



SOCIETY FOR COMPUTERS AND LAW

RESPONSE TO THE GOWERS REVIEW OF INTELLECTUAL PROPERTY

27 April 2006

To: gowers.review@hm-treasury.gov.uk

INTRODUCTION

The Society for Computers and Law (www.scl.org) welcomes this opportunity to respond to the Gowers Review.

The scope of the Gowers Review is extremely wide-ranging. The aim of the Society is to encourage and develop IT for lawyers and IT related law. As such we have chosen to answer a selection only of the questions raised by the Gowers Review and, given the Society's aims and the expertise of its membership, we have limited those responses largely to issues applicable to software and digital rights, concentrating on copyright issues arising in this area.

The Society previously submitted a detailed response and gave oral evidence to the All Parliamentary Internet Group ("APIG") inquiry into digital rights management. The Society's paper is attached for ease of reference, and some of the responses in this response should be read in conjunction with the Society's response to the APIG inquiry.

GENERAL QUESTIONS

Question 4(a): Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs?

Enforcement of the different forms of IP differs widely, depending on the way in which the right is established and the test for infringement.

Copyright

Under UK law copyright arises automatically, although it is a common misconception that some form of registration is required; however it affords protection only against actual copying, which has to be factually proven to have occurred. This can be difficult and expensive.

It is relatively easy (although occasionally legally complex) to establish ownership of copyright. However many unadvised individuals and small businesses mistakenly assume that if they have commissioned creative work they will own it outright and may use it for all purposes; the distinction between ownership and a licence is not familiar to them. In these circumstances it is sometimes possible to obtain ownership on equitable principles, but the values involved rarely warrant the necessary proceedings.

Where material is informally developed, co-ownership often arises and can cause a later dispute when the material proves valuable. Co-ownership can stymie any use of the copyright since each proprietor has the power of veto. This is a common cause of disputes concerning software.

As to enforcement the principal difficulty is proving that copying has taken place. Evidence of factual events can be expensive to obtain and present and witnesses may be unpredictable at trial. The very thorough approach taken towards testing evidence in UK courts through cross examination of witnesses accounts for a significant part of the expense of proceedings, but may nevertheless be appropriate where one person's evidence is key, which is often the case in copyright claims.

A further difficulty is that damages for secondary infringement only arise once the infringer is put on notice. For the purposes of enforcement against counterfeit and pirated copies copyright is therefore less useful than trade mark rights. Whilst there are criminal provisions available they are exceptionally complex and lobbying groups have numerous criticisms to make.

The scope of what is protected by copyright has been broadly interpreted in the past and continues to be: it is said to protect against "over borrowing" of the creator's skill and labour. Software proprietors are obliged to rely principally on copyright for protection; for them a

key question is whether copyright will prevent the development of competing software which produces the same outputs for the same inputs, in a similar (or even identical) format, but using different programming.

The recent Navitaire –v- Easyjet case ([2004] EWHC 1725) tested that question. For the first time, the court considered the exceptions to copyright protection set out in the Software Directive (Article 1(2)); this has the potential to significantly restrict software proprietors' rights, but the court did not come to any firm conclusion on the question, which probably requires a reference to the European Court of Justice. This is potentially problematic and at present creates significant uncertainty (see also Nova Productions Limited v Bell Fruit [2006] EWHC 24).

Copyright is only partially harmonised within the EU, and copyright principles in the USA are distinctly different (not least in respect of the “look and feel” question for software described above). Forms of infringement which utilise the internet are difficult to counter through actions in national courts based on national rights. In particular the scope for action against distribution of peer to peer file sharing software is presently uncertain.

Patents

Patent protection is obtained through a complex registration process at considerable expense. A patent provides protection against an unforeseeable range of activities, irrespective of the infringer's awareness; however the validity of the registration is almost invariably challenged if the patent is enforced, and the patent may well prove to be invalid in the light of prior art.

Patent rights are costly to enforce (commonly several hundred thousand pounds to take to trial) and there is often considerable uncertainty as to the outcome of proceedings, both because of the complexity of reading patent claims onto an allegedly infringing product or process and because of the risk to validity.

Smaller enterprises and individuals who own patents are often unaware of the cost and risk of enforcement; however there is a common view that a large part of the usefulness of a patent is to serve as a readily visible disincentive to others. This can encourage applications for patent rights in respect of claims which are barely inventive, if at all.

The patentability of software has been a hotly disputed issue. Members of the Society hold a wide variety of views and the Society therefore does not comment further. In other fields of endeavour patent rights are a highly specialised form of protection but one which offers considerable incentives to innovate if properly understood.

