

# *The Association for Free Software*

## **Association For Free Software response to consultation on EC Copyright Directive 2001/29/EC**

To Teresa Arnesen  
Copyright Directorate  
The Patent Office  
Harmsworth House  
13-15 Bouverie Street  
London EC4Y 8DP

Tel: +44 (0)20 7596 6513  
Fax: +44 (0)20 7596 6526/6527  
E-mail: [copyright@patent.gov.uk](mailto:copyright@patent.gov.uk)

*This response was prepared by Simon Waters <Simon@wretched.demon.co.uk> with the help of AFFS members and supporters.*

### **What is the Association for Free Software (AFFS)?**

The Association for Free Software (AFFS) is a membership organisation which promotes and defends Free Software in the UK. Its web pages are reachable at <http://www.affs.org.uk/>.

### **Why is the AFFS responding to this consultation?**

The AFFS members are principally individuals and organisations involved with producing and using computer software, and so may be directly affected by some provisions in this directive. The AFFS membership also has a wider interest as representing consumers and users of copyrighted materials. Many members are involved in the distribution of copyrighted material through digital and other channels. Thus the AFFS includes groups in all three categories the Patent Office is seeking to consult.

This legislation also raises wider issues that we believe may adversely affect the environment in which Free Software, and software authors in general operate.

### **Scope of Response**

This response focuses on amendments to Article 6 and 7 of the Directive (Annex A, Section 5, Section 6) concerning the issues surrounding the circumvention of protection measures, and the removal of prevention measures, as well as more general aspects of copyright law.

The AFFS does not feel it is an appropriate body to comment on aspects relating to charges and other aspects of the broadcast, or public performance of copyrighted material by non-commercial organisation.

### **General comments on the origins of, and nature of this legislation.**

The AFFS recognises that in an ever more networked world harmonising laws related to copyright is a desirable goal, simplifying the lives of authors, publishers, and users of copyrighted material. However harmonisation of laws is not sufficient reason of itself to justify changes, legislative changes must receive suitable scrutiny to ensure they are balanced, and consistent with the ideas of natural justice, and other legislation.

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These proposed changes would bring into UK laws similar offences as those arising under the US Digital Millennium Copyright Act (DMCA).

At each new leap in technology, whether the printing press, the record player, the audio tape or the video tape, the existing publishing industry of its day has pleaded the terrible effects the new technology will have on its revenue from copyright infringement. Despite these dire prediction publishing has grown and developed new markets without the widespread use of copy protection mechanisms or legislation to protect those mechanisms. Now for the latest generation of technology we will be faced with a whole new generation of copy protection mechanisms, which are expecting new legislation to protect them.

The AFFS membership has extensive experience with contrivances aimed at protecting copyrighted materials from abuse in the form of software licence systems. Whether it be dongles, software systems like Flexlm, or bespoke systems, any experienced system administrator will tell you they are a significant source of additional cost, headache, down time, and complicate disaster recovery planning.

However it is reasonable that authors and publishers should have the right to utilise such mechanisms should they so choose, subject to suitable protection of the fair use exemptions of copyright. We will demonstrate that protecting those fair use exemptions may conflict with prohibition on circumvention devices.

These proposed changes would in effect make the future equivalent of the Xerox machine, or the blank audio cassette or the video recorder all illegal to own or use. The idea that it represents some minor shift in costs and charges between publisher and user is not supported by the evidence presented by the Patent Office or the experience of our members.

Such far reaching legislative changes should not be made in the guise of minor amendments to the Copyright act.

## **Five Key Objections to the proposed changes.**

- a) It creates offences where none should exist.
- b) The proposed changes do nothing to ensure that current exceptions to copyright law are protected in the real world, such as exemptions for personal use, or study.
- c) No provision is made for safeguards against abuses by rights holders.
- d) The legislation transfers significant costs onto legitimate users, whether they be paying users, or using existing exemptions to access the material.
- e) No provisions exist to protect and ensure a thriving public domain of materials so protected once the copyright period expires.

