

**Topic
Brief 16**

**Copyright, unlawful
file sharing and digital
rights management**

Brief 16



Digital technology used for recording of most contemporary artistic works has (often) eased the task of creating the original content (save for the idea itself)...

Copyright, unlawful file sharing and digital rights management

Copyright and digital rights management (DRM)

Copyright protects the original expression of ideas, but not the ideas themselves. It exists automatically in original creative or artistic works, and gives the owner the right to stop unauthorised copying.

Digital technology used for recording of most contemporary artistic works has (often) eased the task of creating the original content (save for the idea itself), eased the process of distributing the content and ensured the customer gets faithful reproduction of the content. But it has also meant that for little (capital, process, media and distribution – internet) cost the customer has the means to make perfect copies of the content which they can distribute to others without reward going to the creator or legitimate publisher/distributor.

The advent of relatively of low cost 3D printers and free to download Internet tools to create replication data files from space models has led to the potential to copy many products regardless of the original owner's rights, albeit possibly not to the same level of sophistication or quality.

Digital Rights Management is an access control technology(s) that can be used by hardware manufacturers, publishers, or copyright holders to limit the usage of digital content and prevent copying or its conversion to other file formats. Circumvention of Digital Rights Management means, and its dissemination, albeit unlawful, is not uncommon.

UK legislative background

Unlawful peer-to-peer (P2P) (digital) file sharing and copyright infringement through illegal downloads from the Internet (piracy) were identified in the 2006 Andrew Gowers' Review of Intellectual Property¹¹⁸ as causing significant damage to the UK's creative industry. Gowers' Recommendation 39, called upon Government to take action if no industry solution proved possible by the end of 2007. This was accepted by Government and recognised in the Department of Culture Media and Sport 'Creative Economy Strategy Paper (February 2008).

Despite industry efforts, culminating in the voluntary Memorandum of Understanding (MOU) between the Internet Service Providers (ISPs), the content industries, Government and the Office of Communications (OFCOM) signed in July 2008, no voluntary solution was finally identified for dealing with P2P file sharing, or illegal Internet downloads, although the MOU process provided much valuable information and experience.

¹¹⁸ http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf

The Government consulted on possible regulatory solutions in parallel with the MOU process. The outcome of that consultation was announced as Action 13 in the Interim Digital Britain Report¹¹⁹ in January 2009. Action 13 sets out two obligations that apply to ISPs. Firstly, ISP will be required to send notifications to subscribers who have been identified in relation to alleged copyright infringements. Secondly, ISPs will be required to maintain (anonymous) records of the number of times an individual subscriber has been so identified and to maintain lists of those most frequently identified (an aggregate of a plurality of notifications from diverse bodies). At a trigger point determined and agreed by rights holder(s) and ISP(s) the notification will be issued to the alleged infringing subscriber.

The supporting legislation is encapsulated in the Digital Economy Act 2010¹²⁰, which places obligations on rights holders (§3) to inform ISPs that a subscriber to their service has infringed copyright, and that the ISP notifies the alleged infringing subscriber and seeks remedies after a plurality of infringements (§9). The alleged infringer has rights of appeal (§13).

Copyright infringement and digital communication

The sheer scale and complexity of (digital) file sharing means that it will not be possible to trace every infringer.

Digital communication relies upon the data traffic being split into manageable packets (or frames) of data that are then inter-dispersed with other traffic streaming for onward transmission. The network paths can be global in scale with streams of traffic being split and taking multiple routes between the sender and the receiver. If attempts are made to trace data then it is most likely to be achievable at the edge of a network (where sufficient consecutive packets may exist for accurate content analysis) assuming adequate legislation is in place permitting what is essentially eavesdropping and packet inspection. There are various candidate inspection regimes but all require basic packet level inspection. This inspection filtering for all data appearing at the periphery of networks is an unimaginably huge task which is impossible to implement without a major impact upon data flow rates of many orders of magnitude even if the legal structures were in place to allow it.

