

**Public Consultation on Content Online
in the Single Market**

Submission from the Open Rights Group

Open Rights Group
12 Duke's Road
London
WC1H 9AD

Contact: Suw Charman, Executive Director
Tel: +44 (0)20 7096 1079
suw.charman@openrightsgroup.org

<http://www.openrightsgroup.org/>

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1. Introduction to the Open Rights Group

The Open Rights Group is a not-for-profit advocacy group which works to raise awareness of digital rights issues in the UK and Europe. A supporter-funded group, ORG connects journalists with experts, organises campaigns and engages with government consultations on behalf of its supporters and the wider public.

2. Comment

The views of all stakeholders in the information society should be taken into account when forming policy. Broadening your consultation to stakeholders outside the private/corporate sectors is an important step which we fully support. While all stakeholders agree that copyright is of growing importance in the development of the information society, it is paramount that all affected parties, including the public, have adequate opportunity to convey their views on the development of copyright law and policy.

Policy should result from a combination of subjective surveys and empirical research. Policy must not be based solely on the opinions and reports produced by those with vested interests. Instead it should be a product of independent empirical research. Where empirical research is commissioned, results must be acted upon even if their recommendations might be unpopular politically or with industry lobbying groups. We must not follow the example of the Database Directive review - where damaging policy was allowed to stand because it was easier than changing it - but rather show the kind of responsiveness to broader stakeholder interests that was demonstrated in the handling of the Software Patents issue.

We highly recommend that you follow the recommendations of the RSA's Adelphi Charter (1) when considering reform.

3. Specific concerns

3a. Licensing, rights clearance, right holders remuneration

It is becoming increasingly common for rights holders to use contracts and contract law to bypass copyright law, using overly restrictive licence agreements to prevent the public from exercising their fair dealing rights. This effectively extends rights holders monopoly control beyond that granted them by copyright law and, in some cases, diminishes the public domain.

Licences, rather than contracts of sale, are emerging as the key transaction method in the digital environment. The majority of these licences deliver fewer access and copying rights than are available under existing copyright law.

3b. Networks

We fully support the concept of 'network neutrality', which maintains low barriers to entry, provides unfettered access to lawful content, and promotes competition. We should be very wary of any legislation which might allow network operator to profit from discriminatory practices, particularly as network neutrality is already embedded in the concept of 'mere conduits' as enshrined in the ECommerce Directive. Like the Single Market, network neutrality has allowed small publishers and businesses across Europe to reach a wider public thus avoiding media hegemony. It must, therefore, be protected.

A number of undesirable outcomes may result from an end to network neutrality:

- Anti-competitive behaviour, where network operators implement exclusive or preferential deals, or use the tiered system to unfairly promote own-brand content.
- A skewed market that favours larger and better funded content providers, inhibiting local diversity and innovation.
- Increased costs for consumers, because content providers inevitably pass on surcharges to their customers.
- Increased consumer confusion, because broadband users will experience varying response times in a tiered system.

3c. Piracy and unauthorised uploading and downloading of copyright protected works

A failure to distinguish minor copyright infringement performed by individuals from large-scale commercial counterfeiting of works by organised criminal gangs will damage public respect for copyright law. Whilst the former technically constitutes copyright infringement, there is no compelling evidence that it actually harms either right holders or authors / producers. Prosecuting such cases is not in the public interest, and it is particularly important that such infringement remains a matter for the civil, not criminal, law. Introducing draconian IP enforcement provisions, beyond the measures available in most member states, at the behest of multinational content-industries to 'fight terrorism' will also have a corrosive effect on public respect for copyright law.

3d. Digital Rights Management (DRM)

We recommend that the Commission avoid future market interventions such as the Copyright Directive's anti-circumvention provisions, but instead allow the market to decide if DRM is a useful tool for consumers. We particularly support the lifting of anti-circumvention legislation Europe-wide.

- DRM is given close to total legal protection within the UK, with no practical processes allowing for legal circumvention in the interests of disabled access, long-term preservation (archiving) or where the DRM prevents

uses permitted by fair-dealing exceptions. One practical effect of the EUCD anti-circumvention provisions is to undermine the intent of laws protecting the disabled and ensuring public access to information goods. In particular, libraries are worried about losing our cultural history, and the British Library has issued a report on this matter (2).

- . DRM does not have to expire, and can effectively prevent the work from entering into the public domain at the expiry of the copyright period.

We recommend that DRM and TPM (technical protection measures) are not allowed to undermine the longstanding limitations and exceptions such as fair dealing in UK law. One possible method to ensure user-rights (suggested by the UK's National Consumer Council (3)) is for mandatory labelling of DRM products, clearly explaining permitted and prohibited uses.

4. Afterword

If you would like ORG to provide more detailed testimony, please contact Suw Charman, Executive Director (suw.charman@openrightsgroup.org).

References

(1) The RSA Adelphi Charter -

http://www.adelphicharter.org/adelphi_charter.asp

(2) The British Library's IP Manifesto -

<http://www.bl.uk/news/pdf/ipmanifesto.pdf>

(3) The National Consumer Council's recommendations for labelling DRM -

<http://www.ncc.org.uk/intellectualproperty/gowers.pdf>