

All Party Parliamentary Internet Group

*Chairman: - **Derek Wyatt MP***
*Joint Vice Chairmen: - **Charles Hendry MP & Nick Palmer MP***
*Treasurer: - **Alan Reid MP***
*Group Secretary: - **Earl of Errol***

“Digital Rights Management”: Report of an Inquiry by the All Party Internet Group

June 2006



Digital Rights Management

Report of an Inquiry by the All Party Internet Group

June 2006

Introduction

1. The All Party Internet Group (APIG) exists to provide a discussion forum between new media industries and Parliamentarians for the mutual benefit of both groups. Accordingly, the group considers Internet issues as they affect society, informing current parliamentary debate through meetings, informal receptions and reports. The group is open to all Parliamentarians from both the House of Commons and the House of Lords.
2. APIG issued a Press Release (*see Appendix A*) on 15th November 2005 to announce its intention to hold an inquiry into Digital Rights Management. Respondents were asked to focus upon some specific issues:
 - Whether DRM distorts traditional trade-offs in copyright law;
 - Whether new types of content sharing license (such as Creative Commons or Copyleft) need legislation changes to be effective;
 - How copyright deposit libraries should deal with DRM issues;
 - How consumers should be protected when DRM systems are discontinued;
 - To what extent DRM systems should be forced to make exceptions for the partially sighted and people with other disabilities;
 - What legal protections DRM systems should have from those who wish to circumvent them;
 - Whether DRM systems can have unintended consequences on computer functionality;
 - The role of the UK Parliament in influencing the global agenda for this type of technical issue.

In previous inquiries we have provided this type of indication of the questions we were interested in addressing. For reasons we don't fully understand, for this particular inquiry almost all respondents addressed themselves solely to these issues (and felt they had to attempt some sort of comment upon all of them); and very few drew our attention to wider matters. This was disappointing, and in future we will try to stress the open ended and flexible nature of our inquiry. Nevertheless, we did receive a few submissions that covered related issues – as will become clear later in the report.

3. Written submissions to the inquiry were received from:
 - Alliance Against IP Theft
 - AOL UK
 - Association for Free Software (AFFS)
 - Association for Independent Music (AIM)
 - Association for Information Management (Aslib)

Audible Inc
The Authors' Licensing & Collecting Society
BBC
BPI
British Copyright Council (BCC)
British Library
British Music Rights
Business Software Alliance (BSA)
Chris Clark, Clark Marketing Ltd
Consumer Project on Technology (CPT)
Digital Content Forum
Elspa Ltd
EMI
eMusic.com
Foundation for a Free Information Infrastructure, UK (FFII-UK)
Foundation for Information Policy Research (FIPR)
Globalisation Institute
Granada International
Intel Corporation
Intellect
International Association of Music Libraries Archives & Documentation
Centres, (United Kingdom & Ireland Branch)
International Policy Network
Internet Interest Group of the Society for Computers and Law
The Libraries and Archives Copyright Alliance (LACA)
MacRoberts Solicitors
Motion Picture Association
MP4
National Consumer Council (NCC)
Open Rights Group (ORG)
Periodical Publishers Association (PPA)
Personal Managers Association (PMA)
Producers' Alliance for Cinema and Television (Pact)
The Publishers Association (PA)
Publishers Licensing Society Ltd
Rightscom
Royal National Institute of the Blind (RNIB)
Share The Vision
SNOCAP Inc
Society of College, National and University Libraries (SCONUL)
Softwrap Ltd
M J Ray, Turo Technology LLP
UK Campaign for Digital Rights (UK-CDR)
UK Film Council
UK Unix & Open Systems User Group (UKUUG)
Yahoo!

Mark Bailey	Dominic McGonigal
Nicholas Bentley	James McGuigan
David M. Berry	Kevin Marks
Graham Cobb	David Meme
David Collier-Brown	Cinly Ooi
Robin Crorie	Paul Pedley
Jerome Davies	Satwant S Phull
Richard Dawson	C. Quinn
Louise Ferguson	David W. Radcliffe
Bob Halloran	Alfred Reading
David Hawarth	Dom Robinson
Simon Hobson	Timo Ruikka
Theodore W Hong	Daniel Squires
Paul Houghton	William Taylor
Peter Houghton	David Tomlinson
Michael Howe	Simon Walker
John Howkins	Antony Watts
Dominic Jackson	David Weinberger
Jesper Juhl	Anthony Wilkinson
Luke Kenneth Casson Leighton	Daniel Andre Young-Lumsden
Richard Lightman	Gus Zogolovitch
Alex MacFie	

4. On the 2nd February 2006, the committee heard oral evidence from:

Ross Anderson, Chairman, FIPR
Toby Bainton, Secretary, SCONUL
Ian Brown, Board Member, ORG
Chris Castle, Senior Vice President Business & Legal Affairs, SNOCAP Inc
Suw Charman, Director, ORG
Gillian Cordall, Partner, Lewis Silkin
James Evans, Legal Executive, PPA
Louise Ferguson
Clive Field, Director of Scholarship and Collections, British Library
Brian Fielding, Executive Vice President Content & Legal Affairs, Audible Ltd
Nic Garnett, Head of Research and Development, MCPS-BRS Alliance
Rob Hamadi, Head of Communications, PA
Gavin Hill, Steering Member, FFII-UK
Lynn Holdsworth, RNIB
Alex Hudson, Steering Member, FFII-UK
Jill Johnstone, Director of Policy, NCC
Hugh Jones, Copyright Counsel, PA
Laurence Kaye, Partner, Laurence Kaye Solicitors
Anthony Lilley, Vice-Chair of Interactive Media, Pact
Mark Lloyd, Partner, Lloyd Law Solicitors
Steve McCauley, Partner, Impresario Media LLP
Chris McKee, Managing Director, Audible Ltd

John McVay, Chief Executive, Pact
Sean Martin, Head of Architecture and Development, British Library
David Owen, Executive Director, Share The Vision
Tim Padfield, Copyright Officer, National Archives
Rufus Pollock, Director, FFII-UK
David Radcliffe
Steve Redmond, Director of Communications, BPI
Paul Sanders, Founder, State 51
Dan Scorer, RNIB
Barbara Stratton, Secretary, Chartered Institute of Library and Information Professionals
Alison Wenham, Chairman and CEO, AIM
Simon Wheeler, Head of Digital, Beggars Group
Ben White, Copyright Compliance & Licensing Manager, British Library
Andrew Yeates, Consultant

A transcript of the oral evidence session has been made available on our website:

<http://www.apig.org.uk/archive/activities-2006/drm-inquiry/>

5. We are grateful for all the written and oral evidence that we received and also for the expert advice and assistance afforded by our specialist adviser, Dr Richard Clayton of the Computer Laboratory, University of Cambridge.
6. We are also very grateful to the companies that underwrote the costs of this inquiry. This has paid for the printing of the report, enabled a transcript of the oral evidence sessions to be made available, and allowed an honorarium for our special adviser. The contributing companies were AOL UK, Audible Inc, SJ Berwin LLP, eMusic and Random House. In addition, we are grateful for the support of Political Intelligence Ltd who provide Secretariat services to APIG on a non-payment basis.
7. We have been planning this inquiry for some time, and so we were most interested to learn of two parallel inquiries on closely related matters. On the 16th November 2005 the Culture Media and Sport Committee announced an inquiry into “New media and the creative industries”. Also, on the 2nd December 2006 the Chancellor of the Exchequer announced that he had asked Andrew Gowers to lead an Independent Review “to examine the UK’s intellectual property framework”. Due to its obvious relevance to them, we shall be drawing the attention of both of these bodies to our report.

Structure of this report

8. This report starts by considering what is meant by Digital Rights Management and then gives a background account of the issues that have been raised with us.

We then consider particular issues more deeply. We discuss the copyright ‘trade-off’, the extent to which the law should protect DRM systems, and new forms of content sharing license. We then consider the problems faced by libraries, the disabled, and then consumers generally – looking especially at interoperability and competition issues. The report finishes by examining a few issues that do not neatly fit anywhere else, and sets out a proposal for a ‘UK Stakeholders Group’ to oversee future policy. It concludes with a summary of the recommendations that we have made.

