Title: v 1.0
Subtitle:
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URL: wizards-of-os.org/index.php?id=1699

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## Berlin Declaration

To
Mr. Jörg Reinbothe
Head of Unit
Copyright and Neighbouring Rights
Internal Market DG
European Commission

In response to the call for comments on the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Management of Copyright and Related Rights in the Internal Market (COM(2004) 261). [1]

**Berlin Declaration on Collectively Managed Online Rights:**
**Compensation without Control**

Berlin, 21 June 2004 [2]

*** DRM and mass-prosecution of filesharers are not solutions acceptable to an open and equitable society.**
*** Primary goal of copyright lawmaking must be a balance between the rights of creators and those of the public.**
*** Collecting societies need to become more democratic, transparent and flexible, allowing their members to release their works under open-access, non-commercial licenses.**
*** With the collecting societies suitably reformed, the successful European experience with exceptions and limitations compensated by levies should be reviewed for possible application to the on-line realm.**
*** We urge the European Commission to consider a content flatrate to ensure compensation of rightsholders without control over users.**

We, the undersigned, are stakeholders in an equitable Information Society. As copyright scholars and activists we are concerned about the future of the Digital Commons. Especially the Non-Europeans among the signatories look to Europe to maintain and translate for the digital age a system of exceptions and limitations to exclusive rights and collective management of those rights, as has served creators and the public well for more than 40 years.

We welcome the opportunity to submit comments on the legislative initiative concerning collective rights management in the Internal Market. We agree with the EU Commission that collecting societies have an important economic, cultural and social role to play in the digital age, and welcome initiatives to make their operations more transparent, accountable, flexible and efficient. We also agree that Community-wide licensing will have a positive impact on the development of markets for digital cultural goods, and that soft law such as voluntary codes of conduct may not be appropriate or sufficient for creating favorable conditions for these markets and for the public at large.

We agree that the central goal for policy setting in this area is to “ensure the appropriate balance between the interests involved.” (p. 10 [3]) We also share the Commission's doubts whether DRM as the only solution to compensate creators is likely to achieve this balance. It might well end up stifling the development of the Internal Market, rather than encourage it.

The markets for the delivery of cultural goods over the Internet are still extraordinarily dynamic and new business

models are still emerging. Failure to explore the full range of policy options could waste a historic chance to support innovation and an open information order in which an unprecedented number of Europeans can become cultural creators. Hasty action could foreclose as-yet untested models. We would like you to consider in particular one option currently being discussed widely in professional circles that builds on a uniquely European experience: a collectively managed content flatrate for the online realm.

**Ubiquitous DRM is not a solution to IP Rights Management**

The EC states in its Communication that DRM systems “clearly are an important, if not the most important, tool for rights management in the Internal Market of the new digital services.” (p. 10) Against the factual language of the Communication, the term “clearly” sticks out. It appears like an incantation intended to make the exact opposite feeling go away, that the usefulness of DRM system is not clear at all.

Indeed, the Communication expresses that “in their present status of implementation, DRMs do not present a policy solution for ensuring the appropriate balance between the interests involved, be they the interests of the authors and other rightholders or those of legitimate users, consumers and other third parties involved (libraries, service providers, content creators…) as DRM systems are not in themselves an alternative to copyright policy in setting the parameters either in respect of copyright protection or the exceptions and limitations that are traditionally applied by the legislature.” (p. 10)

We welcome the critical stance the Commission takes towards DRM systems, both in respect of the present state of implementation and on principled grounds. We would like to add that not only law but also technology experts question the feasibility of DRM on principled grounds. [4]

The Communication calls for "a global and interoperable technical infrastructure o[f] DRM systems based on consensus among the stakeholders" (p. 11) as a prerequisite for the effective distribution in the Internal Market. In reference to a CEN/ISSS report, it also states that the few available systems with some market uptake have not yet achieved interoperability. We warn against the risk that such a standardisation will reinforce the position of already dominant market players.

