

Response to Gowers Review of Intellectual Property

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The following issues are covered by this response.

General questions	
How IP is awarded	
How IP is used	
How IP is licensed and exchanged	✓
How IP is challenged and enforced	

Specific issues	
Current term of protection on sound recordings and performers' rights	✓
Copyright exceptions – fair use and fair dealing	✓
Copyright – digital rights management	✓
Copyright – orphan works	✓
Copyright – licensing of public performances	✓
Copyright – designated archive status	
Patents – utility patents	
Pharmaceutical Supplementary Protection Certificates (SPCs)	
Trade Marks – international issues	
Designs – registered designs and unregistered design rights	
Legal sanctions on IP infringement	✓
Parallel Imports / International Exhaustion	
Coherence between competition policy and IP policy	

In addition, I will comment on:

- the use of **patents in software development**;
- the use of **end user licence agreements** for software products;
- the **duration of copyright protection on software**;
- the **transfer of IP rights**, particularly the transfer of copyright from artists to large organisations.

There are **no additional documents** accompanying this response.

This response is a duplicate with contact details omitted, for publication on the Gowers Review web site. My full submission also includes contact details.

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Introduction

I believe that copyright is an effective means of providing fair recognition and compensation to those whose efforts produce works of value to society. It is in the public interest to offer reasonable rights to the creators of such works, as an incentive to release the works for general benefit. It is unnecessary, and contrary to the public interest, to provide any further rights than those required to achieve this objective or to provide rights for a longer period than is necessary to achieve the objective.

With this in mind, I believe that for the most part, the current copyright framework offers a reasonable balance between the benefits to copyright holders and to users. However, in some areas the balance is starting to tip heavily toward the rightsholder at the public's expense and needs to be restored, particularly with regard to the duration of protection and DRM technology.

Additionally, from the user's perspective, the system is currently very complicated, covering several different types of copyright and with many surprising omissions and anomalies. This can mean that behaviour that might widely be regarded as reasonable still infringes copyright, where perhaps it would be better classed as fair dealing. It can also lead to difficulties in licensing works subject to copyright even when both rightsholder and user are agreed in principle.

I will propose several ideas to address these issues, mostly relating to expanding fair dealing provisions; duration of copyright and transfer arrangements; and restricting the kind of agreements under which copyright materials may be licensed with a view to simplifying the system as a whole and bringing it into line with common sense.

The argument in favour of patents is similar to that of copyright: the patent holder is awarded exclusive rights for a temporary period, in exchange for revealing the details of their invention for the public's benefit. However, I am concerned at the recent developments in Europe relating to so-called software patents, which historically have not served this purpose elsewhere in the world, and I will present a simple argument against allowing them in the UK.

About the respondent

I am a professional software developer, sometimes programming in my spare time as well, and I use a wide range of software including both commercial and non-commercial products. I am on the organising committee for a non-profit dancing club providing classes and special events to around 2,500 members, and as such I frequently deal with issues of public performance, PPL and PRS, and maintaining the club's extensive music library. I own a significant number of music CDs and films and television shows on DVD. I have contributed extensively to various Internet discussion forums, including one for helping beginners learn to write software, and I am considering publishing a book about subjects that I often explain on that forum, possibly through non-traditional channels. IP issues affect over half of my waking life one way or another, hence this rather long submission.

Executive summary

The following proposals are made in this document.

How IP is licensed and exchanged

1. Simplify the nature of copyrights for sound recordings, so that only a single rightsholder needs to be contacted to arrange any additional licence required for a given recording.
2. Separate the question of whether someone has a legitimate copy of a sound recording from the issue of what performance rights they have for that recording.

Current term of protection on sound recordings and performers' rights

3. The term of protection for copyright of musical recordings should not be extended any further. Consideration should be given to shortening it, where possible.
4. If any extension is introduced, it should apply only to new works published after the date of introduction.

Copyright exceptions – fair use and fair dealing

5. Enhance “fair dealing” provisions so that once an individual or organisation has a legitimate copy of a work, any kind of convenience copying is permitted to facilitate the private use of that work or, if a suitable additional licence has been acquired, the public performance of the work.
6. Peer-to-peer networks and similar distribution systems should *not* be classified as private use of copyright material and should not automatically constitute fair dealing.
7. Treat legitimately recorded broadcast content as a legitimate original copy of a work for the purposes of any fair dealing provisions.
8. Treat content legitimately downloaded from the Internet as a legitimate original copy of a work for the purposes of any fair dealing provisions.
9. Regardless of any fair dealing provisions that might cover caching and archival of Internet content in general, any reproduction that is not faithful and (unless clearly a historical representation) updated in a timely fashion should *not* constitute fair dealing.
10. Caching and archival based on an “opt-out” model, without the explicit consent of the copyright holder, should *not* automatically be classified as fair dealing.

11. A simple mechanism for copyright holders to “opt-in” and give permission for their work to be cached and/or archived should be supported and widely publicised.
12. Ban any deliberate attempt by copyright holders to block legitimate users of their works from making copies under fair dealing provisions. (This should not be interpreted as imposing an obligation on any copyright holder to actively assist with making such copies.)
13. Levies on purchases of recordable media to subsidise any losses incurred by copyright holders as a result of fair dealing provisions should not be permitted.

Copyright – digital rights management

14. DRM should be recognised as an ineffective approach to copyright enforcement that offers little practical benefit to copyright holders, but poses a serious threat both to legitimate users of protected content and ultimately to the public interest. As such DRM should be given no special consideration in law, and its use should be prohibited wherever it would compromise fair dealing.
15. Any products using DRM should be required to state prominently that it is in use and what it does, and the user should be given the option to decline the use of the content and avoid any permanent changes being made to any system with which the content and its DRM came into contact.

Copyright – orphan works

16. If a legal user of a piece of software has no legitimate channel available through which they can obtain previously published extensions to that software from the copyright holder, then copying those extensions from other sources should be legitimised, perhaps via a further fair dealing provision.

Legal sanctions on IP infringement

17. Introduce a fast-track mechanism, such as a court-ordered injunction, so that a copyright holder whose works are demonstrably being made available for illegal downloads may seek immediate blocking of the source offering those downloads.
18. Any financial compensation awarded due to copyright infringement should be based on the amount of damage caused to the copyright holder. The resulting figure may be large, but should always be based on a realistic estimate of the damage caused, not an implausible “worst case” claimed by the copyright holder.

19. If copyright infringement becomes a criminal rather than just a civil matter, then any penalties should still be based primarily on realistic compensation for damage caused. The use of court orders on behaviour, including prison terms, should be very limited; the punishment must fit the nature of the crime.

Software patents

20. The UK should not adopt software patents, and should fight strongly against the repeated attempts to introduce them via Europe.