A glossary is provided *in Appendix B* for those unfamiliar with the technical terms and abbreviations that are used throughout the report.

Finally, *in Appendix C*, we provide a short bibliography of relevant documents that can be consulted for further and more detailed information about the issues we discuss.

Terminology

9. Digital Rights Management is commonly understood to be the generic term for a set of technologies for the identification and protection of intellectual property in digital form.
10. The content industry (and the Copyright and Related Rights Regulations 2003) distinguishes the systems and technologies which can be used to prevent unauthorised copying – or other activities that the rights holder wishes to forbid – calling these “Technological Protection Measures” (TPMs). They use the term “Rights Management Information” (RMI) for the mechanisms that identify digital works and that are used to manage the provision of material to customers. Confusingly, some people appear to use “Digital Rights Management” to mean just RMI technologies.
11. Intellect helpfully explained the distinction as being that RMI expresses the rights owners’ intent, and TPM ensures that this is honoured.
12. Within this report we will use the terms TPM and RMI in line with the content industry usage, and when occasionally we use the term “DRM” it should be read, as in the title, as the widely used generic term – or that we mean some combination of TPM and RMI technologies is being used.

Capabilities of DRM

13. When ‘content’ (by which we mean musical performances, the spoken word, books, films, television programs etcetera, etcetera) is made available in a digital format then it becomes possible to make a perfect copy of that content without reference to the original supplier. Where that supplier is making a business out of providing the content, they are understandably concerned at the potential loss of income.
14. Some DRM mechanisms permit the making of limited numbers of copies, enforced by a securely held counter; or ensure that copies cannot themselves be copied.
15. Other mechanisms embed markers into content so that their provenance can be traced, or so that standard devices will not play copies that have been made using standard tools. This leads to suggestions that this refusal to play marked copies should be required behaviour and calls for the outlawing of ‘non-standard’ devices.
16. Current systems do all of the processing of digital data on a single computer, where the user can arrange for arbitrary code to be run – and hence (perhaps using non-standard tools) it is possible to generate perfect digital copies of content. However, modern systems can be made more secure than this. For example it can be arranged for loudspeakers to accept the digital data directly (in an encrypted form) and that prevents the user from copying the content on the main machine. Once again, there are suggestions (in some quarters) that speakers like this should become compulsory.
17. However, TPMs can be fairly readily overcome through the ‘analogue hole’. The loudspeaker, of whatever technology, must eventually produce sound waves and the content can be captured, albeit with reduced fidelity, at this point. The analogue hole is a difficult problem to address because one cannot deploy police officers in every living room to prevent unauthorised copying. Nevertheless, some recording technologies can detect the markers of protected content in the analogue signals and hence, content-protecting systems could refuse to record them.
18. As a number of responders pointed out, the current generation of TPMs are far from secure against determined attackers who intend to copy the material at a commercial scale (so-called “pirating”). However, where TPM systems have been implemented in hardware – rather than software – they have proved significantly harder to overcome. It has also been rather simpler for rights holders to disrupt the marketing and distribution of hardware adapters (‘mod chips’) than of software modifications (‘hacks’).

19. Because TPMs can almost invariably be circumvented, a legal framework is needed to prevent unauthorised copying at a commercial scale, and in the UK this is provided by the Copyright Designs and Patents Act 1988 (CDPA). As EMI observed to us, the widespread availability of colour printers has made it easier for people to forge banknotes, but this hasn't led to the legalisation of counterfeiting!
20. In developing this legal framework, the legislators protected private individuals by making non-commercial infringement a civil matter – which will in practice mean that minor infringements are seldom pursued. However, as David Tomlinson pointed out, the Internet has changed this balance, because even private individuals making their music available for download can quickly find that copies have been made at what is quite clearly a “commercial scale”.
21. In the future it must be expected that TPMs will rely more and more upon specialist hardware functionality – and that some systems will prove to be extremely complex to overcome and to develop generic evasion technology for. It would therefore be unwise to base public policy upon a continuation of the situation that TPMs are relatively easy to overcome. It may well be that propping up technical measures with legislation will become entirely irrelevant. Equally, assuming that egregious problems caused by TPMs can be addressed by just ‘breaking into the system’ may become unrealistic.

Business models

22. Historically, new technologies have been opposed by those with a vested interest in the status quo. In the early 1980s the musicians union wanted a ban on synthesisers and would not permit the players (operators) of drum machines to join. VCRs were opposed by the film industry – until they realised how much money could be made from renting and selling films and television shows on tape.
23. The Internet is inevitably going to radically alter all current content distribution models; but DRM has the potential to speed up this process because many content owners are unwilling to provide content in an innovative manner unless they can prevent unauthorised copying. PACT put it another way, telling us that the movie business analysis is that in order to beat “piracy” they must ensure that legal versions are available, and they consider TPM essential for this.
24. The content providers feel that they have clear evidence of the harm done by unauthorised copying. The BPI reported that 58% of recordable CDs sold in the UK were used for recording audio at home. It is of course naïve to equate every illegal copy with a lost sale. However the music industry has demonstrably suffered declining sales and EMI told us that the reduction of the music business was due “in part” to “piracy”. We agree that this will be one factor, but we also believe it is relevant to examine the general state of the economy, and to enquire if money is being spent on other forms of entertainment instead – such as computer games or DVDs.
25. The music industry made much of their need to profit from existing artists so as to fund the development of new talent. In particular, the BPI told us that the industry invested £145m in new music in 2004. This is an impressive amount of money by any standard, but we do note that *each* of the four ‘majors’ has recently reported profits of similar value from their music divisions; albeit profits do vary considerably from year to year.
26. Some content providers have not embraced DRM. In particular the ‘independents’ in the music business have generally taken the view that permitting copying helps rather than hinders. AIM said that some “loss of some measure of copyright control” was a “factor in reaching new and enthusiastic music markets around the world”. We note that the marketing of the Arctic Monkeys (who have recently had considerable commercial success) has been firmly based on making material available without restrictions from websites and on file-sharing networks.

27. There are many ways in which consumers could benefit from new business models based on rights holders being more prepared to make digital content available – because they are using TPM. For example, it could spell the end for the ‘time windows’ traditionally used by movie distributors so that films are available first in the cinema, then on premium DVD and pay-per-view television – and finally on free-to-air television and low-cost DVD. It could also significantly affect the viability of making available the ‘long tail’ of work that it is no longer economic to stock on the High Street, but which can be delivered cost-effectively in digital form over the Internet.
28. At a more mundane level, TPM is widely used by the record industry to provide ‘try before you buy’ schemes and the ‘copy for one generation’ technology used by some cable TV providers provides ‘traditional time-shifting functionality’ to consumers.
29. Some industry respondents suggested that consumers should welcome TPM systems because it would prevent them from committing illegal acts or that they would appreciate that it was ‘fair’ for everyone to have to purchase their own copy of a program or song. None of the consumers mentioned these matters – concentrating instead of the activities they believed to be legal and/or desirable that they found that TPMs obstructed.
30. DRM can be used to support very flexible ways of selling content. In particular it can be used to segment markets so that different people pay different prices. Instead of offering content at £10 and getting 2 buyers, or offering it at £1 and getting 20 buyers; it brings in rather more revenue to sell two copies at £10 and 18 copies at £1, yet no-one has paid more than they were prepared to. The economists explain this ‘price differentiation’ as being the way to maximise ‘economic welfare’.
31. Whether one considers differential pricing to be ‘fair’ or ‘reasonable’ is a matter of personal philosophy. Historically, when the nineteenth century railways started to charge different amounts to different people, the legislators prohibited many of these practices. However, more recently, legislators have been far more reluctant to interfere in the workings of ‘the market’, for example, where the airline industry charges different prices to different people for exactly the same flight.

