

February 26, 2008
Vilnius, Lithuania

Dear Sirs,

In response to the Public Consultation on Creative Content Online (http://ec.europa.eu/avpolicy/docs/other_actions/col_en.pdf), please find our comments below:

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?

Interoperable DRM systems are crucial for the following reasons:

- lack of interoperability facilitates market concentration and other distortions, as well as exercise of market power by equipment manufacturers, content distributors;
- lack of interoperability limits consumer choice and competition, may potentially waste consumer investment into the content, protected by particular type of DRM;
- lack of interoperability stifles innovation, disallows feature-competition.

Obstacles to interoperable DRM largely are artificial and driven by selfish interests - reluctance of market incumbents to commit the technology to open standards, locking the market to their own hardware or proprietary standard, which earns revenue.

Regulations for Interoperability of DRM shall be tantamount to software decompilation regulations set forth in the Directive 91/250/EEC (Article 6), i.e. legal protection for DRM shall be denied (or in other words - DRM may be legally reverse-engineered) in cases where there is no possibility to obtain the information necessary to achieve the interoperability of the DRM protected content with other software, hardware or media, and provided that the following conditions are met:

- (a) these acts are performed by the licensee or by another person having a right to use a DRM protected content, or on their behalf by a person authorized to so;
- (b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and

(c) the resulting information shall not be publicly disclosed.

The said rules shall not permit the DRM interoperability information obtained:

- (a) to be used for goals other than to achieve the interoperability of the DRM protected content with the independent software, hardware or media; or
- (b) to be used for the development, production or marketing of a substantially similar DRM system.

Compulsory licensing system may be considered as a secondary alternative, albeit it may not be necessary when the legal path to reverse-engineer the DRM for the interoperability purposes is provided.

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?

It shall be expressly prohibited to manage any consumer personal data for the purposes of DRM (including any software, technology or means allowing tracking of consumer actions or disclosing of personal data), and effective sanctions shall be provided for non-compliance. Technologies which interfere with the security of the consumer personal data indirectly, e.g. open up a new data transfer channel (e.g. TCP/IP ports), shall also be prohibited.

The EU shall at least legislate to ensure the uniform standards for the DRM protected content labeling – e.g. approve the particular label and consumer information message (warning), as well as label/warning visibility standards. Environmental labels may serve as a preferred model.

Very precise regulations of enforcing copyright exceptions against the DRM protected content are also necessary. Among other things, the consumer right to return the unacceptable digital content and to receive compensation for it shall be considered. In order to eliminate the risk of abuse by the consumers, the consumer may be charged certain return fee (e.g. 10% of the value of the respective content).

3) Do you agree that reducing the complexity and enhancing the legibility of end-user license 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?

Legibility of EULAs to consumers is increasingly an issue, however regulation may hardly be a solution for improvement of the the legibility and may only complicate things further. Although consumer friendly licensing (such as Creative Commons - <http://creativecommons.org>) is increasingly attractive, it is also rather young and remains to be adopted for major commercial application. Nevertheless, Creative Commons combined with online licensing (e-licensing) and one stop shop licensing may be the elements needed for the friendlier future licensing model.

EULAs need regulation with respect to two areas - data protection and consumer rights. EULAs shall be required (through regulation) to exclude any consumer consents and other provisions with respect to data protection (e.g. access to and disclosure of consumer data), and such provisions shall be expressly regulated as void. Express and separate consumer consent shall be obtained instead.

Whole new framework on the digital consumer rights is necessary, since there is no further justification on the current limitations of the EU consumer protection framework to audiovisual content (e.g. exclusion of audiovisual content and software in the Par. 3 Article 6 of the Distance Selling Directive 97/7/EC), especially considering that EULAs are usually unavailable without unsealing these items (or even running the software or in some past cases – DRM applications).