## **It creates offences where none should exist.**

By analogy with the security industry, this legislation will criminalise the locksmith as well as the burglar.

First, the suggested legislation tries to draw a distinction between computer software, and other technical devices. This is a futile distinction in this area, and emphasises the problem with laws that attempt to address rapidly changing

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technologies.

There are an increasing number of devices, such as: video recorders, telephones, or multimedia palm top devices that are based on and utilise exactly the same software as general purpose computers. Many utilise free software to do this. The distinction between computer software and other devices implementing complex mathematical algorithms to protect digital content is unclear. If my computer can play an MP3, is it an MP3 player? If I load the same MP3 playing software onto my telephone is it an MP3 player? If I rewrite the firmware on my MP3 player to play only OGG files, is it still an MP3 player?

Many commentators in the IT industry have long predicted that the computers will "disappear", by which they mean they will become closely integrated into the devices we use, to the point where all the devices we use are smart.

When you look at the likely effects of the legislation it is likely to prevent people implementing tools to allow digital information to be easily converted to the format they require. This is the root cause of most of the problems. The assumption in the wording is that the copyright holder should have the right to control how the material is used, but what if the copyright holder is not reachable, no longer in business, or not prepared to support the latest formats, or platforms?

In such circumstance this legislation would seem to potentially lock whole rafts of copyrighted material into obsolete formats, or proprietary systems. The equivalent of tape recording your old LP records could end up being at worst impossible and at best illegal. It would be in the copyright holders interest to abuse this position to extract multiple payments for the same copyrighted material.

The locking of such material into proprietary formats will make it inaccessible to some groups, likely to include the visually impaired, or those that use minority operating systems.

The ability to lock people into particular formats would also have a devastating effect on industrial innovation in a number of fields, most obviously in the field of computer software and consumer electrical goods, where established players in the market will use trade secrets (protected by the proposed legislation) to push their own products and standards.

Unlike the use of patents to create such "format" monopolies, which was a key argument against the extension of patents to software, this monopoly would have no clear period of expiration.

These changes also seem to run counter to the European Software directive, that specifically protects the right to reverse engineer software for the purpose of interoperability. If we accept interoperability is desirable, then these changes undermine the right to make a suitable copy for that use.

## **Protection of existing exemptions**

Whilst some companies have started attempting to create mechanisms than can handle exemptions, allowing cut and paste of up to a certain proportion of text works, allowing library style borrowing, or a certain amount of authorised copying. These kinds of protection mechanisms are of significant complexity, and are likely to be the most expensive to deploy and operate for both publisher and user.

Since the wrangle between Elcomsoft and Adobe, Elcomsoft have continued to reveal weaknesses in almost every mechanism Adobe have added to permit fair uses of the material.

Thus it is seen the increased complexity of such mechanisms will make them less effective in protecting material against unlawful infringements, but also more expensive to implement, and thus less attractive to the author or publisher seeking to protect their work.

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Publishers will do the minimum amount to make the work profitably available - if enabling fair-use rights is extra work, they're unlikely to do it, unless clear penalties are incorporated into the legislation.

## **Abuses by rights holders**

Many of the rights enforcement methods will transmit data about the use of material to a rights holder, or an appointed representative of that rights holder, such as the name of the viewer, the material being viewed, the system or device the material is being viewed on, financial information, and possibly other less obvious information (such as the origin of the information revealing the location of the individual).

This data might be highly sensitive both personally, commercially or politically. The EU has sought to provide some protections on such data through data protection and privacy legislation, however the EU has failed to obtain long term reciprocal arrangements with other countries such as the USA.

However these proposals apparently make it illegal to intercept, or manipulate such rights data to protect the privacy of the user, even where the data is destined for areas where it receives insufficient protection from abuse.

Similarly it is possible to imagine personal rights protection systems which will return said information to individuals who might write documents purely for the purpose of gathering intelligence about their likely readership in a competing organisation. Such an individual is unlikely to be registered under data protection legislation in the UK, even if they were located in the UK.