The copyright “trade-off”

32. Copyright is generally understood to be a trade-off. The creator of copyright material is given a monopoly on exploiting it for a period of time. Currently for a new song or book this is until the creator dies plus 70 years. At the end of this period, the created work enters the public domain and may be exploited by anyone. This scheme is intended to ensure that there are incentives for creators, without creating an indefinite monopoly.
33. Our attention was drawn to Thomas Babbington Macaulay’s speech to the House of Commons on 5th February 1841. Almost all of his speech remains relevant today (we give a link *in Appendix C*), but this passage admirably summarises this analysis of copyright as a trade-off:

Thus, then, stands the case. It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.

34. However, should all available versions of the material be protected by highly effective TPM systems, it may prove impossible, when the copyright expires, for the exploitation to occur – because the material will remain inaccessible except via the monopolistic TPM system. At our oral session Brian Fielding (Audible Inc) indicated that he thought that this would be a desirable state of affairs, but no-one else who responded to us agreed with this position.

35. Whatever the dangers are perceived to be, locking up material 'forever' is somewhat of a theoretical issue at the moment, since, in practice, material is very seldom available in a single format; and, for new material created today, unfettered access will not be an issue until very much later this century.
36. Another way of looking at the trade-offs inherent in the copyright legislation is that in return for a general monopoly, some specific exemptions must be granted. These include the fair dealing exemptions, the special privileges libraries enjoy, and the rights to make otherwise infringing copies to permit the disabled to access the work.
37. Viewing these various balances in abstract philosophical terms was, perhaps, slightly too subtle a notion for an inquiry which was concentrating on rather more concrete issues. The BPI told us that "there are no 'traditional trade-offs' in copyright law", but then went on to describe the existing exemptions to exclusive rights as "right and proper". However, most of the respondents fully understood the nature of our question, albeit there was a clear split in the responses.
38. The rights-holders, without exception, told us that the trade-off was currently in pretty much the right place and there was no problem to address. In particular, many of them made the point that TPM technologies were the counterweight to the ability of anyone who wished to make a perfect digital copy of a work; and then to distribute it for a very low cost to anyone connected to the Internet who wished to access it.
39. Other respondents, mainly users, or those serving users, believed that TPM had shifted the balance towards the rights-holders. There were a number of ways in which the issue was expressed. CPT told us that TPM was "a system of private rules for the use of information" and it was these that threatened the "core exemptions" in copyright law. MacRoberts Solicitors distinguished between copying and access and made the crucial point that TPMs were designed to prevent copying, but could also prevent access. The NCC warned us that the "settlement" over access and use was being rewritten without parliamentary or regulatory oversight.
40. Access or, to put it another way, *using* the protected material, is at the heart of this tussle. ORG made the point that software cannot distinguish between lawful and unlawful uses because this distinction was impossible to determine without first assessing the user's intentions. David Weinberger argued that copyright law worked because there was "wiggle room" and though the law might not admit of any "leeway", once TPM ensured that users had to obey the letter of the law (or of the TPM contract) then people would be unable to do the things they expected.
41. It was quite clear to us that the 'letter of the law' would be quite a surprise to many of the individuals who submitted responses. People told us that they expected to be able to copy CDs as a backup (in case of scratches), or to make compilation albums to play in their cars (or when out and about in their wheelchairs). However, these are almost invariably illegal activities in the UK!
42. Elsewhere in Europe there are private copying exemptions (accompanied by levies on blank media as a counterbalance), but these schemes have never been implemented in the UK. The present day equivalent would be a levy on Internet connections, but even the BPI, who might naively be thought to benefit, called this "utopian and impractical".
43. In the US there is the notion of 'fair use' which provides for some private copying – but the UK's notion of 'fair dealing' is nothing like so wide-ranging and would not generally cover the copying whole tracks, let alone whole CDs. Hence TPMs, by enforcing the letter of the law, and preventing 'illegal copies', are extremely unpopular.

44. On a similar theme, the BBC told us that their trial of an integrated media player had shown them that license fee payers did not understand the limitations of the time-shift exemption (making lawful the video recording of TV shows to watch them later). The BBC only makes digital material available for a week, and it cannot be kept “forever”. However, because the CDPA s70 restriction “solely for the purpose of enabling it to be viewed or listened to at a more convenient time” is now actually enforced, people feel that they have “lost out”.
45. Anthony Wilkinson made a rather more general point about ‘fair dealing’, which is that besides playing protected material he wished to be able to use other programs to access the content to enhance its value, by indexing it or accessing it remotely. TPM generally prevented this type of third party program access, devalued the material, and prevented the development of innovative applications.
46. Some respondents were sanguine about the difficulties that TPMs are actually causing. Rightscom pointed out that just because you couldn’t ‘cut-and-paste’ from an eBook, that didn’t prevent you from exercising your right to quote copyright material in a critical essay – it was merely slightly more tedious to retype the text.
47. The BBC told us that they relied upon ‘fair dealing’ exemptions for reporting current events and for criticism and review; however, they had never encountered a difficulty caused by TPM. Nevertheless, they thought this might become a problem going forward, and they pointed out that the CDPA s296ZE remedy where permitted acts were blocked by TPMs (whereby the Secretary of State could intervene) applied to 23 permitted acts (see Schedule 5A Part 1) but not these fair dealing exemptions.
48. Many of the rights-holders made the point that the TPMs were being applied by intermediaries as a part of their business model and the rights-holder per se was not actually implementing the TPM. We accept this is true and draw attention to the remarks we made above that relatively few works are currently only available in a form that is encumbered by TPM. Nevertheless, there is clearly a trend occurring, towards ever wider use of TPMs.
49. From a completely different perspective, Intel told us that it was important that the legal infrastructure does not inhibit technical innovation – and they feel that the ‘trade-off’ should address this as well! As an example, they pointed out that there were no portable video jukeboxes on the market – just devices capable of video downloads or playing consumer recordings – because it was against the DVD consortium rules to create a portable device.
50. Another analysis was provided by Timo Ruikka at Nokia who outlined the “old paradigm” whereby a permanent copy of a work (a book, a record) was bought and there were then no limitations in time, number or method by which it was read or listened to. Outside the specific agreements that put a copy of the material into the consumer’s hand, were other restrictions that flowed from copyright law; but these were not part of the core contract between consumer and provider.
51. However, he observes, practically everything about the new digital paradigm is a step backwards for the consumer. The presence of TPM means that the provider can now arrange for access to the work to expire, for it not to be transferable to others, to only work with specific devices and many ‘permitted acts’ from copyright legislation will no longer be possible.
52. He argues that once the providers learn from the experiments in providing new types of service, the consumer will benefit. He does not specifically address “copyright balance”, but believes that the “contractual balance” is deserving of just as much attention.

53. In our oral session, Paul Sanders (State 51) pointed out that rights holders had given up monopolies in the past to assist other industries, and in the end sell more content. For example, limitations on performance rights (and the related limitations put forward by the musician union on “needle time”), that restricted the playing of music on the radio were eventually relaxed – to everyone’s benefit. He suggested that the music industry would gain, rather than lose, by diminishing their rights and allowing technical innovation involving the Internet and new types of home entertainment device.

