Submission to the European Commission creative content online consultation

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Executive summary

The Stockholm Network does not believe that European policy toward digital rights management (DRM) is fundamentally broken. As a result, we are wary of attempts to introduce regulation into this area of policy that may have detrimental effects on European intellectual property (IP) regimes, on innovative industry, and on European competitiveness as a whole.

The Stockholm Network fears the introduction of policies which will damage Europe's already fragile IP system. In particular, the Stockholm Network makes the following recommendations:

- The European Commission must reject policies which threaten the sustainability of creative industries and the innovating sectors of the European economy.
- As much as is possible, intellectual property owners should be given a wide-ranging ability to protect their property.
- National governments nor the EU can not and should not attempt to replace market forces and decide what DRM solutions are best for any business.
- Accordingly, the EU should not legislate to encourage or require interoperable DRM systems.
- Rights-owners should not be prevented from drafting EULAs as they see fit. Market forces, and the practicalities of enforcement provide sufficient incentive to firms to draft apposite EULAs.
- Piracy is a crime, not a problem deriving from variations in legislation. Authorities should try to tackle piracy at the systemic level, by stepping up enforcement efforts while liaising with stakeholders in creating a broad education campaign.
- All relevant parties must bear their fair share of responsibility for piracy and copyright theft. This does not only include content creators and end users, but intermediaries including Internet Service Providers (ISPs), and online content mediators and aggregators.
- An effective anti-piracy campaign must inevitably involve some use of filtering methods. Though privacy concerns must be addressed if any such system is to be implemented, a balance can be struck that enables a more rigid enforcement of IPR without jeopardising privacy along the way.
- A due diligence clause on the part of ISPs and online content mediators needs to be included in any upcoming legislation to ensure responsibility for copyright violation is taken by all relevant parties. There should not, however, be a radical push to hold them responsible or liable for all illegal activities third parties engage in as this would surely limit their use by, and usefulness to, the public.

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1.1 About the Stockholm Network

The Stockholm Network (SN) is the leading pan-European think tank and market oriented network.

It is a one-stop shop for organisations seeking to work with Europe's brightest policymakers and thinkers. Today, the Stockholm Network brings together more than 130 market-oriented think tanks from across Europe, giving us the capacity to deliver local messages and locally-tailored global messages across the EU and beyond.

Combined, think tanks in our network publish thousands of op-eds in the high quality European press, produce many hundreds of publications, and hold a wide range of conferences, seminars and meetings. As such, the Stockholm Network and its members influence many millions of Europeans every year.

1.2 About the SN IP and Competition Programme

The Stockholm Network Intellectual Property and Competition Programme was established in January 2005.

Dealing with the field of intellectual property across the board (including in its monthly bulletin - Know-IP™), the Programme aims to achieve three key objectives:

First, to make the field of intellectual property more mainstream as well as accessible to the general public. It seems that, currently, the field of intellectual property, despite having huge economic, social and political implications to the public as a whole, is considered esoteric, technical and to some extent 'grey'. This gap should be bridged.

Second, to increase the interaction between specialists focusing on different aspects of intellectual property rights. A positive effect of the growing importance and impact of the IP field is professionalism and specialisation. This, however, also leads to an undesirable detachment between different elements and themes of IP, which are becoming more and more 'divorced' from each other. For example, copyright, patent and trademark specialists, as well as those dealing with the legal, economic and political aspects of IPRs, seem to operate on parallel tracks. A more active debate between IP specialists will help us to obtain more comprehensive and up-to-date information about developments in the IP field as a whole.

Finally, and perhaps most importantly, the SN IP and Competition Programme aims to encourage discussion, as well as debates, on different burning IP issues. However, such discussions should be as informed as possible. We aim neither to idolise IPRs, nor to demonise them. Rather it is important to see

IPRs as a policy toolbox aimed at achieving two social goals: to provide incentives to innovate and develop new knowledge and informational products in the future; to ensure wide public access to such products in the present.

2.1 Introductory Remarks

The Stockholm Network does not believe that European policy toward digital rights management (DRM) is fundamentally broken. As a result, we are wary of attempts to introduce regulation into this area of policy that may have detrimental effects on European intellectual property (IP) regimes, on innovative industry, and on European competitiveness as a whole.

The controversy surrounding DRM technology of late has been driven by skewed public understanding (or more accurately, a lack of understanding) about what DRMs do. Initiating regulation based on these misunderstandings would compound the damage being done to Europe's innovative industries by poor intellectual property enforcement and high piracy rates. Furthermore, market forces are already proving successful at dealing with the application, uses and limitations of DRM-based technologies, providing a much more efficient and effective substitute to heavy-handed regulatory measures.

