Response to 'Copyright and Innovation: A Consultation Paper'

28 May, 2012

The Irish Free Software Organisation represents the interests of Free Software in Ireland. Here, 'Free' refers to freedom rather than price — Free Software confers on its users the right to run, study, change and distribute it. A great deal of innovation and technological progress has been made possible by Free Software, and it also generates considerable economic value.

We are pleased that the Paper recognises the role of users in driving innovation (§7.2). Software in general provides rich ground for innovation; anybody with the relevant skills can become an innovator, with no large capital outlay being required. Because users of Free Software have the right to learn from, modify, and build on it, Free Software is uniquely placed to enable the innovative transformations described in the Paper. Indeed, this ability to create new value from existing work was part of the motivation for the formalisation of Free Software as a defined idea over twenty-five years ago.

We are also pleased that the Paper devotes thirty pages to discussion of what acts should be permitted without the explicit authorisation of the copyright holder. In the digital realm, this would foster the creation of software tools to take advantage of these statutory exceptions, and Free Software could drive a great deal of such innovation.

As the Paper notes, however, these rights are at risk from the imbalance in the bargaining power of content-providers and users, where rights-holders could effectively 'write their own laws' by means of contract terms:

> The rights provided to consumers or users by the exceptions to copyright could be very easily set at naught by means of terms and conditions in contracts between rights-holders and users.
>
> [p.85, introduction to §7.3.24]

and the following discussion proposes that the law should more explicitly declare that statutory exceptions cannot be overruled by contract terms. We welcome this.

However, we are deeply concerned at the analogous relationship between statutory exceptions and technological protection measures (TPMs), and would like to respond to the invitation at the end of §7.3.24, which asks 'whether there are other consumer protection concerns in the copyright context'.

Just as with terms and conditions in contracts, TPMs can very easily set at naught

the statutory-exceptions rights provided to consumers or users. New legislation should address this, by explicitly allowing circumvention of TPMs where this is a necessary step towards performing a statutory-exception act. Similar language will be required to permit creation, possession, and distribution of tools and information, in the context of statutory exceptions.

We draw these points together by answering the following questions from the Paper.

(33) Is there any evidence that strengthening the provisions relating to technological protection measures and rights management information would have a net beneficial effect on innovation?

The leading nature of this question is troubling. The committee should not, we suggest, be choosing between the status quo on the one hand and a strengthening of TPM provisions on the other. It should also consider whether strengthening of users' rights to circumvent TPMs in pursuit of statutory exceptions would have a net beneficial effect on innovation — as we believe it would.

The Paper discusses, at length, statutory exceptions, rightly considering them so important that they cannot be taken away from users by contract terms. This is recognition of the self-evident fact that these exceptions must be effective, i.e., usable in practice. With much of today's content, enjoyment of these exceptions requires the user to circumvent TPMs, and we urge the clarification of a right to do so.

(62) Should section 2(10) be strengthened by rendering void any term or condition in an agreement which purports to prohibit or restrict an act permitted by CRRA?

Yes.

We repeat in the context of this question our argument from Q(33) that TPMs should not be able to prohibit or restrict a consumer's enjoyment of a statutory exception. The original language of §374 of CRRA 2000 would serve as a model here:

> 374.—Nothing in this Chapter shall be construed as operating to prevent any person from undertaking the acts permitted [. . .] or from undertaking any act of circumvention required to effect such permitted acts.