Legal Protections

54. DRM systems already have considerable legal protection in the Copyright, Designs and Patents Act 1988 (specifically, as amended by The Copyright and Related Rights Regulations 2003; SI 2003 No. 2498) and no submissions from rights-holders believed that these were inadequate, or needed substantial extension.
55. Most of the comments we received on this aspect of DRMs centred on the issue of exemptions to the anti-circumvention proposals. Where a TPM prevents a “permitted act” it is possible to issue a “notice of complaint” to the Secretary of State who can then (if it is appropriate) issue directions to ensure that the permitted act can occur. If these directions are ignored then it would be necessary for the complainant to take action for breach of statutory duty.
56. In the United States, under powers granted under the Digital Millennium Copyright Act (DMCA), every three years the Librarian of Congress holds a ‘Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works’. The most recent list of exemptions (from 2003, a new list will be published soon) includes website lists from filtering software, protection systems based on obsolete ‘dongles’, or media and eBooks where no edition exists that can be accessed by the sight-impaired.
57. In Australia an inquiry by the House Standing Committee on Legal and Constitutional Affairs tabled a report on 1st March 2006 entitled “Review of technological protection measures exceptions”. They recommended a large number of exceptions, the most notable of which relating to region coding of DVDs, software installed without permission, unsupported software (“abandonware”), private use by people with a “print disability”; and for material handled by libraries and the National Gallery of Australia.
58. The UK process of establishing when exemptions should be made was criticised on the grounds that the process was likely, as both the CPT and RNIB put it, to be “slow and cumbersome”. There were also complaints that, in the limit, it would be up to individuals to take legal action to enforce directions, and the RNIB put it to us that the process “lacked teeth”. LACA suggested that failure to obey the Secretary of State’s direction should be a criminal matter, and that all copyright protection for the material should be suspended until the direction was obeyed.
59. The US system, with formal hearings on an ongoing basis, has led to several very specific (and very sensible) new exemptions to TPMs; as has the Australian inquiry. In contrast, we suspect that it is true that the UK system, although superficially more flexible, may prove to be slower and less effective. We are particularly concerned by the way in which Secretary of State’s decisions are to be enforced.
60. Ross Anderson (FIPR) suggested to us that a major difficulty for individuals enforcing their rights in court was the rules on the loser paying the costs of the winning side. This meant that justice was beyond the reach of individuals because they could seldom afford to gamble that their case was so strong as to guarantee a win – and to lose would imperil their savings, and perhaps their houses.

61. However, no-one presented us with any evidence that the notice system had been used, let alone that it had failed to deliver results, or that individuals had not risked legal action. Hence all the objections are, however well-founded, currently just theoretical.
62. From the evidence we received, it was fairly clear that the way in which difficulties are currently being pursued is by means of voluntary arrangements, especially in ensuring that the disabled get access to TPM protected material. So, although we have some sympathy for the view that the system might fail to deliver, there is no compelling reason to overhaul it at the present time.
63. It was suggested to us that the anti-circumvention rules were too wide ranging. In particular, it was suggested that it would be difficult to remove TPM from non-copyright material where the same system was being used for copyright material.
64. There was also some comment on exemptions for academic research. There is already an exemption for research into cryptography in CDPA s296Z(2), albeit with restrictions if there is a “prejudicial” effect on a copyright owner – suggesting that research might be fine, but publication would be problematic. ORG wanted a blanket exemption for research, on the basis that otherwise few academics would risk it, and Rightscom suggested that good TPMs would only be developed if there was research into the weaknesses of current systems.
65. We have considerable sympathy for the view that lack of research will mean that critical weaknesses in TPM systems will fail to be examined, leading to unnecessary problems for the content industry. The furore over Professor Felten’s work in the US on the ‘SDMI Challenge’ has not been replicated in the UK, but we do not see it as being in anyone’s long term interest for academics who spot flaws in systems to end up in court, and hence **we recommend that the Government consider granting a much wider-ranging exemption to the anti-circumvention measures in the CDPA for genuine academic research.**
66. Several respondents felt that the anti-circumvention rules might be used as a lever to ensure some other policy aim – Ross Anderson compared this with the way in which patent law used to outlaw ‘contracts of adhesion’: if you bound users of your patented flour milling process to purchase grain supplies from a particular place, then your patent could not be enforced against anyone.
67. CPT wanted TPM systems to be protected only if they had been registered and the registrar had ensured that suitable arrangements were possible for all “permitted acts”. Anthony Wilkinson wanted protection to apply only where interoperability was possible. ORG wanted the protection to cease if the TPM system was abandoned. Aslib wanted the protection to cease if the mechanisms were used to illegally entrench a monopoly.
68. Although these approaches might initially seem to have some merit, we draw attention to our earlier remark (at #21 above) that it is quite possible that TPM systems will become pretty much unbreakable. We therefore believe that permitting circumvention is unlikely to be a long term method of addressing an ill, and that the proper way to address a serious problem would always be to require the removal, or partial removal, of the TPM system.

New types of content sharing license

69. In our press release we asked for comments on the new types of content sharing license such as Copyleft and Creative Commons that have received a lot of attention in recent months. We were aware that these had taken some effort to craft so as to fit within the UK’s legal framework and wished to know if any changes would be of assistance.

70. Everyone who commented told us that the licenses were solidly based on existing legislation, and that no changes were necessary. The sole exception was MacRoberts Solicitors who observed that it was not possible to assign copyright to an indeterminate group of people. At present the community has dealt with this by setting up formal groups, such as the Apache Software Foundation, and so there does not seem to be a pressing need here, and we have no recommendations to make for change.
71. Several of the rights-holders were rather negative about these licenses, suggesting that the creators and performers did not always understand what they were “giving away forever” and how it could affect an artist’s ability to enter into an exclusive license at a later stage in their career. Although artists should naturally consider these matters, we suspect that these licenses are clearer than many media industry contracts. Also, should it become commonplace for bands to use Creative Commons licenses at an early stage of their career, then as they become successful and sign with a record company, the industry approach to ‘exclusivity’ will doubtless be tempered by the new reality.

Libraries

72. Lending libraries do not only handle books, papers and magazines, but also audio/visual material and, increasingly, they are dealing with digital items. They are also encountering new types of publication, such as ‘electronic journals’ where they do not actually receive the material, but only gain access over the Internet.
73. When the digital items have RMI functionality this can (in so far as the systems are standardised) assist the library in meeting its obligations regarding, for example, the number of simultaneous users.
74. TPMs have been used to underpin the lending of digital content. For example, the New York Public Library lends out MP3 audio books, over the Internet, which can be played for a restricted time period and then automatically expire. However, when the digital material is encumbered with a TPM this can affect the ability of the library to lend the material, or to make it available to disabled users.
75. The copyright deposit libraries are also beginning to handle digital material, and the Legal Deposit Libraries Act 2003 extended their entitlement to digital items. Although deposit libraries will do some lending, their distinct role is to act as a lender of last resort and to ensure that their archives remain available for future generations, and even for future civilisations! Preserving digital material poses considerable challenges over these timescales, even without the extra complexity that TPM may provide.
76. We received a number of submissions, both from lending libraries and deposit libraries, and a number of their representatives appeared before us to give oral evidence. They were generally supportive of rights-holders and wished to see wrongful copying prevented. However, TPM was clearly of considerable concern to them. Although the detail of their submissions differed, their views seldom differed significantly and we perceived them as speaking with one voice, albeit some differing emphases.
77. The libraries’ main submission was that TPM was preventing the exemptions in copyright legislation from being available to them. Library privilege, fair dealing and review or reporting were sometimes impossible, especially when they considered disabled library users. The British Library suggested that “digital is not different” would be an entirely appropriate approach.
78. The libraries highlighted the disparity between s28 of the Special Educational Needs and Disability Act 2001, which requires institutions to “take reasonable steps” to permit disabled people to enjoy facilities on the same basis as their peers, and s296ZA of the Copyright Designs and Patents Act 1998 which forbids interference with TPM even to make “accessible” copies for visually impaired people.