It is important to ensure that laws keep up with changes in technology. But technological advances should not be used as an excuse to diminish IP legal protections, especially when the new technology has made breaking those legal protections so much easier. If, rather than a dramatic increase in copyright theft, Europe had instead suffered a massive and unprecedented wave of burglaries, it is hard to imagine the response would be to make housebreaking legal. Accordingly, the Stockholm Network believes that attention would be better spent ensuring that IP is properly enforced than trying to find ways to whittle away the legal protections it needs.

We believe that a thriving and competitive marketplace is the best means for ensuring solutions to other related concerns such as interoperability and standardisation. We do not think that central planning by EU regulators is a sensible way to decide which technologies should succeed and which should be cast aside. Rather than empowering consumers to choose products best suited to their demands, a policy of regulatory interference would simply limit choice and further constrain innovation. The Stockholm Network urges the European Commission to give proper attention to the needs of Europe's economy and to reject policies which threaten the survival of its most vibrant sector.

Digital Rights Management

3.1 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?

Two concerns are of greatest importance when considering DRM interoperability: is it technologically feasible to make DRM tools interoperable without diminishing their effectiveness? And is it economically desirable to do so?

Any push towards interoperability must not be allowed to jeopardise the intellectual property rights (IPRs) of innovators and content creators. The risk inherent in mandating interoperability in DRM technology is that DRMs will become more vulnerable to being hacked, and less able to respond to such attacks. Common weaknesses can be more easily exploited. Keeping ahead of hackers requires constant adaptation. When interoperability concerns are foremost and industry consensus is necessary, delay is inevitable, giving the upper hand to IP violators. The type of information necessary to achieve interoperability is precisely the information necessary to render DRM useless: encryption algorithms, keys, content metadata, and so on.

The motivation behind mandatory interoperability would seem to be to limit the ability of one company to tie predominance in one sector (say, portable music players) to another (online music sales, for instance). That a law should be so clearly targeted at successful firms is troublesome. Punishing companies for making products people want to buy is detrimental to consumers' interests.

Yet this legislation would presumably go beyond the music sector, where the controversy originates, and include many different content markets, with vastly different characteristics. In doing so, the European Commission would be better off recommending broad principles than attempting to cover the constantly changing markets for the different creative industries. 2007 saw online music making its first tentative signs of retreat from the use of DRM. Offers of DRM-free music online through Amazon and through Apple look set to continue, as the market for online music demanded other alternatives.[1] While this does not mean that audio –DRM is now irrelevant, it is clearly at a different stage of its lifecycle from the newspaper industry, which is just beginning to climb aboard the DRM bandwagon with its ACAP initiative.[2] The Amazon and Apple developments also show that market incentives are perfectly capable of directing corporate policy in the direction consumers desire, without the need for heavy-handed legislative remedies.

Mandatory industry standards also prevent content creators from utilising the full range of available methods of protecting their intellectual property. A particular vendor may want to adopt a more advanced technique. It may also want to have the freedom to change its approach without having to get the approval of the standards body.[3] This kind of constraint is unnecessary, and unhelpful in a climate already predisposed against the rights owner.

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[1] http://www.apple.com/pr/library/2007/04/02itunes.html
[2] http://www.the-acap.org
[3] Killik, J *IPRS, Competition Rules and Interoperability: Who Has Priority*? Stockholm Network Experts Series on Intellectual Property Rights and Competition (London: 2007), p6; http://www.stockholm-network.org/downloads/publications/d41d8cd9-Killick%20Final.pdf

While the Stockholm Network has no objection to the natural development of interoperable systems through natural market pressures, we do not believe that it is something that the EU should legislate to encourage or require.

3.2 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 labelling of digital products and services?

Consumer information is critical in the battle against piracy, as well as in the development of a fully-functioning market. Consumers who are unaware of the rights and restrictions of use associated with a product they buy are at risk of unwitting violation of IPRs.

Consumers are largely unaware of DRM. In a 2006 survey, 62% of consumers surveyed did not know anything about DRM, while only 14% said they knew approximately or well.[4] The survey found that French consumers had greater awareness of DRM than other European nations, but they also cared much less about copyright than other surveyed countries (UK, Spain, Sweden and Germany).

Anecdotally, it is easier to find cases of consumer dissatisfaction with DRMs than where consumers did not mind them. After all, who is going to mention when a product functions as expected? It is only the instances where a product does not do what it was bought for (a CD refuses to be played on a car stereo, or copy-protection software installs harmful or unexpected programs on a computer) that it becomes noteworthy.

Nevertheless, market mechanisms have proven rather reliable at dealing with these concerns. After its XCP rootkit debacle, Sony faced three separate class-action lawsuits over this infringement of privacy and a PR disaster ensued, ending with it having to suspend the use of the software, recall millions of CDs and issue a public apology.[5] Likewise, the backlash against Starforce copy-protection software by consumers caused Ubisoft and other games publishers to switch to other, more responsible, DRM providers.[6]

Clear labelling is in the interest of producers and consumers.