Software licence agreements

21. Clarify the legal status of end user licence agreements.
22. If EULAs are legally binding, then clarify the legal relationships between the user, retailer and copyright holder.
23. Ensure that the user may always cancel a retail purchase of software if they do not agree to an EULA that they were not able to examine in advance, and receive a full and timely refund of the purchase price.
24. Ensure that any fair dealing provisions are set up such that they clearly override any more restrictive provisions in EULAs or similar agreements.
25. EULAs, or similar agreements by any other name, should be forced to disclose prominently any terms that deviate significantly from the user's expectations, including anything not directly related to the installation and use of the named software with which the agreement is associated.
26. Where extension software is supplied for use with an existing product, require that any significant changes in the licensing terms from those of the original product be prominently advertised to the user up-front.

Duration of copyright protection on software

27. Consider significantly reducing the period of copyright protection on software.

Transfer of rights between employee and employer

28. Prohibit employers from making blanket claims to employees' IP rights, including those deriving from work done other than as part of the employment.

General questions

How IP is licensed and exchanged

Barriers to licensing recorded music experienced by a large, non-profit dancing club

These comments relate to my experiences with the dance club, which has encountered considerable barriers to licensing recorded music for various purposes. These barriers may be of interest in their own right, and also as examples for my observations on specific issues later in this submission.

We have a large CD library, produced by a range of record labels including both big names and smaller specialist suppliers, and usually bought through specialist dance music vendors. In addition, we arrange a public performance licence through Phonographic Performances Ltd., so we can play the music on these CDs at our classes and events. This in itself seems to work reasonably well: we understand the difference between personal use and public performance, the costs of a public performance licence are acceptable given the size of our organisation, and the overhead of arranging the licence can be managed by one person in a fairly small amount of time. However, we have found it difficult or impossible to arrange licences for any other purposes; four specific examples follow.

Firstly, we wanted to make a series of compilation CDs featuring the best tracks in our library, purely as a convenience to reduce the number of CD boxes constantly being carried around. Despite making a serious attempt to contact various record labels whose CDs would have been the sources for the compilations to ask for their permission, we were unable to make suitable arrangements. One of the smaller, specialist labels¹ was happy for us to do this, as long as we already had a legitimate copy of the CDs and were making the appropriate arrangements through PPL to play that music in public. However, the larger, big name distributors did not seem to be able to cope with our request. In one case², we encountered a language barrier. The reply we received suggested that the staff did not understand what we were asking. Another large distributor³ replied giving us permission for the copyright in the sound recordings, but saying they could not grant permission for the musical compositions contained therein, for which we would have to contact each composer separately. Thus we have been unable to make the compilation CDs, despite the general willingness of the distributors to allow it (none of those that replied raised any objection) and a good faith effort on our part to seek the relevant permissions.

A second, related issue is that we cannot make back-up copies of our CD library for everyday use and then put the originals into safe storage somewhere because this would infringe copyright. In our case, CDs may be handled dozens of times each week, and their useful lifetime before becoming too scratched to play properly may be as short as a year, so this wastage is a serious problem for us.

1 Ross Mitchell's *Dance And Listen Ltd.*

2 *Casa Musica*, based in Germany

3 *EMI*

A third licensing problem comes through on-line music distribution. This has great potential to improve the size of our music library, as while we do not buy many mainstream albums on CD, these often include individual tracks that work very well for dancing a particular style, which can usually be purchased separately for downloading. However, the licence for such downloads commonly prohibits public performance, and it is not clear to us whether the licensing arrangements we make with PPL for public performance take precedence. As a result, the club does not currently take advantage of on-line music distribution at all.

A fourth issue is the use of laptop computers or MP3 players to hold our entire music collection and make both transportation and finding a given track to play easier than using a whole box full of CDs. This would save us considerable time and effort, but at present, UK fair dealing laws do not seem to allow us to copy the collection from CD onto another device. PPL have recently introduced a new licensing arrangement to cover this use. However, the licence appears to cost £200 per DJ, and PPL's terms do not allow the club to obtain such a licence collectively at present. Since we have already paid for both the original CDs and the right to play the music on them in public via our existing PPL anyway, I consider this additional fee to be daylight robbery, and our organising committee has expressed no interest in pursuing it further.

In all of these cases — making compilations, making back-up copies, downloading music instead of buying CDs, and format-shifting — we are prevented from doing something that would benefit us purely because of licensing issues, despite having already paid both the cost of the original music recording and an additional fee for the right to play it in public. Sometimes the problem was one of communication: it simply wasn't possible for us to obtain a licence despite our requests of the rightsholders and their general willingness to accommodate us. Other times, the barrier was financial, as with the £200 per head "digital DJ" licence.

Proposal 1:

Simplify the nature of copyrights for sound recordings, so that only a single rightsholder needs to be contacted to arrange any additional licence required for a given recording.

Proposal 2:

Separate the question of whether someone has a legitimate copy of a sound recording from the issue of what performance rights they have for that recording.

In particular, if one is licensed to perform a given recording in public, it should not matter where the copy to be played comes from, as long as it was properly obtained from a legitimate source such as a CD or authorised download service.

I will address the question of whether an additional licence should be required for these uses in the first place when I discuss the specific issue of fair dealing provisions later on.

Specific issues

Current term of protection on sound recordings and performers' rights

Given the volume of material published today, the current term seems to be more than adequate to incentivise the production and distribution of new works. Recent extensions to copyright in other jurisdictions such as the United States have not led to high-profile increases in the volume of valuable works produced, but there certainly have been high-profile cases where such extensions kept popular works about to enter the public domain from being released.⁴

Part of the copyright bargain between society and artist is that it is fundamentally a temporary deal: after a reasonable period during which the artist can enjoy exclusive rights, the work enters the public domain for all to benefit. Thus I have little sympathy with recent comments by Sir Cliff Richard, who argues that some musicians who recorded in the 1950s now rely on income from their copyrights to provide their pension, and that it is unfair to switch off the benefits after all this time. The copyright expiry dates have been known for many years, and those musicians have had an entire career to produce new work that generates further income for them, or to make other arrangements to support themselves financially. To extend copyright on this basis would be to place the perpetual income of a few individuals ahead of the public interest, contrary to the very purpose of copyright.

Moreover, the beneficiaries of increased copyrights may not be the artists who contributed the original work at all, but rather those who have inherited the copyrights and have a vested interest in prolonging them indefinitely. For example, the US 1998 Act was supported not by Walt Disney, Sonny Bono and George Gershwin, but by Disney's company, Bono's widow and Gershwin's estate. While the resulting copyright extension certainly benefited these supporters, it obviously could not encourage the late artists to produce further works, making it a totally one-sided deal that provides no public benefit whatsoever.

Proposal 3:

The term of protection for copyright of sound recordings should not be extended any further. Consideration should be given to shortening it, where possible.