79. The lending libraries wished to see librarians being treated as trusted intermediaries who were permitted to make copies of digital material, whether it was protected by TPM or not. They also observed, along with the deposit libraries, that DRM could effectively make copyright perpetual because it would not be removable when the term expired.
80. TPM has tended to mean that digital works are now being 'licensed' by the libraries, rather than bought outright – and the accompanying contract overrides copyright exceptions and limitations. In practice, licenses are non-negotiable and libraries, not being consumers, have a limited ability to have unfair terms removed. Aslib suggested that legislation should be brought forward so that contract terms that overrode copyright provisions would be voided.
81. LACA also noted a trend towards digitising out-of-copyright material to create versions that although, presumably, more affordable, were less accessible than the original.
82. Aslib wanted immunity for the removal of TPM which interferes with other rights, and also for when TPM was removed from copyright expired material. This latter request is conceptually unnecessary, because the CDPA s296ZA offence is only committed when removing TPM from copyright material. However, in practice, removing TPM from digital materials may be a necessary precondition of preserving them long enough for the copyright term to expire.
83. The libraries, and a number of the rights holder organisations, drew our attention to the setting up in September 2005 of the Legal Deposit Advisory Panel. This body is where the negotiations between the government, libraries and publishers will take place, so as to “advise the Secretary of State on the timing and content of regulations relating to legal deposit and to oversee the implementation of the Legal Deposit Libraries Act 2003”.
84. BMR told us that exceptions are best addressed by “the parties concerned which have a comprehensive understanding of the complexity of the issues at hand”. Whilst agreeing that failing to deal with the complexity is undesirable, we do not agree that this is merely a technical matter that does not need to take account of wider public policy issues.
85. It is clear from the more non-specialist submissions that we received that there is a general feeling that libraries should be able to do the same sorts of things with digital materials as they currently do with books. The experts should indeed deal with the fine print, but only once the general direction is widely agreed upon.
86. **We recommend that when the advice from the Legal Deposit Advisory Panel has been received, 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.** We believe that such a consultation will ensure that other interested parties, not least the public at large, will be able to comment upon the proposals and this will help to ensure that they are appropriately balanced.

Access for the disabled

87. One of the most unwelcome effects of TPMs is their ability to prevent the disabled from accessing digital content. This comes about because the specialist hardware and software that is used to convert the content into speech, Braille, or large type, fails to interwork with the protected material.

88. The RNIB pointed out Adobe eBooks usually had “accessibility” settings disabled and that the Microsoft eBook reader implements “owner exclusive” markings and so content cannot be transferred to a Braille device. They pointed out that in some cases the problem was that “audio rights” had been sold to another party and the eBook publisher was being cautious not to infringe. However, since there is a very significant difference between a trained actor’s performance in creating an audio-book for the mass-market and what can be achieved by computerised text-to-speech systems; there is clearly no likelihood of the latter damaging sales of the former.
89. At our oral hearings, Lynn Holdsworth, a visually impaired person, told us of her personal experience of purchasing an eBook from Amazon only to discover that “screen readers have been locked out of this publication”. Neither Amazon nor the publisher was able to assist her, so in the end she obtained an “illegal” copy which her screen reader application could access.
90. There were some specific issues mentioned. Aslib wanted the existing Braille exemptions extended to synthetic speech access. STV felt that dyslexics, who could benefit from assistance technology, should be included with other visual disabilities; and the BBC felt that there was a risk that players, such as the one they shipped, might breach the Disability Discrimination Act if content was inaccessible.
91. The BCC told us they were running pilot schemes with the RNIB on access to eBooks, and BMR that they perceived a “genuine desire to enable access for visually impaired people”. At the oral hearing, the PA told us that they had been talking with the RNIB and the National Library for the Blind for several years and a pilot project was now underway – but that government funding was needed to properly address the problems.
92. We were very pleased to hear that the difficulties encountered by people such as Lynn Holdsworth are being tackled, albeit only in pilot schemes at present. **We recommend 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.**

Consumer issues

93. As we have already observed, there is a significant mismatch between what consumers believe they ought to be permitted to do with copyrighted material and what the law allows. A common viewpoint was that once content had been purchased on one medium, perhaps an audio CD, it was “only fair” to make copies for day-to-day playing or convert it to an MP3 form to add to a compilation to be played in the car. When DVDs were for the wrong region, then consumers feel it appropriate to purchase circumvention software for their computers (or region-free players) in order to enjoy the content.
94. In counterpoint, the record companies told us how some of their TPM systems permitted the creation of X copies, so that a song could be shared within a family, or made available in a car. The point was made that this was far less restrictive than the copying of computer software. However, this is merely the current marketing stance and not an inherent property of the technology. In April 2004, an iTunes ‘upgrade’ changed X from ten to seven, and it was clear from our responses that similar changes (perhaps post-purchase changes!) were feared in the future.
95. Several consumers asked for a statutory right to be able to pass a TPM protected item to a third party. Satwant Phull told us that he had inherited a lot of records and CDs from his grandparents, but was not going to be able to pass his own collection of music on to his heirs.

96. The rights holders stressed to us that if TPMs were unpopular then “the market” would automatically fix the problem over time. We agree with this view, but it is crucial to note that the market cannot function efficiently when consumers are unaware of the presence of TPM mechanisms, fail to understand what acts will be forbidden, or when they have no real choice because particular content is only available with TPM restrictions.
97. There was considerable consensus on the principle that consumers should be aware of what they are purchasing. Not surprisingly, the consumers were in favour, but other respondents were as well. For example, EMI told us “consumers should be aware of the precise terms of the package of rights they have paid for by proper labelling or other explanation” and Intel said “consumer notice requirements in connection with content protection and DRM are not only appropriate, but will in fact help drive both the deployment of new business models and consumer acceptance of content protection and DRMs generally”.
98. There is, of course, a lot of room for doubt about what “clear labelling” might actually be. The BPI told us that the International Federation of Phonographic Industries (IFPI) had “clear labelling guidelines” to ensure that record companies adopt “effective and consistent practices” when labelling CDs which are subject to copy control technologies. However, the NCC told us that the IFPI guidelines “do not appear to have had much influence on industry practice and certainly do not meet NCC’s principles for credible self-regulation”.
99. To illustrate the difficulty of creating clear labels, we were informed that the eBook of ‘Alice in Wonderland’, a children’s’ classic which is long out of copyright, came in a protected form. Because access to the eBook by speech synthesis devices had been blocked (doubtless to the anger of the visually impaired), the product felt that this should be clearly described. Unfortunately the warning actually read “this book may not be read aloud”, risking the disappointment of parents looking for bedtime stories, and generating an urban myth about the wickedness of publishers.
100. Because, as we have observed, consumers expect to copy CDs, we believe that all CDs should in future come with a prominent label saying, “you are not permitted to make any copies of this CD for any reason” – the current rubric (usually in a small font) that says “Unauthorised copying [...] prohibited” is quite clearly overlooked or not understood. The prominent label should add, when appropriate, “and if you try to make a copy, you should note that we have tried very hard to ensure that you will fail”. Doubtless, even clearer and more accurate wording is possible.
101. Furthermore, from the evidence we received, it is likely that a full-disclosure label will also need to say “this CD may not play in all devices”. It will often have to go on to say, “if your current player device breaks or is stolen this content may become inaccessible” and “moving this content to a new device will not be possible if we cease supporting this platform or go out of business”.
102. For some types of content the labelling will need to warn the user, “you cannot access some parts of this DVD without a working Internet connection to enable us to record your identity”, or “your playing of this song may be recorded in marketing databases in foreign countries”. We note that these data protection issues are a matter of concern to the ‘Article 29 Working Group’ of European Data Protection officials, who consider this data transfer to be excessive when there is no evidence of any likely wrongdoing.
103. A more subtle issue, regarding the labelling of product requirements, was drawn to our attention by the NCC. Some content can only be played once player software has been upgraded to the latest version. Leaving aside the possibility of problems arising during the upgrade, some companies have changed their end-user license agreements on more recent versions of their players, and consumers could be forced into a position of having to accept fewer right before enjoying their newly purchased item.