We also welcome the view of the Commission that “the development of Digital Rights Management (DRM) systems should, in principle, be based on their acceptance by all stakeholders, including consumers,” (p. 4) and its recognition that wide acceptance among consumers has yet to be reached. Indeed, consumers' reactions to DRM so far have varied. There is a growing anger over DRM-protected audio CDs that are unusable on some players. [5] There is a clear unwillingness to accept cumbersome procedures and different player and registration requirements for similar products.

The Communication mentions the “doubts about the viability of the available technology” that have been expressed by other stakeholders as well, and that “have proven to be a disincentive to use DRM systems.” (p. 11) Indeed, commercial users, especially small and mid-sized enterprises, are also critical of them, as they present a strong danger of enforcing technology monopolies and creating a new oligopoly of major distributors whose volume of business can sustain the very significant costs of operating a DRM system.

These systems also have the potential to seriously interfere with other EU policy objectives, notably citizens' rights such as that to privacy [6], services essential to a inclusive and sustainable Information Society such as libraries, education, and journalism, the freedom of competition, and the freedom of research and innovation. The digital revolution holds the potential of a semiotic democracy, the reuse and remix culture being one of its most promising innovative aspects. Content locked under DRM will destroy the potential of this culture.

*** We urge the Commission not to cement DRM as the single-path solution, which might be unable to fulfil the expectations held of it.**

**Collecting Societies Need to Become more Flexible, Transparent, and Democratic**

We agree with the European Commission that the current system of collecting societies lacks flexibility, internal and external transparency, and often democratic structures that allow its members to influence its decisions. In particular, we welcome the Commission's refutation [7] of the mandatory requirement in the statute of collecting

societies that all rights of an author in respect of all utilisation forms of his or her works be assigned, including their on-line exploitation. Whatever the justification for this policy has been historically, today it needs to be reformed urgently. We agree with the Communication that "rightholders should have, in principle, and unless the law provides otherwise, the possibility if they so desire to manage certain of their rights individually." (p. 19)

We would like to add that this is so not only "in the light of the deployment of Digital Rights Management (DRM) systems," but also in the light of new open-access, non-commercial licensing models like those of the Creative Commons project [8] that already millions of creators worldwide have chosen for their works. Authors need more flexibility to publish their works under licensing agreements of their choice including the freedom to license for use without payment.

Collecting societies should operate in the service of their members. They should not overly restrict their members' freedom to set the conditions under which others may use their works. The overwhelming success of the Creative Commons licenses – three million link-backs to works licensed under Creative Commons in little more than one year – shows that creators desire the option to share their works with others under non-commercial terms. Collecting societies should be flexible enough to allow their members the advantages of collective representation and at the same time the freedom to be part of the emerging free information culture.

*** We urge the European Commission to work towards reforms of the collecting societies to give choice back to the artists including the right to offer non-commercial licenses independent of artists' collectively managed rights.**

**Compensation without Control: A Music Flatrate**

Filesharing demonstrates a stark economic reality: shipping bits from A to B has become such a low value service that Internet users can effortlessly provide it themselves. This is a result of the communications revolution that the EU has been supporting actively for the last decade. These developments could be good news for the content industries, but not if they continue to base their business models on a proposition of exclusive service provisions that they no longer hold. The content industries are known for their inability to adapt to changing tides. [9] This in itself would not need to be of any concern to citizens or lawmakers. But when an industry undertakes a major re-architecting of the technical and legal foundations of the Information Society based on erroneous assumptions and futile strategies it becomes a matter of broader legal and policy concern.

The Communication states that “a wider availability of DRM systems and services can only bring additional value to both rightholders and consumers if it contributes to the availability of protected content and facilitates the access of end-users to protected content.” (p. 10) This statement is the wrong way around. The current situation is that protected content is widely available and accessible to end-users – in spite of DRM. The lack of compensation for creators, not the lack of availability of content, is the problem that needs solving.

