

Digital rights or digital wrongs

One thing that has come out of the move from analogue to digital media had been the appearance of copy-protection technologies, most commonly referred to as digital rights management ('DRM'). These technologies are usually divided between digital rights management information ('DRMI') and technology protection measures ('TPM'), although both are now usually covered by the single term DRM.

DRM is usually used to protect digital products -- whether it be music, video, or software from copyright infringement and to control the use of such media by consumers by including an licence which will dictate, some would say restrict, the ability of consumers to share and copy the media.

In 2005 the issue of DRM hit the front pages when the copy-protection included on some CDs produced by Sony was found to automatically download hidden files to consumers' computers using a technique often employed by spyware and virus writers to hide their files. The technology produced by MediaMax and XCP installed software when consumers attempted to play the CD on their computer.

As this was happening an all party group of parliamentarians, the All Party Internet Group ('APIG') decided to take a look at the issue of DRM to ask the public and industry to throw light on issues such as: whether DRM distorts traditional analogue trade-offs in copyright law, what legal protection DRM systems should have from those wishing to circumvent them, should DRM systems have to make exceptions for those with disabilities, and, with a direct bearing on the Sony case, whether DRM systems can have unintended consequences on computer functionality.

The inquiry received over 90 written submissions, and the report, published in June, made eight key recommendations:

- That the Office of Fair Trading ('OFT') brings forward labelling regulations so that it will become crystal clear to consumers what they will and will not be able to do with the digital content that they purchase.
- That OFCOM publish guidance to make it clear that companies distributing Technical Protection Measures systems in the UK would, if they have features such as those in Sony-BMG's MediaMax and XCP systems, run a significant risk of being prosecuted for criminal actions.
- That the Department of Trade and Industry investigate the single-market issues that were raised during the Inquiry, with a view to addressing the issue at the European level.
- That the government do not legislate to make DRM systems mandatory.
- That the Department for Culture, Media and Sport review the level of funding for pilot projects that address access to eBooks by those with visual disabilities and that action is taken if they are failing to achieve positive results.
- That the Department of Trade and Industry revisit the results of their review into their moribund 'IP Advisory Committee' and reconstitute it as several more focused forums. One of these should be a 'UK Stakeholders Group' to be chaired by the British Library.
- That the government consider granting a much wider-ranging exemption to the anti-circumvention measures in the 1988 Copyright, Designs and Patents Act for genuine academic research.
- That having taken advice from the Legal Deposit Advisory Panel, the Department for

Culture, Media and Sport hold a formal public consultation, not only on the technical details, but also on the general principles that have been established.

Letting The Market Decide

One of the key threads throughout the findings of the APIG report is the view, supported by a number of contributors in both the non-DRM v DRM camps, that in time market forces and consumer power would decide how the digital market place will function.

The pro-DRM contributors were quick to point to the Sony case as proof of this argument. Whilst they thought the incident was a shambles, they argued that the near universal adverse reaction from the marketplace had forced Sony into abandoning the approach, and resulted in a huge public relations disaster for the company.

APIG was impressed by the speed at which the US legal system handled the case and secured a settlement with Sony, but was concerned that consumers' ability to secure equal protection under UK Law may not have been as straightforward. It called for clear guidance to be drafted in the UK to make it clear to companies distributing similar DRM technologies that they would run risks of being prosecuted under the Computer Misuse Act and/or Data Protection Act. APIG called on the UK's communications regulator, Ofcom, to take on the task of producing guidance for this purpose.

The idea of letting consumers decide what technologies to accept is obviously a sound argument, but for there to be a true choice consumers need a choice not just of different content which includes DRM solutions, but also solutions which do not contain DRM solutions. APIG point out, how can consumers make that choice unless there are comparable options for both.

For example, if you choose to pay iTunes or Napster 79p for a music track with some form of DRM protection, you would surely need an option to buy that same music DRM free as well. The problem there of course is that the major studios will not currently license their catalogues to non-drm services because they want to 'protect' their product against 'pirates', who wants to put their content on p2p networks. This of course ignores the fact that new material -- including exclusives -- added to iTunes and Napster and other services are usually on p2p networks already within hours of first appearing on these sites.