Trade Marks

Registered trade marks are relied upon for enforcement against counterfeit and pirated copies. Theft and counterfeiting are criminal activities, and so the “fit” between civil and criminal remedies is important. At present there is inconsistency between the approach taken by the House of Lords in a criminal case (R v Johnstone) and that taken by the civil courts in the Arsenal case.

The resources available to Trading Standards Officers at local level are very limited, and they therefore have to prioritise work which impacts on health and safety issues rather than economic crime. This is a short term view, but work is going on to improve the position by coordinating intelligence about counterfeiters through a database operated by the Patent Office and by routing part of any funds confiscated from counterfeiters back to Trading Standards. There are also efforts to establish a multi-agency model for anti-counterfeiting work, coordinating the work of the police, trading standards, customs and trade mark proprietors.

Criminal penalties are insufficient to deter counterfeiters, although the work of the Assets Recovery Agency is beginning to redress the imbalance in a useful way.

There is need for more and better communication between the various Government agencies involved and trade mark and copyright proprietors, which is being addressed.

The importation to the EU of genuine goods released in other markets but not authorised for sale in the EU (“grey goods”) is severely hampered by the practical aspects of European customs law. Grey goods are widely stored in bonded warehouses in Europe (and are almost certainly intended for unlawful release into the EU) but they cannot be seized unless a very high evidential burden is met. In practical terms it is therefore possible for grey goods importers to act with impunity (see Class International).

Designs

Designs law has recently been harmonised, and Community rights have been introduced. This has been a spur to registration, and the Community scheme appears set to succeed. This is a good example of an international approach to providing inexpensive and effective protection (although proceedings are likely to become more complex as case law develops).

The UK law of unregistered design right continues, and is unique. Although complex it has proved useful in affording rights against “pattern” spare parts (see Dyson) which are not available under Community designs law.

Question 4(b): Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

Cost is undoubtedly a barrier to smaller organisations and individuals although the cost of proceedings varies across a wide scale, registered design rights being least costly to enforce and patent rights the most costly. It is unrepresentative to think always in terms of the cost of enforcing patent rights; most commercial enterprises have rights of other kinds as well, and design and trade mark laws are aimed at commercial protection.

It is often possible to obtain compliance without issuing proceedings. Registered rights are more effective in this regard as the registration can be produced and tends to be accepted as evidence that the right exists and is valid (at least until more detailed legal advice is taken).

One fundamental determinant of cost is the process for testing evidence in UK courts. Cross examination of witnesses under oath is an expensive process to administer and results in evidence being constantly refined and reworked until trial. One way to contain costs is to shorten the time to trial so that less work can be done unless very wide resources are used; it is a truism that more money is spent the longer it takes to get to trial. Court fees and the cost of advocacy contribute, but are not determinative; the key element is the amount of work required to establish the necessary evidence for the case.

Where complex technical or scientific evidence is required (as in some patent cases) the cost of evidence is greatly increased; this could be reduced to some extent by the use of an expert appointed by the court, rather than each party fielding its own expert, but that approach would not be acceptable to many litigants. Generally speaking the court is very open to case management proposals which are aimed at reducing cost, and there is scope for smaller organisations to think creatively about how to reduce the costs of any particular proceedings.

The opinion service recently introduced by the Patent Office may enable settlement of some disputes at much lower cost, but the fact that the outcome is published is a disincentive to using the service.

Mediation continues to grow but has not proved especially popular in intellectual property disputes, possibly because what is at stake may not be seen as something which can be compromised (although in truth most proceedings are settled in any event). Mediation offers a way to resolve a dispute at any time, but is more likely to succeed at a stage where the parties fully understand their respective legal strengths and weaknesses, since the alternative to commercial terms of settlement is to proceed to trial.

Legal advice is available at a wide range of charge rates, and from patent and trade mark agents as well as solicitors, although generally charge rates in the UK are higher than elsewhere in Europe. The market for advice is competitive.

In the UK there is a “groundless threats” regime which enables any interested party to issue proceedings seeking an injunction and damages against threats of proceedings made to themselves or anyone else; the net effect is that the threatener has to proceed to a trial of validity and infringement. The provisions are complex and require careful initial advice, which adds to the cost of proceedings. The groundless threats provisions in respect of patents have recently been amended so that their effect is less arcane and more readily explained; the groundless threats provisions for other IP rights need to be amended accordingly (this is presently being undertaken for designs).

