

Comments on the Proposed UK Implementation of the European Copyright Directive (2001/29/EC)

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October 2002

1. Introduction and preamble; statement of objection

First of all, I wish to state in the strongest terms my opposition to Community Directive 2001/29/EC (hereafter referred to as the "EUCD" or "Directive"). In no uncertain terms, it is crude, poorly-conceived, short-sighted, extreme and highly imbalanced. It is obvious to any reasonable person that it is a product of the "intellectual property"-protection paranoia that has pervaded Western society over recent years, where specific and well-funded business interests have, with the assistance of articulate legal professionals and politicians with vested interests, succeeded in obscuring the wider issues and responsibilities to society that are incumbent upon those responsible for legislating in the areas of copyright, patents and other intellectual protections. There is widespread recognition amongst even moderate, technologically skilled, normally conservative citizens who support the notion of copyright protection (such as myself) that for the reasons given above, the EUCD is highly objectionable. As such, I consider that the MEP's responsible for the approval of the EUCD have performed a great disservice to society, and singularly failed in their duties to their constituents. I publically condemn them for that.

Nevertheless, given that the Directive has been enacted, I recognise that the UK is placed in the situation of being forced to implement it in UK law and I therefore wish to formally submit the comments contained in this document as part of the UK Patent Office consultation. However, I consider this very much an attempt at "damage limitation", and nothing contained within these comments in any way endorses either the spirit or letter of the Directive, or any implementation of it.

These comments are a response to the Patent Office's proposed amendments ("Proposal") to the 1988 Copyright, Designs and Patents Act (as amended) and focus very much on the proposed implementation of the main Article of contention in the Directive; that is Article 6, which relates to technological protection measures ("TPM's").

2. Scope of the Directive

I concur with the Patent Office's summary that the Directive is relatively prescriptive. Nevertheless, I do not feel the Patent Office has adequately taken up exceptions and the concept of proportionality in its proposed implementation, even considering the permitted acts already prescribed under UK law. I am aware that the proposed implementation contains only *amendments* to the existing UK laws, but I believe that the final implementation should be reviewed in two main areas, which I will discuss in more detail:

- Ensuring that UK law takes full advantage of all exceptions offered by the EUCD
- Altering the recourse, liabilities and remedies where beneficiaries of exceptions suffer enforced restriction of permitted acts by copyright owners or licensees

In particular, I would like to draw attention to the preamble to the EUCD, paragraph 48, where it is stated that:

"...legal protection [of TPM's] should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography."

I feel that the Proposal fails to adequately provide for the key factor of proportionality, as discussed above, and places the burden of adherence to the legislation heavily on the users of copyright material. This is particularly imbalanced considering that in the commercial world, users of copyright material are typically consumers who acquire licenses from large entities under non-negotiable terms, for example when purchasing films and music.

3. Exceptions Provided for in the EUCD

In this section I will mention two areas of particular concern, where the EUCD clearly provides scope for exceptions, but I feel they have not adequately been considered. This may be a non-exhaustive list, and I encourage the Government to take up every exception available under the EUCD to the fullest extent.

3.1. Accessibility

Contrary to Paragraph 43 of the EUCD, the Proposal seems to take no account of the demands of accessibility where TPM's are involved. It seems that the only recourse that disabled users have where their legitimate access to material is prevented by TPM's is to appeal to the Secretary of State. At the *very* least, acknowledged non-profit bodies such as the RNIB and others should be afforded fast and easy access to TPM-protected material in order that they can provide appropriately accessible versions.

Examination of interactions (if any) with the Disability Discrimination Act 1995 should be undertaken, and the results taken on board.

3.2. Cryptographic research

Another particular area of concern is that of cryptographic research. As previously mentioned, the EUCD explicitly cites this as a case where research should not be hindered, yet there is no provision either in current UK law or in the Proposal that addresses this issue.

4. Remedies and liability of copyright holders where permitted acts are prevented by TPM's

4.1. Introduction and problems

This is by far and away the most important, and most neglected part of the current discussions. Exceptions provide a 'safety net' of kinds to users of copyright material, enumerating permitted acts. However, there is nothing in the Proposal which balances the strong protection afforded to content owners who use technological protection measures (TPM's) with the rights of licensees/users in respect of permitted acts. The proposed solution is that where a permitted act is prevented by use of a TPM, a potential beneficiary may appeal to the Secretary of State to receive the benefits to which they are entitled.

