

GOVERNMENT RESPONSE

Consultation on proposed
legislation to address illicit
peer-to-peer (P2P) file-
sharing

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Government Response to a Consultation on proposed legislation to address illicit peer-to-peer (P2P) file-sharing

Introduction

The 16th June 2009 consultation on legislative proposals to address illicit P2P file sharing set out the measures the Government intended to introduce to reduce significantly the number of people engaged in unlawful peer-to-peer file-sharing and the respective roles of Government, industry and Ofcom. The Government's thinking was clarified in the 25th August statement which set out how costs might be apportioned, asked whether account suspension should be available as an option and looked at how any decision to introduce further measures might be introduced in future.

As a result of the consultation, and taking into careful account all responses received, legislation to address online copyright infringement forms part of the Government's Digital Economy Bill, as announced in the Queens Speech on 18th November 2009. It is being introduced in the 5th Parliamentary Session (November 2009).

Responses to the Consultation

Copies of all non-confidential responses received have been placed on the BIS website along with the consultation document and the August statement. These can be found at:

<http://www.berr.gov.uk/consultations/closedwithresponse/index.html>

Summary of Responses

Over 220 responses were received. They fell in five broad categories - rights holders (including representations from music, film, TV, sport, publishing, software, games industries), Internet Service Providers (ISPs), consumer groups, charities and individuals. Individuals accounted for over half of the responses. Although respondents' views varied within each "group", there were some clear common core views.

RIGHTS HOLDERS

In general rights holders supported the initial obligations (to send notifications and collate data on an anonymous basis); they largely rejected the idea that taking legal action themselves should form an important part of the deterrent, claiming this would be ineffective and expensive. They favoured the introduction of an obligation on technical measures up to and including account suspension. In their view, this would

be part of a complete process with the technical measures preceding any legal action by rights holders.

Scope: Large majority in favour of universal coverage (ie all ISPs would have to comply with the obligations).

Coverage: Some called for a wider application than P2P (ie) that the measures should be used to tackle any form of online copyright infringement. P2P is the significant problem at present but technology and behaviour can change quickly and there were calls to “future proof” legislation so as to allow any new developments to be quickly addressed.

Costs: Large majority in favour of costs falling where they lay - a minority view that all the costs should be totalled and then split 50:50. Some suggested that ISPs could recoup their costs from infringing accounts, others pointed to lack of transparency about size and type of ISP costs, some called for the total cost of any technical measures to fall to ISPs.

Power to Direct: Strong support for this being taken by the Secretary of State, some concerns expressed that such decision could be based on Ofcom assessment of efficacy

Technical measures: Strong majority in favour - also that such measures should be a part of the initial process with legal action being considered only as last resort.

Suspension: Large majority in favour, certainly as final measure.

Appeals: A general recognition that a clear appeals route is needed and a need to deter frivolous appeals.

Other: Significant support for some form of co-ordinated process to benefit from both a standardised methodology and economies of scale. There were a number of calls from major players for the code to be developed and in put place by Royal Assent. No limit to the number of notifications should be set.

Whilst the majority view of rights holders was fairly clear and consistent, there were some dissenting voices. Some questioned the costs involved and the alleged scale of the problem (and consequent business benefits that might result as a result of any legislative action). In one or two cases there were serious reservations expressed on the issue of suspension.

CHARITIES

The main concern raised was on child safety. There were calls for the action on P2P to encompass tackling child abuse images shared on P2P

networks (although it should be noted that possession of such images is a criminal offence and the actions proposed here are directed at civil infringement).

The other key issue was in connection with technical measures and suspensions. It was felt any such action could only increase the digital divide, hitting the poorer, less educated families (who are more likely to suffer such restrictions). This would directly impact on the education of children (and young people) and run counter to the Government's Home Access programme.

CONSUMER GROUPS

In general consumer groups supported the initial obligations, to send notifications and targeted legal action by rights holders; they opposed any obligation on technical measures unless required by a prior court ruling. Suspension was seen as a disproportionate response.

Technical measures/suspension

A large majority said technical measures should only be imposed after a court ruling (the exception to this view suggested an independent arbitration body to decide on technical measures). All thought prior approval was necessary. There was also considerable doubt as to how effective or proportionate such measures were. Suspension was regarded as disproportionate.