The main author of this response has himself been involved in the sale and use of network security devices deliberately designed to remove similar identifying data from the commonly used network protocols, but for this particular type of data such a device would suddenly become illegal to use. This has potentially wide implications for many aspects of digital security.

Additional abuses are likely through the use of monopolistic pricing arrangements once a proprietary system is established in the market, and devices to access those formats are widespread. So far this has been avoided by the provision of devices that subvert some abuses, such as multi region DVD players, which were far more commercially successful, but similar devices would presumably be outlawed by these changes.

## **Transfer of Costs**

Whilst the impact suggests the net effect on the economy would be neutral, it is unclear what the argument for this is. In truth the costs of any copyright infringement are already largely passed onto the end user by the publishers in increased prices.

These proposals would seem to hope to reduce the losses from unlawful infringement, and replace it with costs to libraries and other archivists.

However whilst the costs to libraries and archivists will be concrete, the most commonly infringed copyrighted materials, music and film, will be unlawfully copied for as long as the devices produce it in a form that can be recorded by camera or microphone.

The effective monopolies granted by such technologies will have additional costs across the whole digital media industry, potentially stifling innovation.

## **Protection of the Public Domain**

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The Statute of Anne granted copyright for 14 years, and applied safeguards to prevent excessive charging for books. Even then legislation extending monopolies was granted with appropriate safeguards.

The public domain is under attack on a variety of fronts.

European database legislation does not appropriately protect raw collections of public domain material, as it is protected in the USA.

In the USA the public domain is under attack from the repeated extensions of the copyright period. These extensions, if upheld as constitutional, apply to US material in the UK.

However few would dispute that the public domain is a useful source of images, and literary works that inspire and assist both the artist and scholar in his labours.

Copyright protection devices with strong legal protections will undermine the ability of libraries and archives to record, and supply, material in a usable form. This would further undermine the accessibility of material that belongs in the public domain.

Such libraries and archives are already faced with considerable challenges introduced by the rapid proliferation of new media formats.

As a public resource and a public good, it is up to the representatives and legislators to ensure the public domain is protected. The protection devices must be time limited in their effect, and that material so protected is released when a format or mechanism becomes obsolete. Note formats are obsoleted frequently, and far faster than the current long periods of copyright.

## **Conclusions**

Those who wish to protect their copyrighted material with digital safeguards are already free to do so, and may already pass on additional costs to users, and create problems for libraries and archivists.

Indeed the exercise of this freedom has already led to investigation by the European Competition Commission for suspected abuses of monopoly by DVD and CD publishers. In the US legal challenges are being brought over CD protection mechanism for preventing fair use access. Yet despite these alleged abuses the European Union introduces more legislation that protects the publisher and not the consumer. Clearly an exercise in disjointed government.

Strong legal protection for those safeguards threaten to create further mechanisms that are open to abuse, whether to enforce existing monopolies or create new ones. Under these proposals such monopolies might persist indefinitely in stark contrast to existing state granted monopolies on copyrighted material, or patented devices.

Those who wish to create innovative new platforms, devices and media formats will find such legal protections on copyright protection mechanisms stifle innovation or make it prohibitively expensive.

Those groups who might create tools to assist the archivist or librarian are outlawed by this proposed legislation.

The proposal contains no safeguards to protect the rights users of copyrighted works, or the public domain, and thus may be seen as a failing by the legislator to protect the existing rights of the public.

## **Comments on the consultation process itself.**

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The inclusion of amendments pertaining to non-commercial performance rights might better have been separated from issues concerning mechanical protection devices.

The presentation and accessibility of material for this consultation process was in general excellent, and readily accessible to lay readers, and available online in a timely fashion. The Patent Office should be congratulated on their effective use of eGovernment.

The author feels it would have been useful if some key points of existing legislation and documents were better explained, for example the "Three step test" mentioned in UK Implementation Section III, Article 5.5. Alternatively rather than merely referencing such external documents, had those been hyper links to the corresponding online document they could have been more easily accessed. The author hopes the Patent Office will consider this suggestion when preparing future consultations.

Contributors: S R Waters, M J Ray, Alex Hudson

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