The Stockholm Network strongly encourages companies to do all in their power to make it as clear as possible to consumers what they are buying, and what rights and restrictions are contained therein. The Stockholm Network recommends that companies take the initiative in explaining to customers that by paying for a song or CD they do not 'own' the content, merely the plastic containing it. Greater public understanding of the distinction the use of proprietary content and the ownership of that content (by rights owners). Furthermore, if rights owners are concerned that this will be detrimental to sales, it may provide an additional market spur to them arranging license terms more aligned with their consumers' demands.

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[4] Dufft, N. *Digital Video Usage and DRM*, *Berlecon Research/Indicare* (2006), pp 32-35 http://www.indicare.org/tiki-download_file.php?fileId=170

[5] Jensen, A. Moore, S., Pugatch M.P. *Why Digital Rights Management?*, *Stockholm-Network Intellectual Property and Competition Policy Papers* (paper number 6) (London: April 2007)
; p6 http://www.stockholm-network.org/downloads/publications/d41d8cd9-DRM%20Paper%20Final.pdf

[6] In 2006 a class-action lawsuit was brought against Ubisoft by consumers claiming that Starforce DRM technologies installed alongside Ubisoft products made their computers vulnerable to viruses and Trojans. Responding to these complaints, Ubisoft switched DRM providers to Sony's less controversial SecuROM system,

3.3 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?

EULAs usually contain a variety of provisions, not all to do with IPRs. Nonetheless, the combined length of all their sections means they are often ignored by consumers eager to get to the product they just bought (to prove this point, one organisation put a line in their EULA offering " a special consideration including financial compensation" to any user who emailed their address. After 4 months and 3000 downloads, one person wrote in, and was duly sent a check for $1000[7]). This situation is not optimal for either consumers, who are largely unaware of their rights and obligations, and content providers, who cannot be sure their rights are being respected.

However, any compulsion to simplify EULAs removes rights-owners ability to distribute their property as they see fit. Implicitly, a simplified EULA is also a weaker one.

The Stockholm Network believes that, as much as possible, intellectual property owners should be given a wide-ranging ability to protect their property. Hence, we believe that rights-owners should not be prevented from drafting EULAs as they see fit. We believe market forces, and the practicalities of enforcement provide sufficient incentive to firms to draft apposite EULAs. We also believe it is detrimental to the innovative industries to attempt to curtail rights-owners' freedom to pursue such choices as they see fit when deciding how to distribute their property.

3.4 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?

The Stockholm Network has no recommendations on this issue.

3.5 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?

The Stockholm Network does not believe that the inventors of DRM systems should be forced to cede control over their intellectual property. We oppose the idea of government sanctioned business models being legislated into effect. We do not perceive lack of access to DRM from DRM providers as being a critical factor in SMEs' difficulty in enforcing their IPRs. Rather, weak IP enforcement regimes and government policies hostile to the development of more flexible and economical DRM systems do far more damage to SMEs.

We also encourage DRM providers to seek licensing agreements with partners of all sizes, as the merits of market-driven standardisation are clear. We do not believe that governments or the EU can, let alone should, attempt to replace market forces and decide what DRM solutions are best for any business.

[7] Magid L, "It Pays to Read End User License Agreements", in: *PC Pitstop*; http://pcpitstop.com/spycheck/eula.asp

Legal Offers and Piracy

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

While stakeholder dialogue may have a place in tackling piracy, expectations of success should not be overly high. Piracy derives not from people who believe that if the system were made more suitable – by the tweaking of a legal clause, say – that they would henceforth willingly abide copyright laws. Rather, it is those who are wilful opponents of copyright – who see it as objectionable – or those who do not care about copyright, and see it as irrelevant, from whom piracy emerges.

Consumers who fail to comprehend the damage caused to the creative industries by piracy will not be changed without drastic education efforts. And those who object to the very principles of intellectual property are likely to be impervious to persuasion.

Stakeholder co-operation has a role to play in the resolution of individual disputes about particular copyright concerns (the Sony Rootkit and Starforce examples cited in 2.2 might be situations in which dialogue was appropriate), it would require a more concerted effort to solve the larger problem.

However, this is not to say it is impossible. Through public education other societal problems based on free-riding activities have been made socially unacceptable.

In the UK drink driving used to be tolerated by society, if not by the law. In the late 1980s the government began an extended campaign to change social perceptions of the problem, with the support of alcohol producers and retailers, road safety campaigners, and other stakeholders. The campaign created a social stigma around drink driving, reducing incidences across the country through education rather than less reliable enforcement methods.