Question 4(h): What are the principal barriers to efficient and successful challenge and enforcement internationally?

The principal barrier is the cost of multiple proceedings and the need for national advice in each jurisdiction (not least because of differing court systems). There is also the risk of conflicting decisions in different jurisdictions where proceedings are based on national rights.

The availability of Community wide injunctions in respect of Community trade marks and Community registered designs is a huge advance and should be the objective for copyright and patent protection as well

SPECIFIC QUESTIONS

Copyright Exceptions – fair use/fair dealing

(d) Are the current exceptions adequate or in need of updating to reflect technological change?

The current exceptions to copyright are fairly limited in the UK. These are set out in Chapter III of the Copyright Designs and Patents Act 1988 (“CDPA”) and include certain “permitted acts” which may be carried out in relation to a copyright work without infringing copyright – ie “fair dealing” for the purposes of research and private study, criticism, review and news reporting, the making of accessible copies for the visually impaired, certain exemptions for educational purposes and some types of copying carried out by librarians. As noted in the question, there is no equivalent in the UK to the European private use exemptions which has led to inconsistencies between approaches in continental Europe and the UK. The lack of a private use exemption in the UK is little understood outside the legal community.

It is likely, given the various devices on the market and the general ignorance of the legal position, that private copying is widespread within the UK. In particular, copying from CD to PC to MP3 player, all of which (unless carried out under licence) would constitute copyright infringement, is commonplace. Whilst widespread ignorance of the legal position is not in and of itself a good reason to change the law in this respect, it is clear that the law in this area, even if it were understood by consumers, is out of step with many other countries.

Whilst acknowledging that the CDPA is quite clear on the scope of the main exceptions and that there is no private use exception, there are aspects of the CDPA which add to the confusion. For example, the “time shifting” exemption contained in Section 70 of the CDPA which permits the making in domestic premises for private and domestic use of a recording of a broadcast solely for the purpose of enabling it to be viewed or listened to at a more convenient time is widely known. This exemption however applies only to broadcasts and is a source of some debate within the music and television industries.

Therefore we are left under the current state of the law with the position where, for example, the recording to DVD of a TV broadcast is permitted, whereas the copying of exactly the same material from a purchased DVD for use on a portable video player is not. In the first situation, the material has not been purchased by the consumer, but the consumer is able to make a private copy for limited purposes, perhaps diverting revenue from the rights owner (on the basis, for example, that the material may have been issued in DVD format). In the second case, the consumer has purchased the material (making a direct royalty contribution to the relevant rights owner) but is unable to make a digital copy to enable playback on a portable device at a more convenient time.

Furthermore the proliferation of hardware devices which facilitate private copying leads to confusion for the public. Again, it is an infringement to make a private copy, but there are any number of devices, such as DVD burners, MP3 players and the like, which enable such copying (along with legitimate use).

There is therefore obviously a movement on the consumer side in favour of a private copying exemption. The issue from the rights holder's perspective is one of resulting loss of revenues. In Europe, the levy system compensates rights owners as the payoff for permitting private copying. Whilst a blanket fee system is a relatively certain and straightforward way of providing compensation, there are arguments against the use of levies – that they are essentially a regressive tax, that they apply to all users regardless of whether such users wish to make use of the private copying exemption or not and, finally, due to the use of technological protection measures (“TPM”) contained in DRM systems, consumers may be paying for a private copying exemption through the levy which they are unable to exercise due to the TPM applied to the material in question.

The Society's view overall is that the UK's intellectual property framework must achieve a balance between private rights and the public interest. In that regard, the UK courts continue to demonstrate that they are capable of maintaining this balance. The High Court recently dismissed the copyright infringement action brought by the authors of *The Holy Blood and The Holy Grail* against the publishers of *The Da Vinci Code*, based on claims for non-textual infringement of a copyright work. By doing so, it demonstrated that copyright does not protect against the borrowing of an idea contained in a work and thereby struck a fair balance between protecting the rights of the author and allowing literary development.

As such, we therefore consider that a limited review of the current exceptions would be worthwhile in order to ensure this balance is achieved, particularly given the inconsistencies surrounding the ability to copy for time-shifting versus the prohibition on personal copying to enable material to be copied between devices for limited purposes. Any such review would have to take the views of the content owners in terms of remuneration for lost revenues into account.

Copyright – Digital Rights Management

(a) Do you have a view on how the use of digital rights management technologies should be regulated?