This is, to say the least, a ludicrous, bureaucratic and exceedingly poorly thought-out system. It provides absolutely no incentive for copyright holders to ensure that TPM's allow permitted acts, and lays out a slow, burdensome, legalistic process for a beneficiary to simply obtain the rights *that they already have under law!*

Furthermore, the Proposal fails to make provision for cases where TPM's have been used to restrict how some copyright material may be used, but where the copyright holder fails to act on instructions under section XXX 2b) (where the Secretary of State instructs to a copyright holder that a complainant should be enabled to benefit from a permitted act). This is absolutely crucial, particularly in cases where the copyright holder no longer exists (for example, a company has been dissolved). It is also exceedingly short-sighted: huge quantities of copyright material may be created which are protected by proprietary TPM's, but little consideration appears to have been given to the situation 70 years or more on, where the copyright has expired. What if the copyright holder no longer exists, or is unable/unwilling to provide access to the works?

4.2. Proposed solutions

I consider these to be absolutely **essential** and fundamental safeguards in the UK implementation of the EUCD:

4.2.1. *Right to gain independent access to material protected by TPM's for the purposes of licensed or permitted acts*

A provision should be inserted around the same place as XXX, specifically stating that where an act is committed which is contrary to any of the provisions of section 296, 296ZA, 296ZB or 296ZC, and that act is committed in order to gain lawful access to the copyright material (including for the purposes of a permitted act), there is no liability to prosecution.

4.2.2. Escrow of copyright material protected with TPM's

In order to ensure ongoing access to protected material, particularly in the event of a copyright holder ceasing to exist or the term of copyright ending, some escrow scheme should be devised. In this scheme, owners of copyright material who wish to publically distribute material which enjoys substantive protection by TPM's should have a statutory requirement to lodge unprotected copies of the material with an approved escrow service. With appropriate wording, this escrow service should also have a responsibility to provide unprotected copies of material to libraries, archives and other bodies where relevant for the purposes of archival or disabled accessibility.

Such a scheme would undoubtedly be an onerous undertaking, but it is preferable to a system where copyright holders can effectively impose limitless protection on content, and where there is the possibility for users to be permanently and irretrievably denied their rights by rights holders.

4.2.3. Statutory penalties where TPM's inhibit lawful use

To provide an appropriate balance to the legal protection being given to TPM's, the UK implementation should include strong statutory penalties for content owners who publically distribute content protected by TPM's, but where the TPM's restrict lawful use.

The provision in proposed section XXX related to appeals to the Secretary of State should be re-worded so as to include strong penalties for rights holders who fail to respond to instructions from the Secretary of State, and include clear and strong remedies for the beneficiary who has been denied lawful access to material.

4.2.4. Restriction of unfair license terms

In a similar way to that by which consumers are protected against unfair contracts, customers should have protection against unreasonable license terms or technological restrictions, especially where content is acquired under a non-negotiable license (e.g. via the purchase of mass-produced physical products like CD's or DVD's). This protection should include protection against unreasonable terms such as restrictions on where and how content can physically be viewed (in one particular geographical location, for example, using one particular manufacturer's product, or using a particular computer operating system). See also my discussion of DVD region coding in section 5 of this document.

5. Examples of reasonable acts which are threatened

This is by no means at all an exhaustive list, but in this section I would like to note a number of contemporary issues related to TPM's where I have no doubt that society at large would consider certain acts acceptable, yet these are threatened by the Proposal. The UK implementation of the EUCD should ensure, so far as is possible within the bounds of the EUCD, that acts such as these are not prevented.

5.1. Playing of legitimately-acquired DVD's and similarly-protected digital media

It is beyond the scope of this submission to explain the DVD region code system, but this is almost universally acknowledged as a system which imposes illogical, entirely artificial constraints on the playing of lawfully-acquired DVDs. It allows price-fixing and contradicts free market principles. The system is currently on the verge of collapse, partly due to the universal availability of devices ("mod chips" or modified players) which permit the playing of DVDs in equipment with non-matching region codes. The popularity of such devices demonstrates in no uncertain terms the general consumer opinion of systems such as "region coding". Yet under the Proposal, such devices would most likely be illegal. The only benefit that the region code system provides is profiteering, and it is not in the interests of society to provide legal protection for it. See my comments regarding unfair licenses in section 4.2.4 of this document.