This should be the model for anti-piracy campaigns looking forward. The Stockholm Network wishes to emphasise that piracy is a crime, not a problem deriving from variations in legislation. Accordingly, we believe that the authorities should try to tackle piracy at the systemic level, by stepping up enforcement efforts while liaising with stakeholders in creating a broad education campaign.

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

The Stockholm Network believes it is inappropriate to put the burden of policing IP infringements online on rights owners. The French Memorandum of Understanding provides a good starting point to see how rights owners and creators, online mediators (search engines and data aggregation providers) and internet service providers (ISPs) can join forces to help combat piracy. Its innovative approach to tackling unauthorised file-sharing has great potential.[8] The current situation whereby many mediators have been, and are, enjoying a free lunch on behalf of many content producers is neither fair, nor in the long run productive for the producers or users of knowledge. The problem with free lunches is that someone always ends up paying for them sooner or later. It would be a shame if this meant that knowledge producers would think twice about producing and sharing their knowledge with a wider audience. The result would be that the public would end up having to pay more and enjoy less of the benefits then they could in a system of mutual recognition and respect for IPRs.

[8] 'Accord pour le développement et la protection des oeuvres et programmes culturels sur les nouveaux Réseaux'; http://www.culture.gouv.fr/culture/actualites/index-olivennes231107.htm

Still, the memorandum is not without its faults. The idea that IP owners be forced to concede certain rights (such as the ability to release DRM-protected songs) in order to receive protection of their property *quid pro quo* undermines the value of IP.[9]

The Stockholm Network recommends that a due diligence clause on the part of mediators needs to be included in any upcoming legislation to ensure responsibility for copyright violation is taken by all relevant parties. There should not, however, be a radical push to hold them responsible or liable for all illegal activities third parties engage in as this would surely limit their use by, and usefulness to, the public.[10]

The Stockholm Network believes that all relevant parties must bear their fair share of responsibility. This does not only include content creators and end users, but intermediaries including ISPs, and online content mediators and aggregators. This more balanced approach would ensure more thorough and effective responses to piracy can be initiated, rather than the pervasive buck-passing that occurs at present.

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

In practice, the first recommendation in the previous answer would mean a greater use of filtering technologies and disclaimers by online mediators. An active discouragement and filtering of infringing material by sites such as YouTube may result in both lower rates of infringement as well as a better relationship with content creators who would be confident that sites such as YouTube were doing everything within their power to stop infringing activities.

Infrastructure bodies can play a passive or active role in aiding the potential infringing of IPRs. As illegal downloads have increased over the years infrastructure bodies and providers, like Verizon, AT&T, AOL, and BT, have become more circumspect in deciding how their consumer bandwidth allocation is used. The reason for this fundamental shift amongst providers seems to lie with their concomitant switch to more content-based services and with the bundling of telecoms, television, and the internet into one service-provider. Internet piracy eats up a lot of bandwidth and as providers become more content-focused – that is they hope consumers will buy more services, including content, from them – piracy becomes a problem for them as well as traditional content providers like film studios, record companies and musicians. Users, for example, who make use of BitTorrent technologies – a type of continuous peer-to-peer downloading program – tend to clog up internet connections by using all of a user's allocated bandwidth at all times. Thus, discouraging this kind of behaviour is good for the smooth running of the network.

Mediators of content are in much the same position as consumers and internet providers. Their stakes with regards to the protection of IPRs are, on the face of it, not as directly affected by copyright infringement as download-sites or content providers. Yet, for example, search engines play a key role in enabling consumers to locate and view both non-infringing, as well as, copyright infringing material. In fact, in some instances they are absolutely instrumental in allowing internet users to find and access the content of their choice, whether it is legal or illegal. This is a difficult balancing act which search engines and mediators must play, and it goes to the heart of the debate on copyright abuse taking place on the web.. Suffice it to say that questions have been raised both about whether there exists a basic conflict between search engines and content providers, and about whether, the various ventures and new business models which search engines have embarked upon outside of their original remit have contributed to this conflict. From the substantial increase in court cases over the last few years, it would seem that search engines are just as much at the centre of copyright battles as downloading sites.[11]

[9] http://www.vnunet.com/vnunet/news/2204332/french-block-peer-peer-traffic
[10] Torstensson, D., Sasaki, R., Pugatch, M. P. Fair Use or Free Use? The Role of Internet Mediators in Protecting Intellectual Property Rights (Stockholm-Network: London, October 2007)
[11] Torstensson, Sasaki and Pugatch; op cit; pp 12-14

The Stockholm Network believes an effective anti-piracy campaign must inevitably involve some use of filtering methods. Though the Stockholm Network acknowledges that privacy concerns must be addressed if any such system is to be implemented, we believe a balance can be struck that enables a more rigid enforcement of IPR without jeopardising privacy along the way.