The US approach to extending copyright has been particularly cynical because the extensions have been applied retrospectively, extending the protection for existing works as well as for new ones. If copyright exists to incentivise the production and distribution of valuable works, and the existing works have already been created under the earlier, shorter period of protection, what public benefit can possibly be obtained by extending the period after the fact? Naturally, the corporations holding

⁴ The US Copyright Term Extension Act of 1998 is known less than affectionately in some circles as the Mickey Mouse Protection Act, in recognition of the effect it had on Disney's copyright over that character. That copyright protection was about to expire, leaving Mickey and friends in the public domain, when the act was passed.

the copyrights will argue for extensions for as long as they can, but typically these represent neither the artists truly responsible for creating the works nor the general public, both of whom must be placed ahead of the profits of any other party.

Proposal 4:

If any extension is introduced, it should apply only to new works published after the date of introduction.

Copyright exceptions – fair use and fair dealing

Copying for private use (back-ups, format shifting, etc.)

The recording industry often tell us that the true value of a CD is the recording that is on it, and not the media on which it is distributed. This argument is used to justify the high price of CDs and downloads relative to the low marginal cost of mechanically producing each product. Moreover, when we buy a CD or download a music file, we do not buy the recording itself, but rather we are paying for the right to listen to it for personal use (or, with a suitable “upgrade” to the licence, to perform it in public).

If this is the case, then once an individual or organisation has legitimately obtained a copy of a given music recording, it seems reasonable that they should be able to make any further copies necessary for their own use to conveniently enjoy that recording without further permission from the copyright holder. This would cover various uses mentioned in my earlier discussion of licensing barriers, including format-shifting, making back-up copies, and making compilations.

To demonstrate the urgency of this problem, we have now reached the absurd position that the music distribution wing of a company may be selling recordings to customers on CD, and the electrical equipment wing of the same company may be selling MP3 players that are basically designed to hold content ripped from CDs, yet a customer who buys both cannot copy from one to the other without infringing copyright.

A similar argument can be made for other material covered by copyright, such as computer software. It has been standard practice for a very long time to make back-up copies of software in case the original media get corrupted. While this may be legal in the UK under a rather obscure piece of law, it is not clear to the non-lawyers amongst us how this interacts with licence agreements that stipulate how many copies may (or may not) be made, and it would be reassuring to find such copying was clearly covered by general fair dealing provisions.

The uses described above are all widely permitted under other jurisdictions' copyright systems. For example, the United States' fair use provisions seem to cover them all. Recent trends in Australian copyright law are going the same way: in 2005, the Australian Attorney-General's Department

conducted its own review of their legal fair use provisions, and the department's web site⁵ now exhibits many responses that support similar provisions being introduced in that jurisdiction.

The US approach seems to have been reasonably successful in adapting to changing trends, by defining four general tests to classify a given use as fair or not, rather than legislating a list of specific exceptions where copying is permitted. Since the US follows WIPO agreements, it seems that such general exceptions can comply with the three-step test for permitted exceptions to copyright⁶ and could therefore be used in the UK as well. If such a generic approach were to be adopted in the UK — something I would encourage — then it would be useful to provide clear guidance to the public confirming that common uses such as the above are covered.

Proposal 5:

Enhance "fair dealing" provisions so that once an individual or organisation has a legitimate copy of a work, any kind of convenience copying is permitted to facilitate the private use of that work or, if a suitable additional licence has been acquired, the public performance of the work.

Peer-to-peer networks

France recently went even further, when in late 2005, a ruling by the Appeals Court in Versailles held that the use of peer-to-peer networking ("P2P") software, which allows users to share content with other parties over the Internet, amounted to private copying, and that DRM technologies used to prevent it were therefore illegal. In doing so, they effectively legalised the use of P2P software such as Kazaa and eDonkey for mass distribution of copyright works. However, this situation was swiftly adjusted, with France's highest court, the *Cour de Cassation*, overturning the ruling by the lower court in March 2006, citing the three-step test. The controversial DADVSI Act also had late amendments to legalise P2P rejected in March.

Advocates have argued that P2P systems do not, in practice, damage the copyright holder, because of the advertising effect: users encounter content that they would otherwise miss, and a significant number of them will then purchase that content at the market rate, so retail sales are not adversely affected. I am aware of no formal study to substantiate or disprove this theory.

⁵ http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications_2005_Copyright_-_Review_of__Fair_Use_exemption

⁶ Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, a WTO treaty negotiated in 1994, stipulates that limitations and exceptions to exclusive rights be confined (a) to certain special cases, which (b) do not conflict with a normal exploitation of the work, and (c) do not unreasonably prejudice the legitimate interests of the rights holder.

More generally, it may be possible for a copyright holder to benefit by giving works such as books away freely in an electronic format, while charging as usual for hard copy versions. For example, the author Bruce Eckel does this with many of his programming books, through his web site⁷.

However, I believe that P2P networks take a step too far to be classified automatically as fair dealing. These networks have the capacity to extend distribution well beyond the originally-licensed user to an arbitrarily large population, thus potentially undermining the efforts of the copyright holder to judge a fair asking price (or other distribution conditions) for their content. Regardless of any beneficial uses, there are certainly many people who do copy works illegally through P2P networks and never compensate the copyright holder in any way.

While it may or may not benefit to the copyright holder to allow free distribution of their content in some forms, I believe the choice should rest with them, not with those who wish to distribute their works free of charge.

Proposal 6:

Peer-to-peer networks and similar distribution systems should *not* be classified as private use of copyright material and should *not* automatically constitute fair dealing.

Having said this, we must be cautious of demonising P2P technology in its entirety. There are also valuable, legitimate applications for the technology. For example, it is widely used for the distribution of Open Source software, whose contributors actively encourage others to copy and benefit from their work.⁸ Introducing blanket restrictions or prohibitions on P2P technology is not the way forward.

Broadcast content

Since the introduction of audio and video cassettes, users have been recording broadcast content for both time-shifting and permanent archival purposes, regardless of the legality of the latter. The flourishing markets in both DVDs and CDs today suggest that this has not undermined the distribution of that content by other means, particularly if the alternatives present the content in higher quality or in a more convenient format.

Moreover, the broadcaster will typically have paid a far higher sum for the broadcast rights to the work than any individual consumer would have paid for a personal copy, so the copyright holder has

⁷ www.mindview.net

⁸ Examples of Open Source software include the GNU/Linux operating system, the Firefox web browser, and the OpenOffice.org office suite. More information about Open Source and its novel approach to copyright may be found at the OSI web site: www.opensource.org

been fairly compensated and has given their permission for widescale distribution of their work in return; this is a key difference from the P2P networks discussed above.

It therefore seems sensible to bring the law into line with common practice, and consider a recording made of a legitimately received broadcast to be a legitimate original copy for the purposes of fair dealing.