Apple CEO Steve Jobs saw this happening. Back in 2003 he told Rolling Stone that DRM would not work in protecting music. The BPI, however, argued that without DRM, rightsholders 'may have no effective control over their copyrights and therefore no certain prospect of being able to ensure that they are paid'. More than one contributor in written submissions to the inquiry highlighted the fact that many of the issues around DRM would not be resolved until the content providers stopped treating all their customers as potential pirates.

It seems clear that a number of consumers want to purchase DRM free music for their own personal use to use 'legally' anywhere. This is perhaps why Russian site AllofMP3 is now second only to iTunes in the UK. This sites popularity shows people will pay for 'legal' downloads free of DRM (The site's legality is currently under question, and following pressure from international organisations such as the IFPI is currently under investigation in Russia).

Label It

One of the main recommendations to come out of the APIG report is the idea of mandatory labelling to alert consumers to the presence of DRM technologies.

However, this could not happen whilst consumers continued to be kept in the dark about the presence of DRM technologies, did not understand what acts were legal and illegal, and where

particular content was only available with DRM restrictions, so provided no choice in the market. Surprisingly, many of the respondents, both consumers and industry, were in favour of some form of 'clear' labelling of content which contains DRM and of making it clear what consumers could and could not do with the products they purchase.

According to APIG, such labelling on CDs should ensure that it includes all or some of the following information:

- you are not permitted to make any copies of this CD for any reason; this CD may not play in all devices;
- if your current player device breaks or is stolen this content may become inaccessible;
- moving this content to a new device will not be possible if we cease supporting this platform or go out of business;
- you cannot access some parts of this DVD without a working Internet connection to enable us to record your identity;
- 'your playing of this song may be recorded in marketing databases in foreign countries'.

One might ask how big this label will need to be, and whether content providers will just turn this kind of warning label into a long T&C document that people will never read. With more music content moving to digital downloads this seems even more likely. Most consumers also certainly are not aware how agreeing to such contract/licence terms effect their usage rights. APIG recommended that the office of Fair Trading look to bring forward regulations to ensure DRM material contain clear consumer warnings about what can and cannot be done with the material.

Balance Shifted Towards Rightsholders

In oral evidence given to the inquiry Toby Bainton of SCONUL said, 'I think it is true that the statute has become less important and the contract more important'. This seemed to be fear echoed by a number of contributors who felt that the fine balance of interests that has developed over the years in UK copyright law is in danger of being discarded by rightsholders using licensing and contracts to enforce the primacy of contract law over copyright law. Whilst some argued that DRM was needed to protect content, others pointed out that content providers already have copyright law for that. Indeed, Intel stressed that 'laws not technology should be the primary enforcement tool against piracy'.

One of the more interesting points in this whole discussion is the perceived rights consumers believe themselves to have and their actual rights under UK law. As the report correctly points out most non-lawyers would be surprised to learn that, unlike under US 'fair-use' exceptions, making a copy of a CD you've bought or copying that CD to your computer to transfer it to an MP3 player is not actually a permitted 'fair dealing' act under current UK copyright law. So, rightly or wrongly, one of the acts consumers want to maintain, they have never actually legally had in the first place.

However, the issue of DRM technologies, which prevent consumers from doing things which are legal under copyright laws, is an important one which was covered in the inquiry.

Timo Ruikka of Nokia, whilst arguing that in time the consumer will benefit from improved contractual balances, argued that practically everything about the news digital paradigm is a step backwards for the consumer. He is quick to identify that there is a change in the paradigm because where in the analogue world consumers purchase and own the book/CD and can do with that book/CD whatever they want, including selling it on to someone else, the digital world is seeing eBooks and Digital music downloads 'licensed' like software. Essentially consumers are losing their 'first sale doctrine' rights.

