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Ms. Melanie Johnson
Department of Trade and Industry
1 Victoria Street
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13 November 2002

Dear Ms. Johnson,

Re: European Copyright Directive (Directive 2001/29/EC)

I am in possession of a copy of your letter to Mr. Simon Burns MP following my correspondence with him regarding the UK implementation of Community Directive 2001/29/EC ("the EUCD").
Whilst I appreciate your time in providing a detailed response to Mr. Burns regarding some of the issues I raised, I am disappointed that you appear to have sidestepped and/or misunderstood some of the most controversial/contentious points. In the interests of avoiding unnecessary formality, and taking into consideration the short timescale before proposed UK implementation of the EUCD, I would like to take this opportunity to respond to some of the points you made directly. I shall of course forward a copy of this response to Mr. Burns.

Firstly, you note that copyright owners are even now currently able to issue products in any form they wish, including in forms that incorporate copy-protection. I concur with you on this point, but this does not justify not only the legal recognition but the extraordinary and disproportionate protection that is proposed to be given to these technical protection measures. Most offensive is the assault on basic human rights by criminalising even mere *discussion* of how to circumvent technological protection measures ("TPMs"), especially when the bar for what constitutes a TPM is set so low (see definition of "effective" in this context, which covers virtually anything) and irrelevant of whether the circumvention may enable lawful use of copyright material. I find this a breathtaking attack on fundamental freedoms and I would be fascinated to hear how you and/or the Government feel able to defend this. By the same logic, perhaps you ought to consider making (for example) the discussion of natural sciences such as chemistry, physics and biology illegal, since although there are legitimate uses for the knowledge gained, there is always the possibility that it might be used in destructive or illegal ways, such as in the creation of offensive chemical, nuclear or biological weapons (particularly topical considering the current threats from terrorism). It sounds ludicrous, but this is a serious, natural and by no means extreme extrapolation from your proposed criminalisation of speech related to TPMs, with the exception that in my analogous case there is at least the possibility of physical injury or death as a result of discussions, yet with copyright circumvention the worst that might occur is indirect financial loss! However, this does demonstrate the current climate of virtual hysteria where the issues of copyright and intellectual protection are being blown out of all proportion. Yes, the advance of technology creates new challenges and situations to be addressed. Yes, if we are to encourage and reward creativity for the greater good of society then I believe we need substantial intellectual protections enshrined in law. However, what we do not need is "sledgehammer to crack a nut" legislation that throws aside decency, dignity and freedom to satisfy a few specific business interests which are in the interest of the few, not the many. The mere fact that these draconian limits on free speech are unparallelled in any other comparable (or more sensitive) areas clearly demonstrates the disproportionality of the proposed measures, and indicates a certain amount of desperation rather than rational thinking on the part of proponents of this kind of legislation.

Whilst I do not wish to dwell on the DVD region coding issue too much, since I used it merely as an example and it is a drop in the ocean of the wider issues raised, I believe that you may be mistaken in your understanding of the DVD region coding issue; you state that it is your belief that the "mere playing" of a DVD is not controlled by copyright law and therefore Article 6 of the Directive does not afford protection to region coding. Firstly, I approve of your choice of words; "mere playing" implies quite accurately the fact that this is, conceptually, a trivial act. Contrary to your belief however:

1. Region coding is part of a set of carefully-designed "protection" measures including the Content Scrambling System (CSS). Since the stated purpose of CSS is to prevent illegal copying, it is thus a TPM under the terms of the EUCD. Yet to receive a licence to manufacture a player which is able to decrypt CSS, manufacturers are forced to agree to implement region-coding. So, consumers will be unable to defeat region coding without "circumventing" CSS. You can immediately see this as a perfect example of how copyright holders are already "piggybacking" unreasonable restrictions on the back of what are ostensibly content protection measures, and I remind you that the main flaw of your proposed legislation is that **circumvention in order to perform a permitted act is not a defence**.
2. In a similar vein to the above, I fail to see what is to prevent content producers creating unreasonable licensing conditions for use of their content, such as "This DVD may only be played in a Region X drive" and enforcing this with the use of a TPM. Hence the discussion in my submission of legislation similar to unfair contracts legislation, that limits the licensing terms which can be imposed on mass-market content.

Given this, I am of the belief that the wording proposed in the UK implementation of the EUCD fully encompasses and protects the DVD region coding, and furthermore serves as an excellent example as to how technological protection measures offensive to common sense are likely to be legitimised and be afforded entirely inappropriate legal protection by the proposed changes to the CDPA1988. This debate/uncertainty also illustrates the wider point that the deep implications of this legislation have really not been thought through.

May I also remind you of the fact that creating swathes of 'grey areas' (as the proposed legislation does) creates a new danger; even the *possibility* of apparently reasonable (and/or currently permitted) acts being forbidden under the proposed changes opens the way for legal intimidation and threats. This is far from pure speculation; the United States has seen a number of high-profile threats (including to a well-known research professor; I am sure you are aware of the case of Prof. Felten) under their recently-introduced Digital Millennium Copyright Act to which the EUCD bears a close resemblance. Without wishing to create a "David and Goliath" melodrama, I feel compelled to remind you that in the overwhelming number of cases, copyright holders are significantly-sized entities, with resources and aggressive legal teams such that even where they have no case in law, they may be able to achieve their aims by mere intimidation and legal threats; the entities on the receiving ends are likely to be individuals or small organisations that simply do not have the resources to defend themselves. (At risk of digressing, I should add that there is a general concern shared by an increasing number of people, including myself, that the substance of our societal laws is becoming less important than the relative financial resources of plaintiff and defendant, especially on matters relating to intellectual "property" issues. The EUCD is acutely symptomatic of this rather American-style "democracy" of "he who has the gold makes the rules". To ignore this would be to blinker oneself as to the reality of a society increasingly dominated and influenced by very large corporates. I certainly have no problem with the concept of corporate business, but I strongly believe that the legislature should remain scrupulously independent and sensitive to the weaker position of the independent citizen, rather than providing legal bludgeoning tools for those with the resources to use them).