Proposal 7:

Treat legitimately recorded broadcast content as a legitimate original copy of a work for the purposes of any fair dealing provisions.

Content published on the Internet

When a work is made publicly available via the Internet, it has similar characteristics to a broadcast: anyone with access to the service carrying the content may experience it, at least at that time, and the copyright holder accepts this when consenting to its publication on-line. Following the principles advocated above, private use copying of content legitimately downloaded from the Internet seems to be fair dealing. This would cover several common scenarios, including individual archiving of interesting content for personal use, and storage of content in databases by search engines that then use this data to respond to enquiries from users.

Proposal 8:

Treat content legitimately downloaded from the Internet as a legitimate original copy of a work for the purposes of any fair dealing provisions.

I note in passing that if the content on the Internet was made available without proper permission from the copyright holder, then any downloads would not be legitimate, and therefore any further use of the content would not be legitimate under this proposal either. It is not my intent that this proposal should admit a “back door” through which illegally copied software or music may be downloaded without risk by anyone who does not wish to pay for it, with the only responsibility for these actions resting with the source from which the material is downloaded.

Internet caching and archival systems

In recent years, a number of services have appeared that provide temporary caching or permanent archival of various content available on the Internet. Such services include:

- the use of web site caches by search engines such as Google⁹ and Ask¹⁰, where a direct copy of a web site is made available through the search engine's own site without the user having to visit the original site, and the cached copy is updated with some regularity;
- search engines providing previews of content found by a search, such as thumbnails of graphics found by Google's image search feature, or low-resolution screenshots of whole web pages found by Ask;
- the permanent archival of WWW content by the Internet Archive's Wayback Machine¹¹, which stores web site content forever as it appeared at the time the site was scanned, even if the site is subsequently modified or the content removed;
- the permanent archival of Usenet newsgroup postings by systems such as Google Groups¹², some of which also reformat the text of the original posting, for example to introduce advertising links on key words.

These examples all involve storage *and redistribution* of copyright works or derivatives, differentiating them clearly from the previous section on private use of downloaded works.

There seems little doubt that these services can be beneficial. Preview facilities may allow users to find content more quickly. Caches can enable a user to download content even if the copyright holder's own web site is unavailable, perhaps because of a temporary outage in Internet connectivity, or succumbing to the Slashdot effect¹³. Archives can allow users to find content that might otherwise be permanently lost, for example if an academic researcher moves to a new university and their previous web site disappears, or a useful article posted to Usenet has expired on local servers and can no longer be downloaded through the usual mechanism. Such uses all benefit the public and perhaps also the copyright holder.

9 www.google.com

10 www.ask.com

11 www.archive.org

12 groups.google.com

13 Named after a popular technology web site, www.slashdot.org, the Slashdot effect occurs when a popular news web site links to content hosted by another individual or small organisation, resulting in a large and unexpected spike in the number of users downloading that content over the next few hours. This potentially causes the individual or small organisation to exceed a bandwidth cap imposed by their Internet service provider and takes their whole site off-line, or may result in the host being surprised with an extra charge to cover the increased volume of downloads.

However, it must be noted that many of these caching and archive systems do not faithfully reproduce the original content. While writing this paper, I searched for the dancing club web site¹⁴ on various systems. I found that the Wayback Machine incorrectly displayed the same content for two scans from dates several months apart, and had not archived some files at all, resulting in an unpleasant appearance for the site that was never correct. Ask's preview screenshot for the club home page was around six months out of date. Google's cache copied the text content from our pages, but still referred to our own site for the images, a practice which has been frowned upon by the on-line community for many years since it means the original source still takes most of the bandwidth cost. It also means the cache would be unable to reproduce the image content if our site were unavailable. Ask's cache simply showed a blank page.

Problems like these not only negate the apparent advantages of these services, but may also cause direct harm to the content provider. For example, if web site previews are not kept up-to-date, they may fail to reflect late announcements or time-sensitive offers, resulting in the user never visiting the original web site. Similarly, archived material that is not a faithful representation of the original may reflect poorly on the content provider.

Proposal 9:

Regardless of any fair dealing provisions that might cover caching and archival of Internet content in general, any reproduction that is not faithful and (unless clearly a historical representation) updated in a timely fashion should *not* constitute fair dealing.

With that proviso, we must ask whether these services provide sufficient value to justify fair dealing status, given that they typically make copies of complete works, without the knowledge or consent of the copyright holder, and often for commercial gain.

Damage may still be caused to the copyright holder in these cases, though usually it will be less serious. Caches may cause web sites to lose advertising revenue due to lower numbers of visitors reaching the original site. Web site operators may lose useful information about who visits their pages, and thus the ability to refine them, which would usually be in both their own interests and that of their users.

The most significant implication of allowing archiving as fair dealing is that once content is put onto the Internet, it is effectively subject to being reproduced on-line forever. This means that a reasonable comment made in a Usenet posting today, which happens to become politically incorrect in five years' time, may come back to haunt its poster when they apply for a new job and their prospective employer looks them up. If content is accidentally posted on a web site and then hastily retracted, but

14 Found variously at www.cam.ac.uk/Societies/cdc, www.srcf.ucam.org/cdc and www.cambridgedancers.org

archived in between, it is public for good, even if it contained trade secrets or confidential government information. Even if a web site operator adds content they have no right to publish, such as copyright infringing movie or music files or personal information they have obtained illegally, the material is liable to be archived somewhere and remain public even if a court orders the original site to be taken down. Finally, removing the option to offer content for a temporary period only may act as a disincentive to the distribution of useful works, if authors become wary of offering any sort of book preview or article on the web if the material might later lead to a full commercial project. Preserving content is often in the public interest, but preserving all content regardless of circumstance may go too far.

At present, there are established conventions by which a knowledgeable content provider may request that their content not be cached or archived: web sites may use the robots.txt file¹⁵, while those posting to Usenet may set the X-No-Archive header on their posts. These standards are generally respected by the major caching and archiving services, and probably have some legal weight given that much established practice on the Internet relies on the implicit consent of the copyright holder to make copies for certain purposes. However, they are poorly supported in current software, and inexperienced users may be unaware of their existence, or even of the fact that content that appears for only a few days on their own ISP's Usenet server may be stored forever elsewhere if they do not request otherwise. In addition, the X-No-Archive technique is not robust, given the Usenet custom of quoting content to which you are replying in a follow-up post, and the fact that the standard does not dictate that posts quoting non-archived content must themselves become non-archived.

Although this is a close question with arguments for either approach, I do not feel on balance that the advantages of today's "opt-out" caching and archival services are great enough, nor the risks of damaging the copyright holder small enough, to justify granting fair dealing status.

Proposal 10:

Caching and archival based on an "opt-out" model, without the explicit consent of the copyright holder, should *not* automatically be classified as fair dealing.