Disable For Disabilities

The loss of rights and exceptions present in current copyright law that are put under danger from DRM was particularly apparent when applied to users with disabilities. Several people made the point, for example, that whilst s 28 of the Special Education Needs and Disabilities ('SEND') Act 2001 requires institutions to 'take reasonable steps' to permit disabled people to enjoy facilities on the same basis as their peers, that s 296 of the Copyright Designs and Patents Act 1998 does not allow interference/circumvention of DRM, even if it is to facilitate requirements of the SEND Act.

The Visually Impaired Persons Act 2002 also allows for the transformation of media into the appropriate assistive formats, and the creation of an accessible copy made for personal use if an accessible copy is not already commercially available.

The problem is, if a product won't let you take advantage of one of the copyright exemptions under the Copyright Designs and Patents Act as amended by the Copyright and Related Rights Regulations 2003, currently, a person wishing to complain would have to appeal to the Secretary of State. He would then investigate and if he agreed the rights of the complainant were being abused could order the rightholders to allow the exercise of those exceptions. Failure to comply would mean that it was then up to the complainant to take action for a breach of statutory duty. As the Open Right Group told the inquiry it surely should not be the case were consumers need to go through the slow process of complaining to the Secretary of State to gain access to material that they legally have rights to access. One that even after the intervention by the Secretary of State could still leave them needing to resort to the courts to get any action. One could argue that this procedure does not exactly encourage complaints. Indeed, APIG contended that since there was no evidence that this system had been used, or that consumers had not risked legal action due to it, that there was no reason to overhaul it at the current time.

DRM, Competition And Interoperability

APIG called on the Department of Trade and Industry to raise at EU level several single-market, and competition issues such as Apple's pricing of content for UK iTunes users (79p) and other European users (Eur 99 (68p)) and DVD regional coding to ensure their were an effective set of 'principles by which the single market can continue to operate effectively'.

In relation to iTunes they said, 'It is argued that the practice of residency based price discrimination frustrates consumer benefits possible under the single market and that the iTunes system allows market abuse, going against the principles of the single market'. The Commission opened an investigation into these claims last year.

On the question of interoperability, the report concluded that whilst interoperability was desirable, considering the infancy of the DRM market it would be premature to consider legislators considering regulating the market. This is interesting considering the recent decision by the French government to look to do exactly that.

The French government passed a new copyright law which for a while threatened to force Apple (and others) to open up their proprietary DRM systems to make them completely interoperable, a plan Apple labelled quite ridiculously as 'state sponsored piracy'. Eventually a compromise was found that Apple (and other online music store operators) will not, in practice, have to open up their DRM technologies to competitors, unless the copyright holders (artists or record labels) have not given Apple explicit permission to lock those third party devices out. This effectively means that Apple, Napster et al can still avoid having to provide any interoperability by negotiating new deals with the rightholders. The French law also creates a regulatory body to assess requests for interoperability and will have powers to order companies to make their products interoperable unless they enter into deals that exploit the legal loop-hole.

Interestingly, Apple has recently found itself in trouble in Norway and may be fined for operating iTunes in Norway, Sweden and Denmark after a Norwegian Ombudsman ruling that says Apple's terms and conditions of service for iTunes do not comply with the law and is therefore doing business in the country illegally.

The Ombudsman, whose decisions have the status of court rulings, said that the terms of agreement with iTunes were unreasonable with regard to the Norwegian Law Marketing Control Act. It said that Norwegian law, not English, must govern the agreements. It also said that iTunes cannot disclaim liability for any possible damage done to machines by its software, and that the digital rights management ('DRM') which attaches to iTunes songs may not be legal since the only portable device that can play the purchased material is Apple's iPod.

The company was given until 21 June to comply with the ruling.

Conclusion

The findings of the APIG report are sure to be feed into the results of the complete review of UK intellectual property laws, the Gowers review, currently underway and expected to conclude at the end of 2006.

The one silver lining, at least, was the recommendation not to legislate to make DRM systems mandatory. It seems hard not to conclude that the balance has shifted towards the rightsholders at the expense of consumers through the use of DRM. The question is, will the market even the playing field.