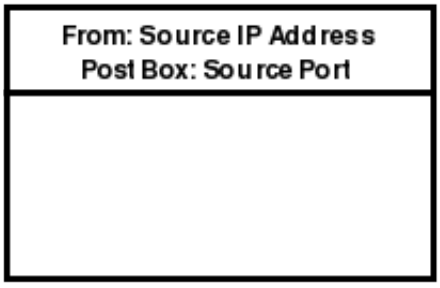
You can't legislate against your own citiziens and then expect them to obey and respect the law. It doesn't work that way. You need to start listening to them. The current copyright laws establish huge periods of time of copyright protection. We believe works should only be protected by copyright for periods of 30 years. And we also believe that any non-commercial use of copyrighted works should be legal. The best way to gain respect in Internet is not creating absurd and abusive laws, and unfortunately copyright laws are a shinny example of what not to do.

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

The french model is precisely is an example of what shouldn't be done, because it's the maximum exponent of how to reach to an agreement by only some of the implicated parts, without taken the consumer into consideration.

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

Sometimes the true Internet condition is -willingly or unwillingly- forgotten, left aside. What is Internet nowadays made of? Packages, bunches of 1's and 0's that together have some meaning -for the transmitters and the receivers-. And, how does -showing it in a very very simple manner- one of those packages (a TCP package) look like?



That's it: **when we use Internet, we are just sending information as if we were using ordinary mail** -though in a *slightly* more sophisticated way-. One may say: OK, but that isn't anything that we didn't already know; really? Then let's gonna answer a simple question:

Would we allow postal services to survey every single mail WITHOUT ANY COURT WARRANT in search for criminal contents?

If the answer is no -we hope so-, then why do we put the filtering issues proposed in the Memorandum of Understanding as a model?

If the answer is yes ... well ... ISPs are not the Police, and are not allowed to indiscriminatedly violate the secrecy and privacy of communications. It goes against Spanish Constitution; it goes against German Constitution -recently, the German Court has found partially unconstitutional a related issue about surveilling home PCs; it cannot be indiscriminated, only suspected criminals and terrorists and **always through a court warrant**-; and if maybe it does not go against any single member State's Constitution -and we are not sure just because we have not checked the 27 EU national constitutions-, may the Spanish and German cases work as a clear example of why this simply cannot be.

And it cannot be, because the only way for ISPs to check whether the transmitted contents between third parties using their networks infringe any law is checking the transmitted packages' contents. As we have seen, that's illegal without a court warrant, and getting court warrants to check criminal contents is something that already exists in our laws. So, as we already have the legal tools to fight the crime, it would be better to stop attempting to use author's rights as a pretext to subtly introduce generalized surveillance of the citizens of the EU. If the measures you propose are not compatible with privacy, they become simply unacceptable.