Proposal 11:

A simple mechanism for copyright holders to "opt-in" and give permission for their work to be cached and/or archived should be supported and widely publicised.

¹⁵ See www.robotstxt.org for more information.

The need to protect the public against circumvention of fair dealing provisions

Any fair dealing provision is worthless if it can be circumvented by the copyright holder through other legal trickery, or if the public is penalised through other mechanisms for exercising the fair dealing options.

For example, I believe that in the United States the fair use provisions in law provide an affirmative defence to copyright infringement rather than any sort of individual right. This leads to concerns that the combination of the Digital Millennium Copyright Act (which makes circumventing copy protection technology illegal under most circumstances, even by someone who would otherwise be allowed to make that copy) and DRM technology might effectively make fair uses illegal even if they don't infringe the copyright itself.

I would argue that while it is unreasonable to impose any burden on copyright holders to assist legitimate users with making fair copies of their works, they should certainly be prohibited from actively inhibiting it. Such a ban would clearly be incompatible with the continued existence of DRM in its current incarnations, but as I will argue when discussing that issue shortly, this has no real world cost, and is a necessary safeguard if there is to be any point in providing fair dealing exceptions at all.

Proposal 12:

Ban any deliberate attempt by copyright holders to block legitimate users of their works from making copies under fair dealing provisions. (This should not be interpreted as imposing an obligation on any copyright holder to actively assist with making such copies.)

Under pressure from media industry bodies, several nations have recently introduced so-called "fair use taxes". These increase the cost of blank media such as CD-Rs that could be used to copy content, and pass the extra profits to the recording industry. I believe such charges are highly inappropriate.

Firstly, the introduction of a levy on blank media would undermine the benefits of any enhancements to fair dealing provisions as discussed earlier. As a consequence, the new provisions would simply shift the point at which the user pays the recording industry for making a copy, even if that copy were considered fair dealing.

Secondly, there are many other legitimate and common uses for blank recordable media: CD-Rs are often used for back-up purposes, for example, and of course even if the material being recorded is subject to copyright, it may well be that any industry groups receiving funding from blank media purchases do not represent the copyright holder. The built-in assumption that big name industry groups should be entitled to payment whenever someone happens to make a recording of any material from any source will be incorrect on many occasions, and thus any blanket charge on blank media is bordering on protectionism.

Proposal 13:

Levies on purchases of recordable media to subsidise any losses incurred by copyright holders as a result of fair dealing provisions should not be permitted.

Copyright – digital rights management

Dangers to fair dealing and timely release into the public domain

One big problem with DRM is that it can seriously interfere with users' ability to enjoy content they have legitimately obtained. Several potential fair dealing provisions discussed earlier in this submission are affected by DRM technologies, particularly when this is combined with the sorts of anti-circumvention laws provided for under the EU Copyright Directive, the DMCA in the United States, and other similarly draconian legislation elsewhere. There is also the question of how one ensures that content is truly released to the public domain after its copyright expires.

Moreover, DRM technologies can lead to concerns like the region coding scheme used with DVDs, which artificially limit the consumer in ways that might kindly be called unethical. There has been much discussion recently of the forthcoming high-definition successors to DVD, and in particular whether the content on these discs will be output at full quality only to hardware supporting the HDCP copy-protection mechanism. If the media companies proceed with this approach, then anyone who bought hardware technically capable of displaying the high-definition content but without that connectivity — a common situation among those who bought even rather expensive HD TVs more than a few months ago — will be left watching only an artificially low quality version of the content they paid for.

Perhaps this sort of issue is best left to market forces to fix, just as multi-region DVD players soon became common, but again, this might be deemed to be circumventing a copy-protection technology and held illegal on those grounds, even if someone did find a way to get the full, high-definition version of the content off their disc.

Dangers posed directly by DRM mechanisms

It is in the nature of software used for DRM that it will work at a low level within the systems concerned in an effort to avoid circumvention. In the case of personal computers there will in general be other, unrelated functions running on the same system, and there is the potential for DRM software to interfere with these functions inappropriately.

Sony received a lot of negative publicity after incorporating the XCP copy-protection software written by another company, First4Internet, on a number of its music CDs. The software concerned was reported to have a number of negative effects, ranging from damaging the operating system software of PCs on which it was installed such that no CDs would play in the CD-ROM drive, to introducing

serious security flaws on the PCs of the kind usually left by hackers after a system has been compromised.

The software installation was intended to be required before the CD would play, but on some systems even if the user declined to install the software when asked it was installed anyway, causing it to fall foul of various United States laws normally used against spyware writers and hackers. Safe and complete uninstallation of the software was difficult, resulting in the release of further software to clean up compromised systems, which itself had bugs leading to further failures.

The whole affair resulted in several class action lawsuits against Sony in the US. The software was, however, trivially circumvented on PCs running Microsoft Windows, and ineffective regardless if the CD was played on other systems.

The ineffectiveness of DRM technology

The call for evidence is perhaps a little optimistic here:

Increasingly digital media content is distributed with digital rights management (DRM) technologies that can enable rights-holders to track usage and prevent unlicensed copying by technological means.

As far as I am aware, there exists no current DRM technology for any widely published content in the UK that has not been defeated soon after being introduced, resulting in the content being illegally distributed DRM-free within a short period of original publication. All major copy-protection technologies used with CDs and DVDs have been compromised. A means of circumventing the HDCP technology to be used with HDTV was known before any device implementing the technology was publicly available. The DRM systems used for music downloads on systems such as Apple's iTunes are readily circumvented. The details of all these cracks, and many sources of the necessary software or hardware, are widely available on the Internet for the price of a search engine query.

We may therefore assume that while the use of DRM systems may (or may not) significantly inhibit unlicensed copying, it most certainly can not entirely prevent it. In any case, content distributed with DRM is almost certain to appear unrestricted on the Internet shortly after release, so it is questionable whether any DRM technology can offer more than an illusory benefit to any copyright holder.

The existence of a non-DRM market

Media groups have argued in the past that copyright infringement is behind various drops in sales, and that DRM is a necessary means for them to protect themselves against this threat. However, the success of legal download services such as Apple's iTunes suggests that when users are offered a reasonable service at a fair price, many will choose to pay for a properly licensed copy rather than download illegally. The remainder, who are willing to spend the time to find illegal copies anyway,

are still able to do so even in the presence of DRM. Thus the argument that DRM is necessary to protect the legitimate markets for content providers is rather weak.

The case against DRM

DRM is an ineffective means of protecting content from illegitimate copying, and is unhelpful in a market where consumers consider the products to be fairly priced anyway. However, it brings with it serious dangers both to the principles of fair dealing and later release to the public domain, and to the integrity of systems on which it is installed.