The Society made a formal submission to the APIG inquiry on DRM (a copy of which is attached). As previously we refer to the two distinct components of DRM (a) standards, the purpose of which is to enable the movement of digital content from one technical platform to another and (b) technical protection measures (“TPM”) being the technical enabling of usage permissions or enforcement of usage restrictions. The question raised by this Review, as with the APIG inquiry, appears to focus more on the protective features of the TPM aspects of DRM rather than the enabling aspects of standards allowing the movement of content between platforms.

As stated in the response to the APIG inquiry we believe that DRM has enabled content owners to make use of more sophisticated means of content distribution which has benefited consumers. However in response to new technologies enabling unauthorised copies to be made and distributed, content providers are continually seeking new techniques to further protect their content. Therefore at present there is a cycle of balancing and rebalancing the respective rights of copyright owners and users.

The main area of difficulty arises out of the limitations on copying imposed by TPMs having a disproportionate and adverse effect on the exercise of copying exemptions – the “permitted acts”, including where it exists, any private copying exemption.

TPMs are granted protection against circumvention under Sections 296 CDPA in relation to computer programs (from the 1991 Software Directive) and 296Z CDPA in relation to copyright works other than computer programs.

Section 296 applies to any computer program to which a “technical device” has been applied that is ‘intended to prevent or restrict’ unauthorised acts restricted by the copyright in that program, imposing tortious liability on any person who manufactures or supplies any means whose sole purpose is to facilitate the circumvention of that technical device knowing or having reason to believe this will result in the making of infringing copies. Therefore it does not prevent someone from circumventing the TPM in order to exercise their rights of decompilation for their own account.

As far as other copyright works are concerned, Section 296ZA CDPA prohibits doing anything to circumvent any “effective technological measure” applied to that work. Again this gives the same legal remedies as the copyright owner has in respect of copyright infringement.

One difference between the two provisions relates to effectiveness of the TPM. Section 296 can be infringed even where the TPM is largely ineffective, as it only has to be “intended” to prevent or restrict copyright infringement for the protection to apply. However for other copyright works, circumvention is only unlawful where the TPM gives “effective” protection. As yet, the question remains unanswered as to how effective the TPM has to be in order for the protection to apply, but it could be argued that this wording encourages content providers to make their TPMs as crack proof and restrictive as possible in order to ensure that the protection is given.

The anti-circumvention provisions do not permit anti-circumvention for the purposes of carrying out a “permitted act” leading to increased difficulties with digital works, particularly for communities such as libraries and the visually impaired. In addition where private copying exemptions exist, individuals cannot take advantage of these due to the TPM itself and the protections against circumvention.

Member states were required to include provisions that would enable permitted acts to be carried out in relation to copyright works. In the UK, this has been implemented by Section 296ZE CDPA which permits a person who is prevented by a TPM from carrying out a permitted act (other than in relation to a computer program) to issue a notice of complaint to the Secretary of State who then “may” instruct the copyright owner or licensee to either give details of the voluntary arrangements in place to enable the permitted acts to be carried out or, if none exist to make available appropriate means of carrying out the permitted act. We do not have any information about whether this complaints system has been used and the results of it. However there is no obligation on the Secretary of State to make such instruction and little practically that can be done if such instruction is not made.

We have two final points in relation to TPMs. The first relates to the perceived “chilling” effect on the creative process. In the “pre-digital” age the Courts made the decision as to whether any creative process (involving borrowing, adapting etc) infringed copyright or not. If the “borrowing” was insubstantial then there was no infringement. In contrast, where TPMs are used to prevent copying (even, for example, a work in PDF), the TPM prevents any form of copying, including insubstantial copying which would not infringe. Whilst Section 296ZE provides a form of remedy where the TPM prevents someone undertaking a “permitted act”, we do not believe that it provides a remedy in respect of such insubstantial copying on the basis that Section 296ZE(i) defines permitted acts as the various exceptions listed in Part 1 of Schedule 5A to the CDPA (and therefore does not include copying which does not, because of its insubstantial nature, amount to infringement of a work).

Secondly, the law does not provide legal protection for TPMs which are used to prevent access or copying of works which are in the public domain i.e. not protected by copyright. This is often overlooked by the critics of legal protection for TPMs. “Technological

measures” are defined in Section 296ZF of the CDPA as covering any technology etc. which is designed...to protect a copyright work. For this purpose, “protection” applies to doing any act restricted by copyright. Thus, once a work ceases to be protected by copyright, it loses the benefit of the anti-circumvention provisions in the Act. However the issues relating to the practical ability to circumvent the TPM remain.

