Gowers Review of Intellectual Property Response

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1 How IP Is Awarded

With regard to patents, patents covering software or mathematical algorithms should never be issued. Software, by its very nature, is complex and built up from multiple smaller components. In the presence of software patents, generally covering small parts of these components, such as compression algorithms (e.g. the LZW patent, held by Unisys until last year), the process of creating software becomes a case of edging across a minefield of patents. If a mere file format, such as the MPEG2 format used for DVD Video, can be covered by over thirty different patents, then one can only guess the sheer number of patents that would cover a large piece of software.

In the U.S., where software patents have been adopted, these problems can already be observed. Overly general patents are given which are far from being novel inventions. For those in the industry, this is clear from even a cursory glance, and even those outside the industry would fail to see something worth-while in some patents granted on software by the US patent office.

Rather than being a means to protect innovation, software patents become a means of establishing dominance for the major players in the field. The software industry is already dominated by a number of large corporations, who build up their own portfolio of software patents and use cost and fear of litigation to keep out others. The cost of obtaining and then protecting patents is beyond the scope of those who exist outside the remit of these major corporations. Even if a small company, for example, can obtain a patent, they are likely to be forced into cross-licensing to avoid accruing the cost of litigating. See http://www.gnu.org/philosophy/savingeurope.html for more information.

2 Current Terms of Protection on Sound Recordings and Performers' Rights

Copyright exists as a careful balancing act between protecting the expression of ideas by a particular party and providing a useful range of public domain material. With regards to term extension, this seems to be a constant method of ensuring that material remains within copyright and is not contributed to the public domain. In the U.S., this has occurred mainly due to lobbying by media giants, whose interests lie solely in protecting their own copyrighted material, to the detriment of the wider public interest.

It is unclear how extending the current term of fifty years to ninety-five in the U.K. would have any beneficial effect. While it would extend protection for a small number of dominant players in the media industry, who have a sizeable catalogue of material dating back that far and wish to maintain a monopoly on its consumption, doing so would be detrimental to others.

What about orphaned works? If the term keeps being extended, will we end up with an empty public domain? A large body of work is already inaccessible, due to copyright protection, but the owners of the work are no longer contactable. This problem is exacerbated by extensions to copyright law, all for the benefit of the few. It also stifles future creativity, as today's artists find it more difficult to re-use material from the past, and creates problems for maintaining our heritage.

3 Copyright Exceptions - Fair Use/Fair Dealing

Certainly, the concept of fair use could be made clearer to the general populous, as today it isn't particularly clear what is illegal and what is allowed under fair use law. Copyright owners certainly don't do anything to help this, and they take advantage of any confusion that causes consumers not to exercise their fair use rights. I don't know if there is a body, similar to the Trading Standards for consumer law, that would be able to answer simple questions in this area, but this would certainly be more acceptable than involving a lawyer at every turn. The Free Software Foundation has certainly been very helpful in this regard, with regard to how copyright applies to Free Software (see http://www.gnu.org/philosophy/free-sw.html for the definition of this term).

I would consider a fair use law to be applicable for the transfer of copyrighted material between media, where this is intended purely for private use. Plenty of consumers already do this without realising that it is against the law, because the illegality of this situation is so contrary to common sense. Of course, consumers don't own the copyrighted material they purchase, but if they have paid money to license its use, then they should be able to do so on any applicable medium.

However, it is useful to bear in mind that the law can go too far to follow the whims of modern society. Changes should only be made to the law if they are really necessary. I believe that fair use is such a case, partly because it is so accepted as being present already, but largely due to the fact that not having such an exemption leaves the market open for copyright owners to continually resell the same material in different formats, a situation which hurts the consumer.

4 Copyright: Digital Rights Management (DRM)

Ideally, digital rights management should not exist. It attempts to do something which is already achieved by copyright law. Current implementations of DRM go beyond this, and place restrictions upon the consumer which go beyond the law, as mentioned in the call for evidence. I believe restricting the legitimate rights of users is far more of an issue than the possibility of piracy.

A further problem in this regard is that generally DRM doesn't work. I mention above the two sides as being equally opposed, but this is far from the truth. DRM fails to prevent piracy, but does succeed in distrusting a majority of legitimate users.

Take the example of a CD containing DRM technology. It only takes one person to obtain a copy of this and post it on the Internet for this protection to be overcome. This is likely to always be possible, if not by some clever means of breaking through the DRM technology, but simply by recording the sound made when playing the material (the so-called 'analog hole').

In contrast, the DRM causes problems for legitimate users. CDs containing such technology have been known to cause software problems (e.g. the recent case of a Sony CD) or hardware problems (CDs have become stuck in Macintosh computers to such an extent that they need to be returned to the supplier for repair). It also aggressively limits where the CD can be played; generally, only standard CD players or personal computers running Microsoft Windows can play the CD, which excludes DVD players, in-car players, computers running other operating systems and numerous other situations.

While we do have to live with DRM for the time being, it should be implemented in such a way that material involving DRM can be accessed and used by Free Software and other factors that affect legitimate consumers should also be dealt with. See http://www.gnu.org/philosophy/opposing-drm.html for more information.