DRM and mass-prosecution are clearly not the answers to the current dilemma. It is bad policy to criminalise a sizable portion of the population to protect an outmoded business model of a handful of players in a relatively small industry. Good policy is to ensure fair compensation to creators, free flows of goods in the Internal Market and an open market place for providers of value added services. Therefore, we suggest that what we need is an Alternative Compensation System (ACS), [10] or, as it has also been called, a Content Flatrate.

The basic goal is to create a system which balances the rights of the creators and rightsholders and of end-users. By taking advantage of the innovative and open character of the Internet, such a system can help to promote the development of entirely new markets for digital cultural goods. Rather than relying on 'pay-per-use' fees collected directly by commercial producers from end users based on pervasive use of DRM technologies, we recommend extending to the Internet the practice of indirect compensation through collecting societies.

Under the proposed system, rights holders would license their on-line rights to a collecting society for collective representation, as they already do for many off-line uses today. This on-line collecting society would oversee the measurement of transfers of protected works over the Internet and then compensate the rights holders based on the actual use of their files by end users. [11] The funds from which the rights-holders are compensated could be raised through any of a number of sources: voluntary subscription payments by end-users or proxies for them or levies on relevant associated goods and services, such as broadband Internet connections, MP3 players [12] and

others, in addition to the levies on blank media, photo copiers, and so on which are already collected today.

Various players have already indicated their interest in this new approach, including music labels, Internet service providers, consumer organisations, peer-to-peer software producers, and collecting societies. The Commission should therefore consider the existing literature on Alternative Compensation Systems [13] in the ongoing reform of the European collecting societies. The Commission should encourage further studies on the feasibility and potential impact of content flatrates, and open up the space for experimentation with them. It should also explore further how competition could increase the efficiency and the diversification of services of collecting societies.

With such an open system it would be possible to balance the interests of the stakeholders, without running the risk of transforming the existing free culture characteristic of the Internet and the democratic societies which created it – where everything is allowed that is not expressively forbidden – into what the US scholar Lawrence Lessig calls a 'permission culture' – where everything that is not explicitly permitted is prohibited. [14] This would contradict the most fundamental policy goals of the EU, seeking to build an inclusive and dynamic Information Society.

*** We urge the Commission to take into consideration the option of a flatrate for digital works to balance the interests of the various stakeholders and to create innovative markets and foster an equitable and inclusive European Information Society.**

**Changes to previous EU policy decisions necessary for a Flatrate for Digital Works**

*Community-Wide Licensing: the Collective Solution*
We agree with the Commission that Community-wide licensing [15] is desirable in the on-line environment. The Communication discusses a number of options that the European legislature has. First, it describes a compulsory license. “[O]ne could seek to reduce the exclusive communication to the public and making available rights to a remuneration right subject to mandatory collective management.” (p. 9) It continues: “However, since both Directive 2001/29/EC and the WIPO 'Internet Treaties' WCT and WPPT establish and harmonise these rights for authors and the right of making available also for holders of neighbouring rights as exclusive rights, it could be held that this option is not available.”

A desirable solution should not be foreclosed from consideration by earlier decisions that in the light of new developments must be challenged.

*** We encourage the EC not to dismiss a solution that might be the best possible, but rather to work towards removing obstacles for its implementation.**

*Harmonising Exceptions*
The Communication states that “Seven Directives were adopted between 1991 and 2001, which harmonised rights and exceptions and certain other features of substantive copyright law.” (p. 5). In fact, the Copyright Directive expressly did not harmonize exceptions, out of respect for differences in national cultural traditions. What it did do was to prescribe an exhaustive list of exceptions that member states may implement. At best, it restricts the range of disharmony across the Internal Market. Harmonisation, if that's what it can be called, ends up restricting the commons aspects of copyright law that member states can grant their citizens. The newly introduced right of communication to the public, the making available right, has no mandatory exception at all. It is inexplicable how in a highly dynamic area like the Information Society – a dynamism that the Commission recognises by pointing to various mechanisms of review and monitoring [16] – the possible exceptions to exclusive rights that may be needed to balance interests in copyright should be limited to a finite list.

