



MPA Response to the UK All Party Parliamentary Internet Group (APIG) Inquiry into Digital Rights Management (DRM)

The Motion Picture Association (MPA) is a trade association that represents seven major international producers and distributors of films, home entertainment and television programmes¹. We welcome the opportunity to comment on the APIG public inquiry into DRM, which is a topic of crucial importance for the film industry. Our member companies have been developing a wide range of online services and are licensing their works to a broad array of new media platforms. New services offer consumers exciting and novel ways of enjoying an ever broader variety of copyright-protected content, notably (but not only) on the Internet. DRM tools play a central role in the success of these new business models in the digital environment.

The APIG inquiry seeks succinct feed-back on eight specific questions relating to the use of DRM “in a continually evolving market place”. For ease of reference and clarity, these eight questions are addressed below in the order outlined by APIG in its invitation to comment (<http://www.apig.org.uk/current-activities/inquiry-into-digital-rights-management.html>).

However, as a general preliminary comment, we would like to point out that DRM tools and technological protection measures (TPM) should be clearly distinguished and that the terms “DRM” and “TPM” should therefore not be used interchangeably. Whereas DRM refers to systems for managing offers to consumers of copyright protected products, TPM correspond to a software, service or device that provides technical protection against copyright infringements and facilitates secure distribution of copyright works.

1. “Whether DRM distorts traditional tradeoffs in copyright law”

Our short answer to APIG’s first question is “no” and this view is based on the understanding that the range of possible uses of copyrighted material has been greatly expanded in the digital age, largely in favour of consumers. As a matter of fact, it needs to be borne in mind that digital technologies have made possible mass replication (indeed cloning) and redistribution of copyright works on a global scale, with little or no marginal cost for users. By facilitating the legitimate provision of copyrighted content to consumers, DRM helps to ensure a fair balance in copyright law in the digital environment.

DRM allows copyright owners to make content available to consumers in a variety of exciting new ways through great product and services diversification. In the film sector, this includes the development of new business models (flexible pricing, superdistribution, video-on-demand, subscription) and new formats (DVD, next generation DVD, digital cinema, digital TV, etc). In turn, DRM empowers consumers to enjoy content when and where they want and to pay for only

¹ The MPA’s members comprise: Buena Vista International, Inc., Metro-Goldwyn-Mayer Studios, Inc., Paramount Pictures Corporation, Sony Pictures Releasing International Corporation, Twentieth Century Fox International Corporation, Universal International Films, Inc., Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

what they want. This more efficient means of delivering content will expand consumer choice. Keeping the foregoing in mind, it appears obvious that DRM is merely a means permitting copyright holders to effectively exercise and protect their existing rights of copyright by allowing the effective management of these rights in the digital environment. Copyright holders and consumers have converging objectives, with rights holders having a clear market incentive to satisfy effective demand for flexible pricing and innovative means of consumption, whereas consumers are expecting a diversified menu of choices.

2. “Whether new types of content sharing license (such as Creative Commons or Copyleft) need legislation changes to be effective”

The key question that public policy should address is how to design the most appropriate framework to incentivise investment in the creative economy. Clearly, there are numerous means of encouraging investment, but it is not yet obvious that legislative changes would be required to underpin new variants of copyright licenses. “New types” of licenses, such as Creative Commons, are in fact merely manifestations of current copyright law in the sense that they employ the exclusive rights that enable the copyright owner to authorize or prohibit different acts. As a case in point, the Free Software Foundation’s website notes that “the [General Public License (GPL)], and other copyleft licenses, are copyright licenses”. As a matter of fact, it should also be noted that these licenses are vigorously enforced in the marketplace (see www.gnu.org/licenses/gpl-violation.html).

UK copyright legislation, like its common law predecessors, is marked by the principle of contractual freedom. Right holders, with some limitations, are thus free to design whatever models they wish to use to license their works. At this stage, it is our view that no evidence supports the idea that changes in UK legislation would be needed to accommodate new types of copyright licenses.