Proposal 14:

DRM should be recognised as an ineffective approach to copyright enforcement that offers little practical benefit to copyright holders, but poses a serious threat both to legitimate users of protected content and ultimately to the public interest. As such DRM should be given no special consideration in law, and its use should be prohibited wherever it would compromise fair dealing.

Users should be made aware of any DRM technology that comes with their content, so they can decline to use it. There should be prominent statements identifying exactly what the DRM system and any associated software do. In particular, audio discs with DRM technology that do not meet Philips' Compact Disc standard and might not play properly on some hardware should not be represented as CDs in stores, and if future high-definition discs will not play at full resolution on non-HDCP hardware, then vendors selling such discs should be required to advertise this fact prominently.

Proposal 15:

Any products using DRM should be required to state prominently that it is in use and what it does, and the user should be given the option to decline the use of the content and avoid any permanent changes being made to any system with which the content and its DRM came into contact.

Copyright – orphan works

I have encountered the orphan works problem in two circumstances.

Multiple copyrights for sound recordings

The first, as discussed under barriers to licensing earlier in this submission, was while trying to license material for the dancing club: a big name record label indicated that they did not hold all relevant copyrights, and so could not grant us the permission we sought unilaterally, preventing us from making copies unless we could contact each composer whose work appeared on the CD. I have already proposed a simplification of the copyright framework that would address this issue.

Extensions to software products

The second relates to computer software. It is common for a user to purchase a software product, and later to purchase extensions to the product. These include “service packs” that fix bugs and security flaws in critical business software. They also include expansion packs for games that provide additional content and, increasingly, updates to prevent cheating by other players in on-line games.

The usefulness of a software product that is not fully extended may be greatly reduced. Users of business applications that are not kept fully patched may experience serious security vulnerabilities. Users of on-line games may be locked out completely if their software does not contain the latest anti-cheating features.

I have experienced a problem on several occasions where I have legitimately obtained the original software, an extension has been released but I have not yet obtained it, and then the supplier has gone out of business. At this point, it is often unclear who may hold any relevant copyrights for the extension software, yet it does not seem to have entered the public domain. Thus it may be impossible for all legitimate users of the original software to properly update it, even if failure to do so brings with it serious consequences.

Proposal 16:

If a legal user of a piece of software has no legitimate channel available through which they can obtain previously published extensions to that software from the copyright holder, then copying those extensions from other sources should be legitimised, perhaps via a further fair dealing provision.

A related, unwelcome trend is that software patches will be made available, but in order to install them the user must agree to a different licence agreement to that which accompanied the original software. I will address this issue in my discussion of licence agreements generally, later in this submission.

Copyright – licensing of public performances

I have encountered problems in this area through the dancing club, as described in general discussion of barriers to licensing earlier in this submission.

Legal sanctions on IP infringement

Here I discuss only copyright infringement.

I believe that the sanctions and penalties against those found to be infringing copyrights should take into account three factors:

1. the immediacy of the infringement;
2. the scale of the infringement and any damage caused to the copyright holder;
3. the relative importance of copyright infringement compared to other illegal acts.

Immediacy

It must be recognised that with the increasing popularity of broadband Internet, it may be possible to make thousands of infringing copies of works at negligible cost in a very short space of time. Consequently, the existing treatment of copyright infringement as a civil matter to be settled through length court proceedings is no longer sufficient for the effective enforcement of copyright law.

Proposal 17:

Introduce a fast-track mechanism, such as a court-ordered injunction, so that a copyright holder whose works are demonstrably being made available for illegal downloads may seek immediate blocking of the source offering those downloads.

While this seems only fair to copyright holders in the face of today's technology, any such mechanism must be carefully balanced to prevent occurrences such as those reported in the United States, where umbrella groups representing media corporations automatically scan the Internet for any downloadable files even resembling their content, and then issue automated take down notices under the Digital Millennium Copyright Act (containing statements made under penalty of perjury!) with no further verification that the content is indeed infringing.

Scale

Again, with the advent of the Internet it is now possible for a single offender to distribute many times the number of infringing copies as would have been possible when physical media were involved. Thus the copyright holder may, conceivably, be caused immense financial damage as a result of a single infringer, and the penalties associated with a successful prosecution for copyright infringement should reflect this.

However, the United States again offers a cautionary tale, with calculations of damages provided by the media industries frequently based on wildly optimistic assumptions. For example, it is unrealistic to assume that 1,000 people each illegally downloading 1,000 different music tracks from a particular

source would have paid the market rate for all 1,000 tracks if the illegal downloads had not taken place, and thus that the record label should be compensated for losing $1,000 \times 1,000 = 1,000,000$ separate sales. While extensive financial damages might reasonably be awarded by a court in cases of mass copying, it is therefore important to ensure that those damages are based on realistic losses, and not some theoretical figure produced by the claimants themselves.

Proposal 18:

Any financial compensation awarded due to copyright infringement should be based on the amount of damage caused to the copyright holder. The resulting figure may be large, but should always be based on a realistic estimate of the damage caused, not an implausible “worst case” claimed by the copyright holder.

Importance of copyright compared to other illegal acts

It is now the case in some jurisdictions, again including various parts of the United States, that the penalties for copyright infringement may exceed those for crimes involving violence, sexual misconduct, and negligence that could result in loss of life. This situation is clearly absurd: while copyright infringement may cause significant damage to the copyright holder's wallet or their pride, there is little that a court cannot either undo or take into consideration when awarding compensation. Thus while it may be appropriate in some cases to impose restrictions on the future behaviour of a copyright infringer to prevent repeat offending, possibly even including a short span in prison for the most serious offenders, any such penalties must be proportionate to the nature of the law-breaking.

Proposal 19:

If copyright infringement becomes a criminal rather than just a civil matter, then any penalties should still be based primarily on realistic compensation for damage caused. The use of court orders on behaviour, including prison terms, should be very limited; the punishment must fit the nature of the crime.

Further issues relating to computer software

Software patents

Although in theory these may provide protection for the smaller developer against a larger group unfairly taking advantage of their work, it is my experience that in practice, such patents have exactly the opposite effect to that intended: large organisations with dedicated legal teams can secure huge numbers of patents, many of them very wide-ranging, cross-licence with other such organisations to secure their own legal position, and then use their patents as weapons against any smaller but more innovative developers.

This phenomenon has been seen on many occasions in other jurisdictions: controversial patent issues range from awarding Amazon the “one click” patent, which has hampered the use of an apparently obvious idea by competing web sites, to Unisys's granting and later revoking a licence for non-commercial software to use, without paying royalties, the LZW data compression algorithm, which is fundamental to the GIF file format widely used to include graphics on web pages. These cases have caused significant problems for the web design and software development industries, and rather than promoting the growth and adoption of new ideas, the patents have probably slowed the improvement of products in these areas while rivals refused to pay royalties on the patents and were forced to develop alternatives instead.