Separately, in case of restrictive EULAs particular regulatory safeguards shall be put in place, disqualifying the right holders from benefits of the public social compensation schemes (i.e. benefits of the copyright levies). This is necessary since the content industries and collective administration bodies have not come up with any viable and uniform solution for reconciling DRMs and levies.

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 that alternative dispute resolution (ADR) mechanisms do not contribute to consumer confidence, especially in the new EU Member States. The ADR mechanisms in most cases (especially based on Lithuanian experience) lack authority and impartiality, they add additional complexity, while failing to provide final solution. Also, very limited

remedies (and almost no sanctions) along with the prohibitive costs of the judicial path discourage consumers from seeking resolution.

Clear and straightforward remedies (as well as particular economic sanctions) available to consumers (e.g. express right to return unsatisfying content for a refund, express right to bail out of the unsatisfying digital service) would be preferred option.

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?

As long as interoperability and openness of DRM technologies is ensured (resulting in increasing competition both in the DRM technology, content and content distribution markets) through regulations suggested above, we believe that market itself is able to produce SME friendly DRM solutions. Thus, no special regulations for SME access to DRM technologies are necessary. Instead the governments shall set an example by themselves adopting and advocating interoperable and open content standards.

It is also noteworthy that DRMs are far from established technology, and SMEs are in position to produce disruptive innovations, which independent from the existing DRM technologies. Artificially added ease of access to existing DRM technologies risks interfering with the economic incentives for innovation in the field.

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?

Uniform Common Market for digital goods shall be principal priority for the European Parliament and the Council, as well as the European Commission within the Creative Content Online initiative. Multi-territory (EU-wide) rights licensing is one of the key tasks. Multi-territory rights licensing may be facilitated by the real competition for the collective administration of rights, since only with competition it will become lucrative.

Collective administration institutions in Europe have had ample time to come up with multi-territory licensing solution, however due to obvious lack of incentive, failed to find their own way. Also, there is no reason to believe that they will be interested to change the *status quo* without the external stimuli.

In this situation, we are not in favour of soft-law regulation, since previous recommendations (especially Commission Recommendation 2005/737/EC of 18 October 2005) have had only limited effect. Also some of the means that we are proposing (see (7) below) are impossible to undertake by means of soft-law alone.

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?

Current collective administration mechanisms lack efficiency and transparency, moreover, they have little or no incentive to improve in these areas. This is the one of major causes undermining the multi-territory rights licensing (as there is little added value for the existing collective administration bodies).

Several measures are needed in order to overcome these obstacles:

- (a) margins and detailed expense statement of the collective administration shall be required to be public;
- (b) disbursements and wages of the management of the collective administration bodies (including disbursements to the board members, etc., which are not employed by the collective administration body and only receive disbursements as a compensation for their rights as an artists) shall be required to be public;
- (c) uniform standards for compensation for the same types of rights and standard uses thereof are needed at the Community level;
- (d) facilitating of Community wide e-licensing platform, accessible online and open to the public, as well as right-holders;
- (e) encouragement of one-stop-shops, i.e. automatic clearing of rights at a standard rate (cf. (c) above).

Added market pressure alone is capable to increase efficiency of the collective administration, as well as augment their interest in multi-territory licensing.

Copyright levies, which are essentially a form of automatic licensing to consumers, shall also be re-evaluated. E-licensing may be proper means to provide fair and adequate compensation for the consumer uses of the digital content, without imposing the broad, inefficient and non-transparent social burden of current levy systems. Thus, instead of a general levies on media, a consumer in need or a additional private use copy shall be able purchase an inexpensive and standardised individual license online. We believe that current levy systems are one of the burdens for the further development of the content market in the EU.

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)?*

We agree in principle, however, more empirical studies are necessary in order to establish the optimal level of compensation. We also believe that older content shall be made increasingly accessible to the society, by establishing incentives for the right holders to make such content less expensive and accessible. One possibility may be to gradually decrease compensation for such content (i.e. decrease amounts channelled through the collective administration system), unless the general pricing and accessibility is not improved by the right holder voluntarily. Similar possibility may be gradually increasing taxation of the older content, which would make it less profitable to the right holder if the same price is maintained (as for the new content).