104. Such labelling as we have suggested may seem excessively worrying to the providers of content, however they do seem to us to represent the current reality. We feel that accurate, easy to read, and easy to understand labelling is a prerequisite for DRM (and particularly TPM) to be seen to be truly successful in the market – and not just a set of technologies foisted onto consumers without their knowledge or understanding.
105. **We recommend that the Office of Fair Trading (OFT) bring forward appropriate labelling regulations so that it will become crystal clear to consumers what they will and will not be able to do with digital content that they purchase.** In the long run, ‘media literacy’ will ensure that consumers understand what they are purchasing and what they might reasonably expect to be able to do with digital content. In the meantime, the evidence we received suggests that extensive labelling is essential.
106. One of the issues that we asked respondents to comment upon was that of TPM systems being discontinued. Although this will seldom cause a work to disappear altogether, it can have significant impact on individual consumers who find themselves with content that they can no longer enjoy.
107. The BBC has given considerable thought to this problem. They put forward a possible scenario in which they made material available from their archives without any time limit on playing it. This material might need to be TPM protected to, for example, ensure that only UK individuals could access it. However, if in the fullness of time the TPM system became outdated, then the BBC would not support players on the latest generation of home computer equipment and so the “permanently owned” material would, in practice, be owned no longer.
108. The BBC pointed out that this scenario is far from fanciful; Microsoft has recently announced that there will be no future upgrades or support for ‘Windows Media Player for Mac’.
109. Many of the comments we received were that discontinuation was a simple market issue. If manufacturers did not provide upgrade paths then their product would be less attractive, and so “of course” they would deal with the problem. Equally, if manufacturers went out of business leaving lots of consumer demand, then surely someone would come along and provide them with a product.
110. Although we are far less convinced than many industry respondents that consumers will not be left in lurch – there might well be consumers who were willing to pay, but just not enough of them – we reluctantly agree that this is an issue best left to the market. No special arrangements were dictated by the government for the owners of 78’s when LPs were introduced. No special scheme was provided for LP owners when CDs came in. Nothing was done to recompense Betamax owners... and so we expect it to go on.
111. However, there are rather more aspects to discontinuation when TPM is involved. Some schemes bind copies to particular machines. In order to assist users it can be possible to move the copy onto a new machine, but this may involve access to the manufacturer’s website, which may no longer be active. We therefore consider it entirely appropriate that all of these dependencies are clearly spelled out at the point of purchase. If manufacturers feel that it is ‘negative’ to mention that there is a risk that they will go out of business, and this affects sales – then this is the market pushing back to tell them that their TPM scheme is less than satisfactory.
112. Even where the manufacturer stays in business, there is still an issue of being ‘locked in’ to particular technologies, even if other offerings are more attractive or less expensive. As an example, once someone has purchased a great deal of TPM protected music for an iPod then if their next player is not manufactured by Apple then this music could become inaccessible to them. There are currently practical (albeit, not necessary lawful) ways of addressing this problem for iPods, but this may not be true for all formats.

113. Therefore **we recommend that the OFT labelling regulations we proposed, in #105 above, should ensure that the risks are clearly spelled out, at the point of purchase, whenever consumers could lose access to digital content if systems are discontinued, or devices fail, or players are replaced by systems from a different manufacturer.**

The Sony-BMG affair

114. Shortly before our inquiry was announced it was revealed that Sony-BMG had shipped millions of CDs in the United States with two extremely problematic copy-protection systems. One system, called MediaMax, installed itself even if a user refused permission and hid its device driver from standard tools. The other, XCP, contained what was rather loosely called a “rootkit” – it was merely a method of hiding programs so that they did not appear in directory listings (as used by actual rootkits that permit unauthorised access). Besides their copy protection roles, both systems contacted a website whenever the user inserted a protected disc – a gross intrusion of privacy.
115. When the systems became public knowledge Sony-BMG initially denied there were any problems. Then they released a flawed un-install system (that compromised the security of those who ran it) and they eventually settled out of court in the face of a number of class-action lawsuits.
116. Our respondents – consumers and rights holders alike – were universally unimpressed by this saga, using words such as “debacle”, “blunder”, “arrogance” and “shambles”. A number suggested that such systems were very likely to infringe UK legislation, possibly even being a criminal offence under the Computer Misuse Act 1990 or the Data Protection Act 1998.
117. We are equally shocked that a reputable company could mislead purchasers in this blatant manner by ignoring a user’s request not to install; altering operating systems without permission so as to hide their programs; and surreptitiously collecting personal data. However, we do note that the US legal system was able to deliver a reasonable (and rapid) resolution of the problem.
118. Nevertheless, it is possible that similar cases will arise in the future as they have in the past (UK-CDR reminded us of the 2002 Celion Dion CD that could not be ejected from iMac machines). To try and prevent this, **we recommend that OFCOM publish guidance to make it clear that companies distributing TPM 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.**

Interoperability

119. Two TPM systems currently dominate the marketplace for music content, but files in one format are currently incompatible with players that support the other. The ‘Microsoft Windows Media Digital Rights Management’ system is currently supported on more than 60 devices and is used by dozens of retailers including Napster, AOL and Yahoo! The Apple system is called ‘Fair Play’ and works only on the market-leading Apple-controlled products and services such as the iPod and the iTunes music store.
120. With two distinct systems, businesses have some interesting decisions to take. eMusic operate a subscription-based service and told us that they were the number two digital downloading service (behind iTunes). If they were to use a TPM system then this would not be the Apple system – and hence their music would not be playable on iPods. They therefore decided to eschew TPM altogether and use an unprotected MP3 format. In turn this meant that the record ‘majors’ (Universal Music, EMI, Warner Music Group and Sony-BMG) would not permit them to carry their material – so their site only contains music from 3,800 ‘independent labels’.

121. Chris Clark told us that to play songs downloaded from Virgin's site you had to use a Virgin media player, and his MusicMatch player would be disabled. Microsoft wanted MP3s to always be played through their player, and their passion for reconfiguration meant that looking at a video clip sent by email would cause his preferred viewer to be overwritten. He believed that this "turf war" was compromising his own system; and more seriously, it had the potential to damage his business if the marketing materials he created for a living were sent to a client and the resultant "turf war" there was to cause their system to crash.
122. There are other TPM systems for other media, and other compatibility issues. For example the content protection system for DVDs cannot, in practice, be licensed for use in 'free software'.
123. There was a general feeling in the responses we received that interoperability would be extremely desirable, and that the market would eventually resolve the issues. However, we were cautioned by many that it was not the place of Governments or legislators to "pick winners". We were told that the main role for regulators was to ensure that there were no anti-competitive barriers that would prevent the market from identifying the most viable and attractive TPM systems and business models. Others suggested that OFCOM should be encouraging, or even mandating, open and interoperable industry standard TPM systems.
124. We entirely agree that it is not appropriate for legislators to pick standards, and although interoperability is clearly desirable, we see no value in bringing forward measures at the current time to require it. The rate of technological change and market development remains very high and any interference risks freezing the technology and the market. What is happening now may bear little resemblance to what happens in 2007, let alone in 2010 or later, and so it is premature to consider regulating in such a dynamic area.

Competition

125. Several respondents saw the issue in terms of competition. In particular, FIPR saw the issue as being far wider than software, music and video companies. Rights management mechanisms have already been used to control after-markets for printer ink cartridges, mobile phone batteries and games console memory add-ons. We were reminded that where, for example, car makers had tried to use intellectual property claims to control spare-parts markets, Governments had intervened to restore competition.
126. FIPR also drew our attention to an economic analysis by Hal Varian in early 2005 that predicted that the "platform vendors" (on which content is played) would benefit more from stronger DRM than the "content owners". This was because the platform industry was concentrated around fewer firms and this was the way that the economics usually played out. FIPR suggested that we were already seeing this prediction come true as Apple and other platform vendors drove down the price of content and squeezed the amount paid to the artists. Their message to the content industry was along the lines of, "be careful what you wish for!"
127. FIPR suggested that as "computers" became ever cheaper, many more products would become software-based, which would lead to the development of more monopolies. They told us that the solution would not lie in a "right to circumvent" or "rights to disassemble in order to inter-work", but in the courts ordering monopolistic DRM systems to be unlocked.
128. AFFS also noted the tendency to create artificial monopolies by producing "closed" platforms such as Intel's Viiv technology and almost all computer games consoles (although to describe multiple competing systems as each being a monopoly is a little premature until one comes to dominate the market).