For this reason, I believe that software is best protected through conventional copyright means, and patents should be kept well clear of this field.

Proposal 20:

The UK should not adopt software patents, and should fight strongly against the repeated attempts to introduce them via Europe.

Software licence agreements

It is common for software to come with an “end user licence agreement”, which the user is asked to agree to before using the product. Historically, the EULA was presented on paper, inside the shrink-wrapped package containing the media on which the software was supplied. Today, it is more common to present a message to the user installing the software and require them to indicate that they have read and agree to the licence terms before proceeding with installation. This practice causes a number of serious concerns.

Status of the EULA as a contract

First and foremost, it is not clear to many people whether the EULA can form a binding legal contract, regardless of whatever the agreement itself says.

Proposal 21:

Clarify the legal status of end user licence agreements.

If the EULA does not form a contract or other binding agreement, most of the remaining discussion in this section becomes moot, but the question is raised as to how software vendors can legitimately charge different rates depending on the number of users who will be using their software, for example.

The consequences of failure to agree to the EULA

If the EULA is interpreted as a contract then this creates the unusual legal position that a consumer may pay for a software product without having seen the EULA, and then wish to cancel the purchase if they do not agree to the EULA's terms. However, in the case of software, many retailers will be reluctant to accept returns of opened packages, regardless of any wording in the EULA that says the user may return the product for a full refund if they do not agree.

Proposal 22:

If EULAs are legally binding, then clarify the legal relationships between the user, retailer and copyright holder.

Proposal 23:

Ensure that the user may always cancel a retail purchase of software if they do not agree to an EULA that they were not able to examine in advance, and receive a full and timely refund of the purchase price.

Restrictions on use within the EULA

It is common for EULAs to indicate that a user may (or may not) make a certain number of copies of the software for purposes such as backing up or installing on a network server. While these may be advantageous to the user in the absence of strong fair dealing provisions, they might come into conflict with such provisions if fair dealing were extended as discussed earlier in this submission. Since fair copies are fundamentally made without infringing copyright, no licence agreement should be able to override any fair dealing provisions.

Proposal 24:

Ensure that any fair dealing provisions are set up such that they clearly override any more restrictive provisions in EULAs or similar agreements.

Incorporation of unexpected terms in the EULA

An unwelcome recent trend is that EULAs contain terms wholly unrelated to copying the software to which they apply, such as the user giving permission for additional software (such as “adware” or “spyware”) to be installed on the computer at the same time, or granting the copyright holder the right to visit the user's premises and conduct an audit. Since users rarely read extensive EULA terms before indicating their acceptance — something hard to criticise given the length of many EULAs today and the dense and usually irrelevant legalese they tend to contain — this could result in all kinds of damage to the user that they would not expect just from installing a piece of software. Following the lead of other industries, such as the regulations now applying to those advertising credit facilities, it seems to be in the best interests of the public to require any such dubious terms to be prominently declared up-front.

Proposal 25:

EULAs, or similar agreements by any other name, should be forced to disclose prominently any terms that deviate significantly from the user's expectations, including anything not directly related to the installation and use of the named software with which the agreement is associated.

Variation in EULA terms for extension software

Another recent development is for an original software product to be supplied under one licence agreement, but for extensions to the software to be supplied with a different licence agreement, which the user is again asked to accept before installing the update. Recall from the earlier discussion in this submission that these may include essential security updates or other features necessary to the continued effective use of the original product. This practice might be used, for example, to force users of software that plays MP3 files to agree to installing DRM technologies at the same time as an essential security fix.

Clearly this is a sharp practice that is not in the interests of anyone but the software vendors. While it may be necessary to make some minor changes in the wording of an update's EULA, we live in a world where it is common for software to be shipped with many bugs initially and then corrected later via some form of product update, and allowing the update to have arbitrarily different EULA terms to the original is tantamount to writing a blank cheque to the software vendor the moment the original software is purchased.

Proposal 26:

Where extension software is supplied for use with an existing product, require that any significant changes in the licensing terms from those of the original product be prominently advertised to the user up-front.

If a user declines to install an update because of changes in the licensing conditions, this may render the original product unfit for purpose. It may be considered appropriate to provide for compensation in this case, or perhaps to provide a mandatory alternative licence, such that the user may obtain the update through the normal means (potentially including having to pay for it) but may then use it according to their original licence terms they first agreed to.

Duration of copyright protection on software

The software development industry moves at a high speed, with the shelf life of a typical product rarely exceeding a few years. It is also in the nature of writing code that any more advanced product in a particular field may bear significant resemblance to parts of simpler products that went before it, even if the newer product is genuinely created as an original work with no particular reference to the source code for the earlier works.

This is a rather different situation to other copyright material such as musical works or books. In light of the pace of industry development, it may be appropriate to shorten copyright terms on software considerably. This should not adversely affect the return on investment for most software developers, since most products sold commercially will either make a profit within a small number of years or never make one at all. However, it would ensure that someone developing the most advanced desktop publishing product in the world was not later sued by the author of the simplest text editor in the world for writing code to process documents consisting of a series of paragraphs consisting of a series of words, because although the application was far more advanced and the programming techniques now common knowledge, the basic structure of the code happened to be similar.

Proposal 27:

Consider significantly reducing the period of copyright protection on software.

Issues relating to the transfer of IP rights

The final issue I would like to consider is the effect of allowing intellectual property rights to be transferred, particularly from original artists to large organisations such as employers and distributors.

Transfer of rights between employee and employer

It is common practice for intellectual property created by an employee in the course of his or her employment to be transferred automatically to the employer. This seems reasonable where the IP is related to the employment, for example:

- IP created during the normal working hours of the employment
- IP created using the employer's resources
- IP otherwise directly related to the employee's rôle, such that the employee would not have been able to create it independently (for example, because it is based on trade secrets).

Indeed, without such a provision, it would be difficult for businesses such as software companies or advertising agencies to operate within our current IP framework, while R&D within the manufacturing industry would lose much of its incentive.

However, it seems increasingly common in some industries for employment contracts to assign *all* IP rights gained by the employee during their period of employment to the employer, including those deriving from work done wholly independently of the employment.

The ethics of an employer claiming IP rights from work done outside the scope of the employment are dubious at best. Why should an employer who pays an employee to design advertising flyers also get the patent rights to a new invention the employee thinks of on their own time? Why should an employer who pays an employee to write computer programs for a specific task also be able to claim the rights to any other software the employee may write on their own time? Such use of IP is no incentive for the employer to create and distribute new works, though of course they may benefit greatly despite making no contribution at all to the work in question.

From the employee's point of view, catch-all contractual IP clauses can act as a strong disincentive, actively preventing employees from creating and distributing works they otherwise might have. For example, some of my work colleagues write software for our employer by day, but by night they are semi-professional musicians, and they publish their compositions. They would be unable to do this if our contracts gave all IP rights to our employer.