3. “How copyright deposit libraries should deal with DRM issues”

The need to answer this question would seem to depend to a large extent on the types of copyright-protected works being deposited, and the extent of DRM usage in the particular sector. In some instances, it may well be that no need to “deal with DRM issues” arises at all. Besides, keeping in mind our general comment on the need to distinguish “DRM” and “TPM” (see second § on first page), we would like to put it to APIG’s consideration that a more accurate wording of this question might perhaps be to ask “how copyright deposit libraries should deal with TPM issues” but that question would fall outside of the scope of a public inquiry devoted to the DRM topic.

This being said, it might be worth noting that the European Union’s “Copyright” Directive (Directive 2001/29/EC – see notably Recitals 51 and 52 + Article 6.4) envisions voluntary agreements between right holders and other parties concerned to accommodate certain copyright exceptions or limitations provided for in national law in accordance with the Directive. This voluntary path is successfully being pursued in the UK, as well as in other EU countries. As telling examples, we would notably like to draw APIG’s attention to the current discussions between the MPA and the British Film Institute (BFI). Germany also provides a useful example,

where voluntary agreements have been adopted between the German National Library and the music and book publishing sectors.

4. “How consumers should be protected when DRM systems are discontinued”

As we read it, this question goes to the heart of the balance that should be struck between, on the one hand, the need to encourage technological development and, on the other hand, the desire to minimize legacy problems. However, the issue at stake would more accurately seem to refer to “format obsolescence”, rather than “DRM obsolescence”. In this context, while acknowledging that new technologies cannot from the outset be required – let alone designed – to last forever, manufacturers and/or providers of new technologies are clearly expected to ensure fair degrees of interoperability. Moreover, it is vital that consumers are provided information on any legacy issues, including in particular analogue switch-over matters.

The MPA believes that current regulation should provide the necessary comfort in the form of consumer protection and similar laws. At the same time, we would also argue that with new technologies being developed, comes a concomitant requirement to limit legacy issues (rather than to create them). In most cases, the overall benefits of new technologies for consumers should outweigh the deficits from legacy issues created by the very migration to a popular new technology. Industry self-regulation, notably through proper product labeling, should also be instrumental in ensuring the smooth transition to new technologies.

While not excluding the eventual need for government to intervene in possible cases of obvious market failure, such as the so-called analogue hole, the MPA would argue that, as a general rule, the marketplace and its commercial incentives provide the best way to solve legacy problems. Evidence suggests that new technologies usually contain incentives for the consumer to migrate but that migration often takes time. In this context, the market has repeatedly shown, by endeavouring to reach interoperable solutions, that there are very strong commercial incentives to manage technological migration in such a way as to minimize the alienation of consumers.

5. “To what extent DRM systems should be forced to make exceptions for the partially sighted and people with other disabilities”

To usefully respond to this question, it again appears appropriate to reiterate the importance of the distinction made above between DRM and TPM.

As a first element of answer, it should also be said that DRM is a technology in development and that, as such, there is no reason why it could not provide solutions (rather than “raise obstacles”, as the wording of Question 5 seems to suggest) for the accommodation of copyright exceptions to the extent that they become necessary. Secondly, the MPA would also argue that not every disability needs to be overcome by the circumvention of, say, a TPM. One-size-does-not-necessarily-fit-all and any copyright holder should be entitled to provide a narrowly tailored response relative to a particular disability, without eliminating the TPM in its entirety or providing a key that would be available to all users.

APIG's invitation to comment includes a reference to the UK's Copyright, Designs and Patents Act (CPDA) that deserves close attention, since this instrument already provides a pragmatic method to deal with situations where copyright exceptions need to be accommodated in the digital environment. In a nut-shell, Section 296ZE of the CPDA establishes a detailed "remedy where effective technological measures prevent permitted acts". This is designed to implement Article 6.4 of the EC Copyright Directive. This intervention mechanism gives the Secretary of State regulatory powers to ensure that beneficiaries of exceptions can benefit from exceptions (or permitted acts).