5.2. Development and use of free/“open source” software

Despite the monopolisation of the desktop computer OS market, a large and growing number of citizens choose to use free/“open source” software and operating systems. Notably, the UK Government has recently produced a policy document on the use of open source software in government. Yet the Proposal threatens this market, and freedom of choice by consumers, because the circumvention of TPM's (which is outlawed) is frequently an essential step in accessing content for a lawful purpose, and so the access of TPM-protected content via free software is threatened.

For example, in the course of development of something as simple as a DVD player as free software, TPM's must be circumvented. This is an example of why the provision suggested in section 4.2.1 of this document is an essential protection to enable lawful use of content.

5.3. Reverse-engineering of software programs and maintenance of interoperability

Section 296 outlaws devices or programs that might be legitimately required for the lawful and permitted reverse-engineering of software programs, for example in order to create interoperable products.

5.4. Security/academic research

There have already been examples in the United States, has been introduced, demonstrating that laws protecting TPM's and associated technology have been used to stifle or threaten computer security research (see, for example, the cases of Dmitry Sklyarov[1] and Prof. Felten [2,3] – detailed discussion is beyond the scope of this submission). The 'anti-discussion' provisions of the EUCD are assaults on free speech and open technical discussion of software, security and other matters. As such, if the Proposal is implemented in its current form, I expect at some point to see challenges under European human rights legislation on these matters, but in the meantime the demands of the EUCD should be tempered as much as possible.

5.5. 'Space-shifting' of lawfully-acquired content

Consumers have a frequent desire/need to 'space-shift' lawfully acquired content for convenience. ('Space-shifting' here refers to the logical complement of time-shifting, where content is moved from one media to another, not to facilitate unlawful use but simply for convenience – e.g. moving music from a CD to a cassette tape in order to play in a car, or from CD to computer in order to have a convenient 'digital jukebox'). Such space-shifting should (contrary to the current ambiguous legal situation, where it is not explicitly permitted, but where “fair dealing” may come into play) enjoy strong protection and should not rely on the goodwill of rights holders to 'graciously' permit it when implementing their TPM's.

5.6. Backing-up of lawfully-acquired content

Similar to section 5.5 above, there are concerns that TPM's may effectively prevent the securing by backup of lawfully-acquired and appropriately licensed content by a user. The right to create backups should enjoy strong protection.

6. Summary and conclusions

Even given the restrictions placed on the UK Government by the EUCD, the proposed implementation sadly makes many of the same mistakes and fails to take opportunities that are available *consistent with the Directive* to ensure that UK copyright law remains as balanced as possible.

The final implementation should take account of the problems discussed in this submission; summarily:

- ensuring that lawful use of material is not subject to unfair, time-consuming and legalistic constraints
- ensuring that libraries and archives can continue to function in a useful way
- ensuring improving accessibility for all
- providing adequate penalties to ensure that rights holders “play fair”

- most importantly, ensuring that users (and society at large) are not placed at the whim of rights holders and that technology is not permitted to create artificial rights structures that effectively supersede those created in law.

This can be summed up by the following statement:

Copyright law grants rights holders a temporary monopoly over their creations, in return for the benefit to society of encouraging creativity. The law should not allow rights holders to abuse this privilege by holding society to ransom and unilaterally imposing protections which artificially extend the privileges granted to them. The law should also allow equitable use of publically-communicated material by all members of society, including those with special accessibility requirements. Due regard should be taken of these matters in a historical context; that is, where rights holders may no longer exist and/or copyright protection has lapsed.

In order to fulfil its duties to the citizens of this country, the UK Government must ensure that these basic principles are upheld and that at all times impartiality is maintained, balancing the (often noisy) demands of business with the frequently less heard yet most important demands of equitable and fair society.

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October 2002

7. References

- [1] Information about the Sklyarov case - <http://www.freesklyarov.org/>
- [2] Professor W. Felten - <http://www.cs.princeton.edu/~felten/>
- [3] Threat to Prof. Felten's research under the DMCA – <http://www.cs.princeton.edu/sip/sdmi/>