Legal offers and piracy

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

Stakeholders (which shall include the consumers of digital content) have a lot to do in improving copyright protection online. Stakeholder cooperation will only be effective provided it represents all stakeholders, and no stakeholder can impose its position on the others. The consumers of digital content are most often ignored in the key decisions on online copyright regulation, uniformly labeled as "pirates", while at the same time have to carry the full social cost of copyright systems (levies, extended protection terms, etc.).

Moreover, copyright reforms in the last two decades have shaped increasingly unilateral picture of copyright - where society/consumers are allowed to use the content only as much as it is expressly permitted by the right holders. The creative uses of copyrighted content are increasingly limited and social uses burdened. Thus, perception of copyright has changed from the instrument of creativity into the cashing instrument.

These perceptions need to be changed, in order to improve respect of copyright in the online environment. At a policy level we would propose the following shifts:

- (a) consumers/society need to be allowed a voice in copyright regulation, especially with respect to decisions affecting every household (e.g. levies);
- (b) social and non-commercial creative uses of copyrighted content need to be unburdened;

- (c) consumers shall be provided with clear and express digital consumer rights (including right to use digital content purchased by consumer in any way, form and medium, as long as it is intended for personal non-commercial enjoyment (may be implemented through simple, inexpensive and standardised consumer e-licensing, as it was suggested above));
- (d) copyright levy system shall be reformed in a way that society at large does not carry the cost, and only individual uses are levied (e.g. through consumer oriented e-licensing);
- (e) more competition needs to be created in content distribution and content licensing markets;
- (f) consumers and SMEs shall be provided with efficient, inexpensive and explicit infrastructure in order to commercialize, protect and enforce their own copyrights;
- (g) more legislative protection needs to be provided for the original authors (to avoid sidelining of the author in sharing of the profits of a successful work).

Additionally, we would suggest to involve consumers in the policing of online marketplace, opt-in choices for consumers (e.g. consumers themselves shall be entitled to chose whether they want to block P2P traffic and other traffic; we believe that many parents will consciously choose to restrict such traffic for their families, if given an opportunity) instead of pre-imposed restrictions (as it is attempted in most cases, including the latest French initiative mentioned below), the governments shall commit to and promote the open and non-proprietary standards (paving the way for uniform and interoperable content standards, which would also be accessible to the).

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

The French Memorandum of Understanding is not a novel idea, and has yet to prove that it will yield any tangible results. In particular we are not comfortable with the content filtering, as the method of choice, also, the discretion exercised by the right holder organizations and/or ISPs (without allowing consumers themselves to decide whether they want to opt-in for filtering), as well as lack of any independent review.

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

No. The downsides of filtering are too numerous, outreaching and enabling abuse. Also, such practices assume that all internet users are infringing copyright, hence all internet uses shall be restricted. Such assumptions are unfair and dangerous, and shall not serve as a basis for internet regulation.



We believe that primary causes of online copyright infringements are economic – lack of competitively priced and uniform (interoperable) digital content, as well as lack or simple and inexpensive ability to purchase personal (consumer oriented licenses) are the main reasons. Market concentration, lack of interoperable DRMs, lack of uniform Common Market for digital goods all contribute to the said economic causes.

Please also consider that due to the global nature of the digital content markets, the EU is loosing ground as the host of the digital marketplace (also losing jobs and tax income), since said restrictions make it increasingly lucrative and easy for consumers to purchase digital content abroad.

For any questions or more detailed comment please contact Dr. Mindaugas Kiškis, mindaugas@irii.lt (Mykolas Romeris University, <http://www.mruni.lt>; Internet Research and Innovation Institute, <http://www.irii.lt>).

Sincerely,

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