6. "What legal protections DRM systems should have from those who wish to circumvent them"

As previously clarified, the important distinction made between DRM and TPM should here be kept in mind.

Article 6 of the EU "Copyright" Directive (EUCD) mandates Member States to provide adequate legal protection against the circumvention of any effective technological measures carried out by someone in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective. In line with the EUCD, the legal protections of DRM systems should therefore include an appropriate knowledge standard. Secondly, the legal protection should ensure that the provision of information and "other means" to circumvent are covered as well. Thirdly, the manufacture and distribution of circumvention devices should be prohibited even pursuant to a lawful use (i.e., to exercise an exception). Finally, the definition of "effective technological measures" must be implemented in such a way that technological measures do not have to be "un-hackable" to qualify for legal protection, since the guarantee provided by the legal protection would otherwise be totally deprived of its content.

The CPDA appears to be broadly in line with the EUCD regarding legal protection of technological measures but two points of concern may however be useful mentioned at this stage. Firstly, the British implementation appears to feature an omission of the "limited commercially significant purposes or use" test in the section on criminal sanctions (Art. 6.2b of the EUCD) as well as a narrower implementation of the Art. 6.2a test ("promoted, advertised or marketed for the circumvention of" effective technological measures).

In addition, a significant procedural problem arises in sections 296ZA(4) and 296ZD(3) from the incorporation by reference of section 102(1) of the Act. The circumvention provisions rightly allow both the publisher of TPM-protected works and the owner of the technology affected to bring proceedings against prohibited circumvention activities. Section 102(1) requires copyright infringement claimants with interests in the same work all to be joined in the action. As applied to the circumvention provisions, it arguably requires the technology owner to join everyone with any copyright interest in the work protected (and vice versa) before he can proceed with his action. This is a pointless fetter on potential claimants, especially given that under the Civil Procedure Rules, the court can at its discretion join any party whose participation in the action seems desirable (CPR, rule 19(2)). This mandatory requirement did not appear in the pre-EUCD anti-circumvention provisions introduced in 1988 (section 296) and should be deleted.

7. “Whether DRM systems can have unintended consequences on computer functionality”

Unintended consequences are usually hard to predict since, by nature, they are not expected. It would therefore appear as a somewhat blunt display of over-confidence to simply answer “no” to question 7. Indeed, all new technologies are susceptible to display a certain amount of glitches or, at least, room for improvement in the same way as any software loaded into a computer may have unintended consequences before being improved by its authors through an iterative process of “software development”. In this framework, it should be said that every effort is made by content providers to ensure that consumer devices are not adversely affected by DRM systems. Again, as in the case of the protection of consumers if and when a DRM system is discontinued (see question 4 above), the speed of fixing and the information supplied to users will be crucial to the success or failure of a given technology. In our view, the marketplace should be the ultimate arbiter determining this outcome. With regard to existing law, notably in the fields of consumer protection, product liability and privacy, the MPA does not see any justifiable reason to treat DRM differently than any other innovative technologies available in the marketplace.

8. “The role of the UK Parliament in influencing the global agenda for this type of technical issue”

In our opinion, the UK Parliament could play an important role in securing the continued introduction and use of DRM tools in the digital marketplace, and hence in the development of new digital media services to the benefit of both consumers and content providers. The UK Parliament should notably:

- Continue to monitor the impact of the implementation in the UK (and in other countries) of the EU Copyright Directive, notably on rights holders, the marketplace, the copyright exceptions (and its beneficiaries), as well as technological development.
- Continue to provide input to the Government relating to the general development of the digital environment.
- Encourage and, as deemed appropriate, facilitate the cooperation between content providers, telecom operators, Internet service providers (ISPs) and other interested stakeholders with a view to clean up a marketplace plagued by rampant piracy and effectively allow legal alternatives to flourish.
- Support market efforts to ensure the development of interoperable standards for content protection.

We would be happy to provide further details on the above-mentioned issues upon request. We thank you for your attention and consideration.

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