Thus the current legislative proposals¹²⁵ will only work for P2P file transfers if prior substantive evidence is available to justify (and have authorised) an eavesdrop on a specific sender or receiver, or through diligent policing of Internet websites that declare illegal offerings of copyright material for download, and the monitoring of site access. The only sure way to prove receipt or ownership of illicit material is by proof of physical evidence. Whilst the material will be in some encoded form it will reside in physical medium such as a computer hard drive or non-volatile memory device such as a memory stick or CD/DVD.

119 http://webarchive.nationalarchives.gov.uk/20100511084737/http://www.culture.gov.uk/what_we_do/broadcasting/5944.aspx

120 http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1

Impending copyright legislation changes

In late 2010 an independent review of how intellectual property supported innovation and growth was announced by the Prime Minister David Cameron and commissioned from Professor Ian Hargreaves. The Hargreaves Review of Intellectual Property and Growth “Digital Opportunity” was published in mid-2011 and made a number of recommendations¹²¹:

Copyright licensing

The UK should establish a cross sectorial Digital Copyright Exchange:

- Incentives and disincentives to encourage rights holders and others to participate
- Trial “Copyright Hub” created in partnership with the Digital Catapult⁵

The UK should work with the European Commission to establish a framework for cross border copyright licensing:

- Clear UK benefits as a major exporter of copyright works
- Collecting societies required by law to work to codes of practice

Orphan works access

This should be supported with legislation so they can be licensed:

- Extended collective licensing
- Clearance procedure for use of individual works
- Checking procedure to determine ‘orphan’ credentials using Digital Copyright Exchange

¹²¹ <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

Copyright exceptions for the digital age

We should resist over regulation of activities, which do not conflict with copyright incentives to creators.

Realise legitimate UK opportunities for:

- Format shifting
- Text and data mining
- Parody and practice
- Non-commercial research – personal use copying
- Library archiving, education, museums

Realise at EU level rights to support text and data analytics

Provide a copyright framework which permits digital technology adaptability whilst not trading on the underlying creative and expressive purpose of the work

Ensure contracts cannot override these exceptions

The Government ran a number of public consultations and events on its proposals for implementing the Hargreaves recommendations on copyright and the setting up of a Digital Rights Exchange (DCE). These culminated in several Government Policy Statements on modernising copyright which set out their intention to legislate to:

- Allow schemes to be introduced for the commercial and non-commercial use of ‘orphan’ copyright works and voluntary extended collective licensing of copyright works, subject to a number of important safeguards.
- To create a backstop power to require collecting societies to adopt codes of conduct based on minimum standards [published in October 2012¹²²].

¹²² <http://www.ipa.gov.uk/hargreaves-minimumstandards.pdf>

Enforcement

A strategy, policy and approach to enforcement are being developed by an Intellectual property office working group to:

- Focus on all forms of on-line copyright
- Address social media usage
- Be compatible with the European Commission and wider International proposals (cross border activity)
- Educate society to respect IP

The main Government response¹²³ to the Hargreaves review was published in December 2012 and set out proposals for a copyright exceptions framework to introduce greater freedoms in copyright law to allow third parties to use copyright works for a variety of economically and/or socially valuable purposes without the need to seek permission from copyright owners. Proposals for protecting the interests of copyright owners and creators are to be built in to the revised framework.

Suggested further information:

- Gowers Report for HM Treasury¹¹⁸
- Hargreaves Review of IP and Growth¹²¹
- UK Government response to Hargreaves Review – “Modernising Copyright: a modern, robust and flexible framework”¹²³
- Intellectual Property Office webpage on Hargreaves implementation – Copyright¹²⁴
- Digital Economy Act 201¹²⁰
- See also **IPAN Issue Brief 3** – “Can copyright survive the threat of the internet?”

¹²³ <http://www.ipo.gov.uk/response-2011-copyright-final.pdf>

¹²⁴ <http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright.htm>