We believe therefore that this area would benefit from further consideration. DRM has enabled more content to be more readily available. However there are clearly difficulties arising from the inability to users to lift the TPM to enable “permitted acts” and the lock-up of copyright content as a result. There is also the separate issue of TPMs restricting copying of public domain works and the ability to make insubstantial, and therefore, non-infringing copies of copyright works. Dealing with this by way of legislation may have an adverse effect and any recommendations in this area should bear in mind the need to ensure that the legal framework encourages a growth in the provision of content on multiple platforms. A suggestion which might be considered would be the introduction of a scheme whereby the “key” to unlock TPMs is deposited with an independent trusted third party who would then be responsible for requests to lift the TPM in certain prescribed circumstances. Such a scheme would need to be swift, inexpensive and easy to use but if introduced might go some way to addressing the concerns of both the content owners and users. Furthermore we believe that Government intervention in terms of promoting the adoption of common standards to enable inter-operability would also be highly welcome.

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SOCIETY FOR COMPUTERS AND LAW – INTERNET INTEREST GROUP

RESPONSE TO THE ALL PARLIAMENTARY INTERNET GROUP INQUIRY INTO DIGITAL RIGHTS MANAGEMENT

21 December 2005

By e-mail: admin@apig.org.uk

INTRODUCTION

The Society for Computers and Law (www.scl.org) welcomes this opportunity to respond to the APIG Inquiry and to contribute to the important debate concerning DRM.

As APIG will be aware, there are two distinct components in the technologies described by the umbrella term “DRM”. The first is standards (e.g. MPEG 21) whose purpose is to enable the movement of digital content from one technical platform to another in machine readable form by providing, amongst other things, a standardised grammar and vocabulary to identify and describe intellectual property and the rights pertaining to it. This first component of DRM is sometimes termed the ‘Management of Digital Rights’ or ‘MDR’. The important point to make here is that MDR is often deployed without the second component in DRM – technical protection measures (“TPMs”). These are the technical enabling of usage permissions or enforcement of usage restrictions. Examples of the deployment of MDR without any TPMs can be found in the publishing industry and in ‘Creative Commons’

licences which provide the user with the necessary code which describes the rights attached to licensed content.

However, the inquiry seems to be concerned exclusively with TPMs i.e. the Digital Management of Rights. Whilst this is a very important aspect of DRM, we believe that it is important not to lose sight of the enabling aspect of MDR which is necessary in order for digital content to be made more widely available. Indeed, the term ‘DRM’ as used in the inquiry is synonymous with TPMs. It is extremely important not to lose sight of the enabling function of DMR as part of the infrastructure for trading digital rights. The enabling and protective features of DMR and TPMs together form the two pillars which enable rights owners to distribute content over a wide range of platforms

RESPONSE TO SPECIFIC QUESTIONS

1. Does DRM distort traditional tradeoffs in copyright law?

This first question in our view refers to the trade off in copyright law between the protections given to the copyright owner and the number of exceptions to those protections (such as fair use) given to users of copyright material. As such it is only concerned with the TPM aspects of DRM. The question suggests that this traditional trade off is distorted by DRM as DRM limits the rights of users to make use of those exceptions and may also limit any permissions granted by the copyright owner by technological means.

We believe that DRM has contributed to a step change in the trade off between the rights of copyright owners and the necessary exceptions granted to users. We do not believe, however, that this amounts to a “distortion”. DRM has enabled content owners to make use of more sophisticated means of content distribution. In turn, this is a response to new digital technologies which have made it easier to make and distribute unauthorised copies. As new technologies become available, content providers are making use of new techniques to protect their content.

Therefore we see the process more as the latest instalment of the balancing and rebalancing of the respective rights of copyright owners and users.

In particular, in the UK, due to the absence of a “private copying” exception, we do not believe the step change is as acute as in certain other EU member states. which have a private copying exemption together with compensation for rights owners in the form of levies. In those member states, the deployment by rights owners of TPMs will have a direct impact on their continuing receipt of levies. This results directly from Article 5.2 (b) of the EU Copyright Directive. Also, the interaction between TPMs and levies will need to be monitored carefully to avoid a “double whammy” on consumers i.e. indirect payment of levies for the enjoyment of the private copying exemption whilst being subject to limitations on their ability to make use of the private copying exemption by the application of TPMs.