129. The NCC drew our attention to the way in which DVD region coding was being used for market segmentation, with different prices in different regions. Market forces meant that in the UK there was a wide availability of region-free players (and simple Internet searches will yield workarounds for other players – which are clearly deliberately leaked by manufacturers). However, laptops tend not to be region-free, despite the increasing likelihood that their owners will take them abroad. The NCC also noted that some ‘region 1’ (North America) DVDs now check for the proper region setting in the player, although we observe that a new generation of workarounds has made this ineffective.
130. Several people pointed out that iTunes charge different prices in different countries. In the US a single download costs \$0.99 (about 55p) in Europe it costs €0.99 (about 68p) and in the UK £0.79. This is enforced by checking the address linked to the credit card used for purchases. However, the TPM system prevents entrepreneurs from purchasing ‘cheap’ tunes in the US or on the continent and then selling them for a profit in the UK. It seems to us that this is somewhat at odds with the notion of the ‘single market’ and the ‘doctrine of exhaustion’ after first sale.
131. FIPR also cautioned us that the framework for intellectual property was being created by programmers and private companies and not by legislators or judges.
132. **We recommend that the Department of Trade and Industry investigate the single-market issues that have been raised with us, with a view to addressing the issue at the European level. We accept the argument that other industries may soon find their markets distorted by DRM systems and so we recommend rapid development of the principles by which the single market can continue to operate effectively.**

Other issues

133. Several respondents were concerned about the possibility of a mandatory imposition of DRM systems (especially TPMs). They thought this would have significant effects on “open source” systems and would raise prices for businesses – whose new computers would cost more, because of features that had been added solely to “police” home users.
134. We did not hear any evidence to suggest that mandatory DRM is currently on the agenda in the UK or Europe. However, a handful of respondents were in favour. In particular the PMA were concerned that “loopholes” were being exploited to put material onto the Internet without compensating their clients. They also wanted DRM to be compulsory for the exploitation of copyright material in new media.
135. Although we think it unlikely that, having considered all the pros and cons, that any government would be in favour, for the record, **we recommend that the government do NOT legislate to make DRM systems mandatory.**
136. The MPA drew our attention to Article 6.2b of the EUCD which prohibits circumvention devices which have only a “limited commercially significant purpose”. UK law is based on the CBS Songs Ltd v Amstrad Consumer Electronics plc case decided by the House of Lords in 1988, which held that Amstrad did not procure copyright infringement by selling a twin-head double-speed cassette tape recorder – although undoubtedly quite a number of customers purchased it for that reason. The MPA did not supply us with any specific examples of the type of equipment they had in mind; and we are not prepared to suggest over-turning rulings that have stood for decades.

137. The MPA also pointed out a deeply technical issue with s296ZA(4) and s296ZD(3) which they believe requires both anti-circumvention technology and content copyright owners to join each other into any legal action. The MPA observes that the Civil Procedure Rules (CPR 19(2)) already permit the court to join other parties to actions when this is desirable and hence this new arrangement is inconvenient and unnecessary. We note the MPA's remarks, but suspect that any changes would have ramifications for other types of legal action, which would require careful consideration.

Future policy oversight

138. Despite drawing attention to the matter in our press release, we only received a handful of comments on 'IPRED2' a European proposal that would raise the penalties for copyright and patent infringement. These comments, notably from CPT, were hostile, indicating that the proposal would criminalise consumers and restrict legal use. Cinly Ooi told us that there would be a "chilling effect" on the production of "open source" software because of the risk of infringement.

139. We conclude, albeit from limited evidence, that the advancement of IPRED2 is not a matter that is currently of mainstream concern to the content industry or that the proposals are especially well understood. We think this is symptomatic of the 'technical' approach to legislation in this area and is likely to lead to further law-making that fails to achieve a fair balance.

140. Several respondents pointed out that DRM legislation had been undertaken "under the guise" of trade-related Directives, yet in practice the impact was far wider. The rules had been negotiated by technical specialists from the rights holders and no consideration had been given to protecting consumer interests or even in inviting consumer representatives along to the talks.

141. John Howkins pointed out that Parliament had delegated its responsibilities to the Patent Office but the quinquennial reviews that were originally envisaged were replaced in 2002 by "business reviews of the end-to-end process in achieving specific outcomes". This appears to mean that the Patent Office's Business Plan is agreed each year with the DTI. This business plan can be found on the Patent Office website. We were unable to locate any mention of DRM, TPM or even the word 'digital' within it.

142. Alex MacFie put matters fairly bluntly, saying that the law was being made by "patent office bureaucrats" with "little political accountability". John Howkins suggested that the issues at stake were "regulation" and not "law" – and assessing the trade-offs involved, testing for proportionality, fairness and cost-effectiveness, were exactly the thing that MPs are good at! However, he believed that this political input was now sadly lacking. He pointed out that the DTI used to have an IP Advisory Committee (IPAC), but this had been abandoned.

143. There was a review of IPAC in 2004 which concluded that it "has not adequately fulfilled its role and has largely disappointed the expectations of both its members and other stakeholders". The review talked of re-launching IPAC. However, this does not appear to have happened and its, rather abandoned looking, website records that there are no current committee members -- and also shows that what work the committee did manage to undertake was entirely on wider aspects of intellectual property, rather than the specific issues of concern to this inquiry.

144. Perhaps not surprisingly, we agree with the analysis that oversight of the regulation of DRM cannot be left solely to technical experts; but it is not necessarily a matter for busy MPs and Peers to add to their schedules. Although ultimately a matter for the government of the day, we do not believe that these matters are party political.

145. We therefore see an important role for an independent ‘stakeholders’ body with representatives from rights holders, the creators of content, the libraries and also consumers – in fact, just the types of people who have taken the time and trouble to advise us in this inquiry. This body should be specifically attempting to ensure that domestic legislation, and pan-European legislation developed in Brussels, strikes an appropriate balance between competing interests.
146. Given their middle-ground position between consumers on the one hand and the rights-holders on the other, we believe that the appropriate body to chair this stakeholders group would be the British Library. We feel that this choice is particularly appropriate, since many practical solutions to addressing the issues of balance that DRM throws up, may involve the British Library holding non-protected material in trust for the nation.
147. Hence, we recommend 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. It should specifically address the complex issues surrounding DRM, not just from the point of view of experts on the technology, but with a wide-ranging membership that includes representatives of consumers, libraries and the creators of content – as well as the ‘usual suspects’ from the rights holders and content distribution industries.

Summary of Recommendations

- #65** We recommend that the Government consider granting a much wider-ranging exemption to the anti-circumvention measures in the CDPA for genuine academic research.
- #86** We recommend that when the advice from the Legal Deposit Advisory Panel has been received, 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.
- #92** We recommend 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.
- #105** We recommend that the Office of Fair Trading (OFT) bring forward appropriate labelling regulations so that it will become crystal clear to consumers what they will and will not be able to do with digital content that they purchase.
- #113** We recommend that the OFT labelling regulations we proposed, in #105 above, should ensure that the risks are clearly spelled out, at the point of purchase, whenever consumers could lose access to digital content if systems are discontinued, or devices fail, or players are replaced by systems from a different manufacturer.
- #118** We recommend that OFCOM publish guidance to make it clear that companies distributing TPM 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.
- #132** We recommend that the Department of Trade and Industry investigate the single-market issues that have been raised with us, with a view to addressing the issue at the European level. We accept the argument that other industries may soon find their markets distorted by DRM systems and so we recommend rapid development of the principles by which the single market can continue to operate effectively.
- #135** We recommend that the government do NOT legislate to make DRM systems mandatory.
- #147** We recommend 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. It should specifically address the complex issues surrounding DRM, not just from the point of view of experts on the technology, but with a wide-ranging membership that includes representatives of consumers, libraries and the creators of content – as well as the 'usual suspects' from the rights holders and content distribution industries.

Appendix A: Press Notice & Guidelines for Witnesses

15th November 2005
For immediate release

Press Release – APIG to hold public inquiry on Digital Rights Management

The All Party Parliamentary Internet Group (APIG) is to hold a public inquiry into the issues surrounding Digital Rights Management (DRM).