As another example, much Open Source software is written by professional programmers in their spare time. However, those who forfeit all IP rights to their employer are unable to contribute, since they do not have the rights to offer their work under Open Source licensing arrangements such as the GNU General Public Licence. A developer without such rights can not even write a useful program and then give it away completely free for the benefit of all!

It can be difficult for employees to avoid accepting unfavourable contractual IPR terms, particularly in industries where such arrangements are becoming common, and large organisations are reluctant to permit individual changes to employment contracts. A few months ago, a large, US-based corporation acquired my employer, a small, privately-owned, UK-based company. One of the first actions by the corporation's HR group was to propose new contracts for all UK employees. These included blanket IP clauses far more favourable to the corporation than those we had previously agreed, which were openly supported by the Vice President taking leadership of our group. After extensive negotiations, the corporation agreed to revert the IP terms to those in our previous contracts, but it seems likely that we achieved this only by objecting *en masse* to the revised contracts. Clearly this option is not available to individuals starting new jobs.

While some key areas of employment contracts, such as working hours and grievance procedures, are covered by various regulations and legal safeguards, at present there is no such protection of employees' rights to intellectual property. I believe it is time for these rights to be protected as well.

Proposal 28:

Prohibit employers from making blanket claims to employees' IP rights, including those deriving from work done other than as part of the employment.

It would be unreasonable to impose this change retrospectively and withdraw IP rights that employers already have. However, it seems quite feasible to restrict any existing contractual terms allowing such claims to existing works only, releasing employees to create and distribute new works in future.

Moreover, the benefit of the doubt should be given to the employee where work is only incidentally related to the employment. Otherwise, an employer of software developers might try to claim rights to any code written by their staff in a different field because, for example, the same programming language was used. Again, this would inhibit the creation and distribution of new works by those employees outside that employment.

Transfer between artist and distributor

In several industries that depend on copyright, the artists who originally create a work are effectively forced to hand over their rights to a large company such as a book publisher or record label, in exchange for that company's assistance with marketing, mass production and distribution. The terms

of the deal are rarely favourable to the artist, but the only alternative is to go it alone, which is not an entirely unrealistic prospect in an Internet-enabled world, but remains far from the norm.

While in principle this is a matter for the individual artists and their distributors, there is an inherent bias towards the established, big name companies here, which tends to result in a small number of organisations holding large numbers of copyrights. Even if a work turns out to be wildly successful, the distributor — a mere middleman, and by far the least valuable player in the game — is now the primary beneficiary of the copyright protection. The artist will receive only such additional compensation as they agreed up-front, with none of the advantages that the exclusive distribution rights awarded to them initially were intended to confer. Moreover, the distributors are generally commercial organisations, who will fight very hard to maintain and extend their copyrights long after the original artist stopped benefiting from them and the public domain is waiting for the works.

In this situation, copyright has stopped serving its intended purpose. It is no longer acting as a major benefit to artists, who have been reduced almost to producing works-for-hire for the distributors, yet the artists are still the only party responsible for the creation of the new works. It is also no longer acting in the interests of the public, since the direct feedback loop that motivates artists to produce more and better quality work for the public to enjoy has been broken. And yet, if the publishers and record labels all disappeared tomorrow, skilled and talented artists would still be able to create valuable works, and other distribution channels would soon evolve to allow the public to benefit from them and the artists to receive just rewards for their efforts.

It must be in the public interest to seek a different balance here, where the benefits of distributors are reduced to reflect the small amount of value they really add, while the public and the artists are the major beneficiaries. However, this would probably require a rather dramatic change in the copyright framework.

One possibility would be to make copyright itself non-transferable, as in Spain, and instead allow exclusive distribution agreements to be made with a statutory maximum duration of only a few months. This way distributors become the servants of the artist: those who provide an effective service in producing and distributing large numbers of copies are benefiting both the public and the artist more, and are more likely to see their arrangements renewed; while those who fail to maximise the potential of any given work, and therefore provide less benefit to public and artist alike, would see a smaller return and potentially lose their agreement altogether.

Another possibility would be to allow the transfer of copyright, but reduce its term dramatically the moment it is transferred, reflecting the fact that it is no longer directly benefiting the original artists, and therefore society might reasonably claim the work for the public domain much sooner.

Clearly ideas such as these may be unrealistic in light of international frameworks, so I make no specific proposals here. However, I do think it is important to recognise that the balance of power given by today's copyright framework to major distributors such as book publishers and record labels is disproportionate to their value in the grand scheme of things. The public interest must be the most important factor in the formation of any legal system, and in this case the public interest is best served by motivating artists to produce and disclose new works of value. The profits of a large company are a distant third in importance, and any changes to the copyright framework that reflect this order of priorities are to be welcomed.

Conclusions

At all times, we must remember that copyright is intended to serve the public interest by motivating the creation and distribution of new works. Although the basic premise is reasonable, the balance has recently been tilting towards the copyright holder and should be restored.

In a framework where this copyright holder is often a major industry organisation rather than the original artist anyway, we should strongly resist the introduction of measures that hinder legitimate users, such as DRM. We should also oppose the extension of copyright terms well beyond what is necessary to serve the primary goal of encouraging the publication of more and better works, and indeed consider reducing those terms where there is no particular indication that the current length is necessary for the goal.

When in doubt, we should always side with the public. Thus I advocate the extension of the current fair dealing provisions to cover everyday activities such as making back-ups, format-shifting, and archiving recorded broadcasts or interesting content found on the Internet, where these are done for private use with no republication or commercial benefit involved. I also advocate clamping down on abuses such as incorporating irrelevant terms in software licence agreements, and on the aggressive acquisition of copyrights by organisations at the expense of the artists who create new works.

At the same time, we must protect the legitimate rights of the copyright holder, particularly in the face of the cheap, fast distribution of works possible via the Internet. I do not believe that "opt-out" facilities such as caching and archival services, or distribution beyond personal use on P2P networks, merit fair dealing status. Updating the legal sanctions available against copyright infringers, and in particular introducing an efficient mechanism to seek immediate blocking of illegal on-line sources, seems well overdue. However, care must be taken to ensure that any penalties are proportionate to the realistic level of damage caused, and that any instant take down mechanism cannot be abused by blocking hosts without adequate proof that infringement is definitely taking place.

Overall, our existing copyright framework is in need of considerable simplification. I believe this is best exemplified by the way the dancing club wanted to copy some content, but even the record label who supplied it could not tell us who held all the relevant copyrights. Such complexity will inevitably be a barrier to the effective use of material, and serves the interests of no-one.

Finally, I believe that software patents are an unwelcome trend, which results in the patent system working against the very goals it is intended to support.

Thank you for your consideration.

Chris Newton
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