

FIPR's Consultation Response on DRM

The Foundation for Information Policy Research is an independent body that studies the interaction between information technology and society. Its goal is to identify technical developments with significant social impact, commission and undertake research into public policy alternatives, and promote public understanding and dialogue between technologists and policy-makers in the UK and Europe.

FIPR welcomes the All-Parliamentary Internet Group's public inquiry into DRM systems, as these will pose many interesting technology policy questions over the next few years. FIPR has long been active in this area; we led the campaign in Europe that persuaded the European Parliament to amend the IPR Enforcement Directive to remove, inter alia, criminal sanctions for infringement.

Rights-management mechanisms are not just an issue for software, music and video companies, but for many other markets too. Soon after the WIPO anti-circumvention provisions were incorporated into US law, printer vendors started using rights-management mechanisms to stop their customers buying ink cartridges from anyone else. Other industries, such as mobile phone manufacturers, soon followed (in their case controlling the aftermarket for batteries). Public anger started to build.

Accessory control is nothing new – carmakers have long struggled for control of spare-parts markets, and governments have intervened repeatedly to restore competition. The more recent use (and abuse) of digital rights-management mechanisms for market control have also evoked strong negative responses. Parliament should note, though, that these responses have been different in Europe and the USA. In America, the printer vendors' attempt to use the Digital Millennium Copyright Act to stifle competition in the ink cartridge market was thrown out by the courts; in Europe, a recycling directive has ordered that ink cartridges be refillable from next year. We should be wary about Europe and the USA drifting apart on the way we deal with such issues.

The problem facing legislators is twofold. First, many everyday products now contain processors, and often communications too. As more and more of their value comes to lie in their software, so more and more industries will come to acquire some of the characteristics of the software industry – the good (flexibility and rapid response to market demand), the bad (usability and stability issues) and the ugly (monopolies).

Second, the business models common in the software industry (and which are becoming common elsewhere) are economically efficient but can be politically unpopular. Price discrimination is simply the most obvious example: it is common in industries with high fixed costs and low marginal costs, but has always been unpopular. Price differentials in 19th century railway tickets led to regulation: a rational railway operator will charge passengers their marginal willingness to pay, but the public detests the resulting fare structure as arbitrary and unfair. Most countries then over-regulated their railways.

It is fascinating that the content industry spent a decade lobbying furiously for DRM, and now that it's arrived they find it not quite to their liking. The turnaround came in 2005. In January, economist Hal Varian gave a keynote talk to a big DRM conference in Berlin. He argued that platform vendors would benefit the most from stronger DRM; linking two industries usually benefits the more concentrated of the two. Thus the platform industry (where Apple has over half the market) should gain more than the music industry.

The music industry was dismissive then, but by mid-year was getting apprehensive about loss of control. The musicians are even more worried – they complain that while a single used to sell as a £2.99 CD of which the performer got 34p, it is now a 79p download paying a miserable 3–4p. So much for the lobbyists' fine talk about DRM 'protecting creativity'! Yet this kind of outcome could have been expected, given the change in industry structure and the shift in power over the supply chain. One interesting development is the growing number of self-distributing artists, who deal with the download sites directly – or give away recordings, and make their money from live performance. Perhaps the music majors are simply becoming obsolete.

What lessons can be drawn from this? Policymakers should focus on the underlying economics. In the long run, ensuring competition matters more than arguing over default rights; and although we are no fans of the music industry, we tend to agree with them that the biggest threat to growth comes from the monopolies that proprietary DRM systems can create and entrench. Certainly, any DRM system that is abused for monopolistic purposes should lose all legal protection: the European Parliament being a creature of the Treaty of Rome should not be able to protect conduct that breaches that treaty. But a mere 'right to try to circumvent' is unlikely to be enough. Next-generation DRM systems – particularly those based on 'Trusted Computing' – may be technically very hard to circumvent. If Microsoft locks down its Office file formats, how can the developers of competing products unlock them?

The real issue is not circumvention but competition. In cases of abuse, judges must be able to order DRM mechanisms unlocked. For detailed suggestions, we refer MPs to FIPR's (and EDRI's) Response to the EU Consultation on Review of Copyright Law, October 2004.

I would like finally to suggest the following analogy. During the eighteenth century, Parliament redefined the role of the state from defending faith to defending property. During the nineteenth, the limits of private property were worked out – from the abolition of slavery to the regulation of the railways. We now face a similar process for intellectual property. Parliament has decided that creativity must be defended just as much as land or gold; the limits now have to be worked out. The framework should be erected by elected legislators, and specific cases should be decided by judges – not by the programmers who create the DRM mechanisms. Digital rights are too important for that.

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