Returning to your letter, you discuss how you believe the proposed implementation of the EUCD seeks to achieve a fair balance and the proposed means of ensuring that "education, library and archive" fields are able to fully benefit from exemptions in copyright law. Leaving aside the fact that you appear to have omitted consumers/citizens as stakeholders in these discussions, you then go on to state that you believe the bureaucratic procedure which you have proposed (applications to the Secretary of State) is workable (and implicitly, therefore, that my fears are unfounded). Regrettably, you fail to provide any justification for this belief, nor address any of the specific points which I raised. Again, these include:

- slow, burdensome, bureaucratic process – ironic in legislation which is supposed to be recognising the rapid changes brought to society by digital technology!
- lack of recognition of the time-sensitivity of much copyrighted content
- lack of punitive measures to punish copyright holders who fail to comply with directions from the Secretary of State
- lack of incentive for copyright holders to ensure that beneficiaries of exceptions can easily take advantage of these exceptions without having to resort to recourse to the Secretary of State (see also previous point about punitive provisions)
- lack of assurance that exceptions (including actions related to works that have passed into the public domain) can technically be taken advantage of in cases where the copyright holder no longer exists or is unable to provide the requisite access

I refer you to section 4 of my submission to the Patent Office where I discuss these matters in detail and provide proposed solutions, which I believe could be implemented in such a way as to be compliant with the demands of

the EUCD but which in any case are essential protections, and to legislate without these would be grossly ignorant of reasonable consumer rights and common sense.

I am aware that TPMs on public domain works will not be protected under the legislation, but I feel that your statement that "it would be unwise of copyright owners...to apply these measures to public domain works" misses the point, which is *not* that TPMs may be applied to works already in the public domain (although the issue of joint distribution of public domain material alongside copyright-protected material is an interesting one; would a TPM be protected if it was necessary to circumvent it in order to gain access to a public domain work but at the same time that circumvention gave access to a work protected by copyright?). Rather, my point was that a TPM may be applied to a work upon creation in the present day, but at the expiry of copyright in the distant future, there is no guarantee that it will be technically possible to access a work, even though the TPM will no longer be legally protected. Your point that it is "unlikely...in practice that there will be no unprotected copies in existence" is acknowledged, and indeed I would hope this is the case, but without provisions to ensure this (such as trusted third party escrow, discussed in my submission), the reality may turn out to be substantially different, especially given the lack of incentives for compliance by copyright holders.

Again and again in this proposed legislation and your letter, it seems that the Government is implicitly assuming that copyright holders will "play fair" and that the problems that I and others foresee are theoretical only. Yet evidence of past and current actions by corporate copyright holders does not support this view, and it seems to me to be foolish to give such enormous and easily-wielded power to one set of stakeholders, *and* then rely on that same set of stakeholders being sufficiently self-regulating that it is deemed unnecessary to make available punitive remedies against them, and considered reasonable to force any complaints through a burdensome process. This legislation would, in practice, make copyright holders "judge, jury and executioner" on matters related to their works; this is entirely inappropriate and intolerable in a democratic society.

In summary, your proposals remain knee-jerk legislation at its worst; openly and heavily biased with any concepts of proportionality of common sense thrown out of the window. Tools (and even free discussion) rather than acts are criminalised. I acknowledge your point about the considerable consultation on these measures at European level, but unfortunately the mere fact that there may have been years of consultation does not magically turn bad legislation into good, nor will it satisfy those who find their rights under threat. I have yet to examine the records of the European-level consultations and debates on the topic, but considering that even someone such as myself (who has detailed technical knowledge and interests in this area combined with a willingness to expend considerable resources on entering the political debate, none of which is probably typical of the average citizen who will be affected by these measures) failed to become aware of the consultations, I find it difficult to believe that in the face of highly visible promotional exercises on the part of corporate copyright holders and similarly resourceful entities with vested interests, the views and impact on "ordinary" members of the public and consumers were realistically given more than token consideration. I am aware that many of the arguments put forward by the "IP" lobby[1] can appear enticing and superficially reasonable, yet they frequently do not stand up to scrutiny.

Finally, may I point out that if the proposed changes are pushed through in their current or substantially similar (indefensible) form, the Government will not only be failing to act in the interests of the citizens of this country (I challenge you to honestly state that, given full and impartial facts and sufficient knowledge to make an informed decision, a majority of citizens would be in favour of the proposed changes), but will also turn moderate and fundamentally honest citizens into criminals. This draconian legislation harks back to control over speech and expression reminiscent of Soviet-era politics in the East rather than the progressive, twenty-first century country which this Government claims to be trying to build.

In pursuance of the creation and maintenance of a just, equitable and free society, I sincerely hope that you will act to ensure that the rights of *all*, not just corporate interests, are protected in respect of these matters.

Yours sincerely,

Tim Jackson

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1. I use the term "IP lobby" cautiously, since it implies that to oppose said lobby is to oppose any form of intellectual protection, which is certainly not the stance of most moderates such as myself