Whilst any limitations on copying imposed by TPMs could have a disproportionate and adverse effect on the exercise of the private copying exemption (where it exists), the legal framework is also in place to redress that effect in Article 6.4 of the same Directive. This is implemented in UK copyright law through Sections 296Za-D and 296ZG of the Copyright, Designs and Patents Act 1988, as amended. We have yet to see how these provisions work in practice and their effectiveness should be subject to scrutiny.

Overall, we consider that DRM makes possible a much more precise and targeted method of reward to rights owners than the more ‘rough and ready’ approach of levies. However, the choice between TPMs and levies will, in the final analysis, be market driven, led by consumer choice.

Finally, in our view the question of distortion is, in effect, a moral question. We do not believe this is the right question to ask, and would prefer that issues relating to DRM were considered more from a practical and commercial standpoint (i.e. are there commercial solutions, such as differential pricing structures, which will act to redress the balance?).

2. Do new types of content sharing licence (such as Creative Commons or Copyleft) need legislative changes to be effective?

We believe that current copyright laws are perfectly adequate to deal with these new types of content sharing licence. Creative Commons and Copyleft are merely specific forms of permissions granted by copyright owners and no legislative changes are required for them to be effective.

3. How should copyright deposit libraries deal with DRM?

The Legal Deposit Libraries Act 2003 (the ‘**LDLA**’) permits the Secretary of State to make regulations to supplement sections 1 and 2 of the LDLA as they apply to works published in media other than print.

We are of the view that issues arising out of DRM will need to be addressed and, no doubt, will be addressed through the mechanisms put in place by the LDLA. Any regulations dealing with the legal deposit of digital content would need to regulate the circumstances in which, and methods by which, a deposit library may ‘unlock’ any technical protection measures if this is necessary to facilitate access for legal deposit purposes as envisaged by the LDLA. It is important that the Regulations are framed and operated in a way which ensures that TPMs are deployed in a manner which does not prevent the legal deposit libraries from discharging their statutory duties.

4. How should consumers be protected when DRM systems are discontinued?

We do not believe that the discontinuance of DRM systems should be made a special case. As with software and other forms of technology (CDs, DVDs etc) consumers expect technology to progress and cannot expect specific formats to continue indefinitely. Consumers will resist too frequent changes to formats and industry is fully aware of this consumer pressure. Hence hardware manufacturers often ensure that their new devices are backwards-compatible to maximise their consumer base. We believe the same will be true of DRM systems.

5. To what extent should DRM systems be forced to make exceptions for the partially-sighted and people with disabilities?

In our view, other respondents to the inquiry will be in a better position to answer this question.

6. What legal protection should DRM systems have from those who wish to circumvent them?

This question appears to be based on a critical standpoint: i.e. that the current legal protection for DRM systems is too heavily weighed in favour of the copyright owner.

The current protection given to copyright owners (embodied in section 296Z of the Copyright Designs and Patents Act 1988) is the result of years of consultation and debate and arises from the TRIPS agreement, the WIPO Copyright Treaties and is embodied into European law. DRM systems therefore have this legal protection and we do not believe there is any merit in reopening the debate. If it is considered that this protection is too great, we should look more at commercial considerations to provide some balance.

7. Do DRM systems have unintended consequences on computer functionality?

DRM systems (i.e. TPMs) are software programs and as such they will always have an effect on computer functionality (as with any computer program). We do not believe that these consequences are generally unintended. Technical protection measures are, in our view, intended to be as restrictive and wide ranging as possible in order to provide the content owner with comfort that the content being distributed is given the highest level of protection against unauthorised copying and distribution. As with all software, however, it is always possible for a DRM system to have an effect on computer functionality that was not originally envisaged.

We believe that the important issue here is that consumers are given clear and specific information at the time of purchase concerning the DRM system in use.

We recommend consideration a prominent labelling scheme which fully informs consumers of the nature of the relevant TPM. Any such scheme must set TPMs in context as software applications.

8. What is the role of the UK parliament in influencing the global agenda for this type of technical issue?

We believe that the UK government should largely take a non-interventionist approach. As stated above, on the whole, we believe that the market will be the main influence in determining the success and future of DRM.

The UK government could however take the lead in inter-operability issues by, for example, encouraging common standards. One further recommended measure would be the introduction of a prominent labelling scheme for products protected by DRM

CONCLUSION

In conclusion, our recommendations are:

- A prominent labelling scheme should be considered to protect and inform consumers
- Commercial solutions (such as the downloading permissions offered by commercial online services such as iTunes) should be explored and further encouraged.
- The UK parliament should be at the forefront in encouraging the adoption of common standards

Society For Computers and Law (Internet Interest Group)

21/12/2005

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