

Comments upon the proposed amendments to UK law to implement the requirements of European Community Directive 2001/29/EC

Chris Lightfoot*

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Abstract

In this document, I consider the impact of the proposed amendments to UK law to implement the requirements of European Community Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ('the Directive'). I focus on the impact of the Directive upon the users of copyrighted material ('consumers') and others who are collaterally affected by it, and discuss how detrimental effects might be mitigated. Where I discuss works protected by copyright, it is understood that these are works distributed in a digital form to which technical protection measures (TPMs), as defined in Article 6.3 of the Directive, may be applied.

1 Effects upon fair dealing exceptions

The most serious issue for consumers in the proposed implementation is the practical effect of the mechanism by which a beneficiary of one of the exceptions permitted under existing UK copyright law may obtain the benefit of that exception¹. The consumer is expected to 'issue a notice

*Email: <chris@ex-parrot.com>

¹Section 6.4 of the Directive.

of complaint to the Secretary of State²; the Secretary of State will then, having considered the complaint, give directions to the rights holder or licensee to enable the complainant to benefit from the exception.

This procedure is likely to be slow, and to impose an unjustified workload on consumers. As an example, consider a class of thirty school children who are instructed to write an critical essay on a novel which is supplied to them in the form of an electronic book. In order to exercise their rights to reproduce short extracts from the novel³ they might expect to be able to “cut and paste” text from the electronic book into their work; however, this act may be prohibited by the technical protection measure (TPM) applied to the book. Are all thirty children expected to issue notices of complaint to the Secretary of State in order to benefit from the exception? How, practically, is the Secretary of State expected to enable the complainants to so benefit? How long is it likely to take?

I am informed⁴ that the Government expects that, when a complainant has been permitted to take advantage of an exception, the rights holder will not continue to frustrate the efforts of others to do so. This seems optimistic, and since rights holders are unlikely to be willing or able to modify the TPMs on copies of a work which have already been distributed, I believe that the optimism is misplaced. In particular, the likelihood is that when the Secretary of State directs a rights holder to permit a consumer to benefit from an exception, they will have to do so by supplying a copy of the work (or of a part of it) which is afforded less stringent protection by the effective technical measure. We must assume that the rights holder would be unwilling to widely distribute such a copy of the work, and so even future consumers will be forced to resort to issuing a notice of complaint to the Secretary of State in order to benefit from the exceptions.

The UK implementation should provide stronger guarantees for consumers. Since it is probable that many consumers of a given work may wish to benefit from the exceptions, the most sensible way to permit this would seem to be to require rights holders to promptly issue to consumers who can prove that they are beneficiaries of an exception a copy of the work which will permit them to benefit from that exception. A complaint to the Secretary of State would then be necessary only in the case where the rights holder fails to discharge their responsibilities under Article 6.4.

I am informed⁵ that the Government judges that it is not possible to enable the beneficiary of an exception to take action against a rights holder

²Proposed implementation, Annex A, 5.2.

³Sections 29 and 30 of CDPA (1988).

⁴Personal communication.

⁵Personal communication.

who fails to permit them to benefit from that exception. It is not clear to me that this is the case, and enabling consumers to take legal action to force rights holders to permit them to benefit from exceptions would seem a sensible way to resolve disputes about those exceptions without appeal to the Secretary of State.

Another general problem with the proposed implementation in this area occurs when a rights holder is no longer in a position to enable a consumer to benefit from an exception. This might occur if the rights holder no longer has a copy of the work which is not protected by an effective technical measure, or if the rights holder has died or is a company which has since failed. The proposed implementation does not address this problem.

I believe that the only way to solve this is to require that, for any work which is distributed to the public under a TPM, a copy with no such protection be lodged in an archive, perhaps associated with one of the Copyright Libraries. By doing so, it will always be possible a consumer to benefit from an exception, regardless of the status of the rights holder. Such an archive could be regulated by the same provisions of current law which apply to existing libraries and archives.