DRM is used to describe a number of technologies that can be incorporated into electronic devices to control the use of digital media. DRM is usually thought of as “copy protection” for music, films and video games, but can have much wider application, allowing computer software to be rented, or providing assurance that only authorised programs are executed on a particular computer.

The policy debate around DRM is often cast on the one hand as to how music publishers and movie moguls can prevent revenue loss from illegal duplication. On the other hand, consumers may lose existing rights to freely enjoy what they have purchased and to pass it on to others when they have finished with it.

However, to portray the issues surrounding DRM as merely a consumer versus publisher debate is misleading. DRM permits the creation of new business models where you buy the right to read a book just once, or pay a fraction of penny every time you play a song. This allows publishers greatly flexibility in the services they offer and leads to increased consumer choice.

Launching the inquiry, APIG Chairman Derek Wyatt MP said

“DRM systems bring threats and opportunities to both publishers and consumers. This inquiry will seek to establish how consumers, artists and the distribution companies should be protected in a continually evolving market place”

The inquiry seeks written evidence particularly focusing upon the following:

- **Whether DRM distorts traditional trade-offs in copyright law;**
- **Whether new types of content sharing license (such as Creative Commons or Copleft) need legislation changes to be effective;**
- **How copyright deposit libraries should deal with DRM issues;**
- **How consumers should be protected when DRM systems are discontinued;**
- **To what extent DRM systems should be forced to make exceptions for the partially sighted and people with other disabilities;**
- **What legal protections DRM systems should have from those who wish to circumvent them;**
- **Whether DRM systems can have unintended consequences on computer functionality;**
- **The role of the UK Parliament in influencing the global agenda for this type of technical issue.**

APIG calls upon interested parties to present written evidence to the inquiry before 21st December 2005.

Written evidence should be submitted to admin@apig.org.uk. APIG may, at its discretion, ask for oral evidence from witnesses in January 2006 at the Houses of Parliament.

Note to Editors:

The All Party Parliamentary Internet Group exists to provide a discussion forum between new media industries and parliamentarians. Accordingly, the group considers Internet issues as they affect society, informing Parliamentary debate through meetings, informal receptions, inquiries and reports. The group is open to all members of the Houses of Parliament.

<http://www.apig.org.uk>

APIG DRM Inquiry: Guidelines for Witnesses

1. The All Party Parliamentary Internet Group announced its inquiry into the “Digital Rights Management” on November 15th 2005. The inquiry is anxious to receive as wide a range of submissions as possible.

2. Documents of relevance to the inquiry include:

- Current UK Law on Copyright, summary page

<http://www.patent.gov.uk/copy/legislation/copylaw.htm>

- Current EU Law on Copyright & Neighbouring Rights, summary page

http://europa.eu.int/comm/internal_market/copyright/index_en.htm

- “IPRED2” the proposed 2nd “Intellectual Property” Rights Enforcement Directive {SEC(2005)848}

http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0276en01.pdf

3. Written submissions should be concise and address the matters raised by the inquiry, concentrating on the issues with which the witness has a special interest. A typical length would be about 1,000 words. Essential statistics or further details can be added as appendices.

4. It would be very much preferred if written submissions were made in an electronic format. They should be in plain text (ASCII), Adobe PDF, Microsoft Word .DOC or .RTF format. Submissions should be dated and include the name, address and telephone number of the person in the organization who is responsible for the submission. They should be sent via email to inquiry@apig.org.uk.

5. It is at the inquiry’s discretion to publish any evidence it receives. Any information that a witness would not wish to be considered for publication should be clearly marked.

6. The inquiry has asked for all written evidence to be submitted by 21st December 2005. The Officers of APIG, following consideration of written evidence, will decide which organisations and individuals to invite to give oral evidence in Westminster in January 2006.

Appendix B: Glossary of Terms

AIM	Association for Independent Music	http://www.musicindie.com
AFFS	Association for Free Software	http://www.affs.org.uk/
APIG	All Party Internet Group, a discussion forum for Parliamentarians and the new media industries and the body responsible for this report.	
Aslib	Association for Information Management	http://www.aslib.co.uk
BBC	British Broadcasting Corporation	http://www.bbc.co.uk
BCC	British Copyright Council	http://www.britishcopyright.org
BPI	British Phonographic Industry	http://www.bpi.co.uk
BMR	British Music Rights	http://www.bmr.org
CD	Compact Disk	
CDPA	Copyright Designs and Patents Act 1998 (as amended)	
CPT	Consumer Project on Technology	http://www.cptech.org
DRM	Digital Rights Management System	
DTI	Department for Trade and Industry	
DVD	Digital Video Disk	
EMI	Originally, “Electrical and Music Industries” http://www.emigroup.com	
FIPR	Foundation for Information Policy Research	http://www.fipr.org
LACA	Libraries & Archives Copyright Alliance	http://www.cilip.org.uk/laca

LP

Long Playing record

MPA

Motion Picture Association <http://www.mpa.org>

MP3

MPEG-1 Audio Layer 3; a compression scheme for audio files.

NCC

National Consumer Council <http://www.ncc.org.uk>

OFCOM

Office of Communications; independent regulator and competition authority for the UK communications industries.

OFT

Office of Fair Trading; the UK's competition and consumer authority.

ORG

Open Rights Group <http://www.openrightsgroup.org>

Pact

Producers' Alliance for Cinema & Television <http://www.pact.co.uk>

PMA

Personal Managers Association <http://www.thepma.com>

RMI

Rights Management Information

RNIB

Royal National Institute of the Blind <http://www.rnib.org.uk>

SDMI

Secure Digital Music Initiative

STV

Share The Vision <http://www.nlb-online.org>

TPM

Technical Protection Measure

TV

Television

UK

United Kingdom

UK-CDR

UK Campaign for Digital Rights <http://ukcdr.org>

US

United States

Appendix C: Bibliography

UK legislation

Copyright Designs and Patents Act 1998

http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm

Note that the Act has been amended, so the original version is of limited use. Various places provide the current text, for example:

<http://www.patent.gov.uk/copy/legislation/index.htm>

<http://www.jenkins-ip.com/patlaw/index1.htm>

Copyright and Related Rights Regulations 2003

<http://www.opsi.gov.uk/si/si2003/20032498.htm>

Data Protection Act 1998

<http://www.opsi.gov.uk/acts/acts1998/19980029.htm>

Other relevant documents

Contractual balance in digital content services

Timo Ruikka, June 2005

http://www.indicare.org/tiki-read_article.php?articleId=113

IPRED2 “procedure file”

<http://www.europarl.eu.int/oeil/file.jsp?id=5263692>

Lessons from the Sony CD DRM Episode

J. Alex Halderman and Edward W. Felten, 14 February 2006

<http://itpolicy.princeton.edu/pub/sonydrm-ext.pdf>

Review of technological protection measures

Australian House of Representatives

<http://www.aph.gov.au/HOUSE/committee/laca/protection/report.htm>

Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, US Copyright Office

<http://www.copyright.gov/1201/>

Thomas Babbington Macaulay’s 1841/2 speeches on copyright

<http://www.baen.com/library/palaver4.htm>

Working document on data protection issues related to intellectual property rights

Article 29 Data Protection Working Party 18 January 2005, xxxx/05/EN WP 104

http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2005/wp104_en.pdf

Written and oral evidence submitted to this inquiry

<http://www.apig.org.uk/activities-2006/drm-inquiry/>

Previous APIG Inquiries

Report of an Inquiry on ‘Revision of the Computer Misuse Act’, June 2004

<http://www.apig.org.uk/archive/activities-2004/computer-misuse-inquiry/CMAReportFinalVersion1.pdf>

Report of an Inquiry on ‘Spam’, October 2003

http://www.apig.org.uk/archive/activities-2003/spam-public-enquiry/spam_report.pdf

Report of an Inquiry on ‘Communications Data’, January 2003

<http://www.apig.org.uk/archive/activities-2002/data-retention-inquiry/APIGreport.pdf>