*** We therefore urge the EC to revise the decisions on exceptions in the Copyright Directive in the ongoing review process.**

**Conclusion**

The debate on Alternative Compensation Systems is developing viable alternatives to exclusive rights for compensating authors. It proves that Digital Rights Management is not the only way to ensure compensation of

authors and rights holders. In fact, DRM systems are poorly suited to ensure appropriate compensation to all eligible parties. They are of questionable technical feasibility and social appropriateness. Instead of fighting peer-to-peer distribution, therefore, an effective copyright strategy for the future will embrace the Internet's advantages. An Alternative Compensation System, renewing the uniquely European experience of strong collective rights management for the Internet age, can jump-start the development of innovative and diversified markets for the delivery of cultural goods over communication networks.

*** We urge the Commission to carefully evaluate these possibilities, and to ensure that adequate room is left in developing copyright law to explore these options.**

Berlin, 12 June 2004

**Signed**

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Dr. Rüdiger Weis, mathematician, Cryptolabs Amsterdam

Harald Welte, Free Software Author & netfilter core team, Berlin

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**Notes**

[1] http://europa.eu.int/comm/internal_market/copyright/management/management_en.htm

[2] Jointly issued by speakers of the conference "Wizards of OS. The Future of the Digital Commons," 10-12 June 2004, Berlin, http://wizards-of-os.org

[3] All quotes if not otherwise noted refer to the EC Communication (COM(2004) 261).

[4] See, for example, Biddle, Peter; England, Paul; Peinado, Marcus; Willman Bryan (2002). The Darknet and the Future of Content Distribution. Paper Presented at the ACM Workshop on Digital Rights Management, Nov. 18

[5] See, for example, a public register of standard-breaking audio CDs: http://www.heise.de/ct/cd-register/

[6] The Communication correctly points out that “DRM systems can be used ... to trace behaviour” (p. 10). See also European Union (1995). Directive on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data. Official Journal of the European Communities of 23 November 1995 No L. 281

[7] In the "Daftpunk" Decision (case COMP/C2/37.219), 06.08.2002, http://europa.eu.int/comm/competition/antitrust/cases/decisions/37219/fr.pdf cited in the Communication (p. 16 f.)

[8] http://wwww.creativecommons.org

[9] E.g. the refusal of major music labels to sign rock 'n' roll artists until they lost a significant market share to independent labels. (See, for example, the recent study by Peter Tschmuck. Kreativität und Innovation in der Musikindustrie, Studien Verlag, Innsbruck 2003.)

[10] See, for example, Fisher, William W. (forthcoming 2004). Promises to Keep: Technology, Law, and the Future of Entertainment. Stanford, CA, Stanford University Press, pre-prints availbable at http://www.tfisher.org/PTK.htm. See also Lincoff, Bennett (November 22, 2002), A Full, Fair And Feasible Solution To The Dilemma of Online Music Licensing, http://www.quicktopic.com/boing/D/uhAMNwVb8yfkc.html

[11] The Berkman Center for Internet and Society at Harvard Law School and the Center for Internet and Society at Stanford Law School with a grant by the National Science Foundation, jointly have begun to develop sampling software for this purpose.

[12] Canada introduced such a levy on mp3 players in late 2003. See: http://www.cb-cda.gc.ca

[13] A sample can be found here: http://crosscommons.org/acs.html

[14] Lessig, Lawrence (2004). Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity. New York, Penguin Press.

[15] Defined as “the grant of a licence by a single collecting society in a single transaction for exploitation throughout the Community.” (p. 8)

[16] “Legislation of present and future EU Member States in this area is evolving together with emerging changes regarding technology and new markets.” (p. 12)) “In this respect [the exception for private copying], the Commission is also under a duty to examine within the context of the Article 12 Contact Committee, whether acts permitted by law are being adversely affected by the use of effective technological measures (so called "technological lock up").” (p. 10)

[^] nach oben

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