2 Duration of copyright and the public domain

Eventually copyright in a work expires. However, a TPM may not. Since the same type of TPM may protect other works which are still copyrighted, and in any case an effective technical measure is defined as⁶: (my emphasis)

... any technology, device or component that, in the normal course of its operation, *is designed to prevent or restrict acts*, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright....

it seems that consumers may well not be permitted to circumvent a TPM protecting a work in which copyright has expired. (I am given to understand⁷ that the Department of Trade and Industry does not concur with this view, but I cannot see from my reading of the Directive how they have reached their conclusion.)

⁶Article 6.3 of the Directive.

⁷Personal communication.

Therefore, former rights holder may continue to sell a work in which copyright has expired and be afforded the protections of Article 6 of the directive, so long as they sell it in conjunction with, and under the umbrella of the same TPM as, another copyright work⁸. In this way, the former rights holder may extend the protection afforded a work beyond the period intended by Parliament. In this way society may be denied the benefit of access to the work after copyright in it has expired. This undermines the fundamental ‘social contract’ of copyright, by affording a rights holder an effectively unlimited term of protection.

Even more serious, and as discussed above, is the case where the rights holder has not retained a copy of the work which is not protected by a TPM, or where the rights holder no longer exists. If we assume that the TPM cannot be circumvented, the same archive of unprotected works which I suggest as a means to permit consumers to benefit from the fair dealing exceptions could serve to ensure that copies of works will eventually enter the public domain. Such an archive would seem a reasonable part of an Article 6.4 implementation and therefore may form part of an implementation of the Directive, which does not itself address this issue.

3 Libraries and the access to information

The Directive does not contain any provisions which require rights holders to make available to libraries copies of works which may be lent out to borrowers without restriction. This is extremely unfortunate, since it may restrict access to information by people who cannot afford to pay for access to works. Nothing would prohibit the establishment of a voluntary scheme intended to encourage publishers to make new works in digital form available to libraries on reasonable terms. UK legislation could be amended to establish such a programme.

4 Software interoperability

Although the Directive explicitly does not apply to the ‘protection of technological measures used in connection with computer programs’⁹, the proposed UK implementation may nevertheless effectively prevent the development of software designed to be interoperable with future or existing

⁸And perhaps, depending upon the interpretation of Article 6.3, even without so ‘bundling’ it.

⁹Paragraph 50 of the preamble to the Directive.

software written by others, and thereby harm computer users by limiting freedom of choice and stifling market competition. In particular, if a piece of software exists (call it 'A') which employs a TPM to protect the data files which it reads and writes, then an interoperable piece of software ('B') could only be written by 'reverse-engineering' the TPM¹⁰ and incorporating into B an implementation of the same TPM. A TPM which has been reverse-engineered in this way could also be circumvented. Under section 296ZA of the proposed implementation, the user or author of the interoperable software B which then be liable as for infringement of copyright in the protected work (in this case, the data file which can be operated upon by the original and interoperable software programs).

By issuing copyrighted works in the format read by its program A, the owner of copyright in A could then prevent the distribution of B by taking legal action against its authors, distributors or users. The effect of this would be to prevent any software interoperable with A from being developed and distributed. The owner of copyright in the original software A could therefore use the protections afforded by the proposed implementation to establish and maintain a dominant market position to the detriment of competition.

The UK implementation should explicitly permit circumvention of a TPM for purposes of interoperability, in the same way that the current CDPA permits decompilation for the purposes of interoperability.

5 Scientific research

The Directive requires that¹¹

... protection [afforded to TPMs] should not hinder research into cryptography.

For the avoidance of doubt, the UK implementation should make clear that researchers into cryptographic methods, attacks on cryptographic systems, etc. not be liable even where their work could be or is applied to the circumvention of TPMs (for instance where a cryptographic system under investigation by a researcher is used in a well-known TPM), so that publication of the results of such research not be in any way restricted.

¹⁰Note that the TPM is *not* being considered here as applying to the software A itself; that would not be covered by the Directive.

¹¹Paragraph 48 of the preamble to the Directive.