Time limit

There was strong support for the idea that the period for a rights holder to take legal action on an infringement should be limited. Currently there is a 6 year period within which action can be taken by rights holder, but it is very hard for any defence to be mounted against allegations of an offence that occurred a year or more ago.

A 12 month period to evaluate the notifications process was deemed the minimum.

Costs

This was of less concern to consumer groups although most felt rights holders should pay – there was clear concern over the cost to an individual of appeals/fighting court action etc. It was felt the process as set out in the August statement would act as a disincentive to ISPs to invest to introduce efficient procedures.

Power to direct

Concern was expressed over the ability of major economic players to influence the process by lobbying. As a minimum, the criteria for decisions by the Secretary of State should be set out clearly (and Ofcom's advice should be binding) with the right to a judicial review of any decision.

Appeals

Clear, fast effective and affordable route of appeal at all stages.

Other

They made a clear call for new business models and reform of copyright laws. They also felt there should be a requirement that only the rights holder (or appointed representative) could trigger the obligations.

ISPS/INTERMEDIARIES

Cost was the key issue with ISPs citing the “beneficiary pays” principle i.e. the party who is expected to benefit from any reduction in file-sharing should pay for the cost of the measures taken. ISPs said they would get no benefit from a reduction in P2P and that rights holders should cover their costs. There was real concern on technical measures both in terms of the power to direct and serious doubt expressed over how effective any measures might be. There was also concern that technical measures should only be applied after a ruling from an appropriate body.

Scope

Two respondents (out of 17) felt all ISPs should be in scope. Five felt mobile network operators (MNOs) should be excluded while seven felt there was a case for a small firms (SME) exemption or for there to be some threshold level for inclusion based on the share of P2P traffic. The key concern was competition pressures on smaller players.

However, many of those who felt merit in an SME exemption felt this would not be necessary if the ISP could recover costs from the rights holders

Costs

11 felt the costs should be 100% recoverable from the rights holder. Key arguments cited were “beneficiary pays” and reference was made to the courts where any third party costs were recoverable. Two suggested that ISPs should charge rights holders a flat fee per notification. One felt cost division should be left to the Code.

Technical measures/suspension

Six said suspension should not be included at all. 14 said technical measures were ineffective with five saying any technical measure should require prior court approval. A further theme was that technical measures should only be used if it had been demonstrated they were needed and effective. It was felt Ofcom should be responsible for evaluating and recommending what (if any) technical measures should be used.

Power to direct

Nine expressed real concern at the Secretary of State taking the decision on whether to move to a third obligation on technical measures. All wanted some assurance that Ofcom would have a key role to play in recommending whether to move to a second stage or that the Secretary of State would follow a strict set of criteria before taking any decision.

Appeals

The appeals mechanism should be robust and quick. Issue of how it would be funded was raised – it was noted that the ISPs would entirely be acting on information supplied by rights holders.

Other common issues raised

Timescale – concern was expressed over the Secretary of State's ability to shorten the timescale. Most felt 12 months was a minimum period to allow the notifications/court action to have an effect.

Number of notifications – most felt a cap was needed. However this depended on who paid. If rights holders were to bear the cost, there was less concern over an upper limit.

Number of warning letters – general feeling that three letters was appropriate.

Sunset – many felt there was a need to include sunset provisions in the legislation. P2P is a problem now but the whole area of internet technology and consumer behaviour is fast changing and what may/may not be needed or appropriate now could quickly become outdated and unnecessary.

Indemnification – some ISPs wanted protection in the event of an incorrect IP address identification and notification.

Multiple occupancy/users of connection – concern was raised over the harm inflicted on non file-sharers if some form of sanction was imposed on the subscriber.

INDIVIDUAL RESPONSES

Responses from individuals varied greatly. Some chose to reply on one issue only, while others provided a full reply. Rather than try and summarise this wide range of views, the table below gives some flavour of the most common issues raised and the comments made. These issues were ranked according to the number of times the issues was identified. Some comments are factually incorrect but are included as they represent widely held views.

A significant number were in relation to an issue the consultation and legislation will not directly address – law firms using court orders to obtain multiple personal contact details and sending out letters demanding payment on behalf of rights holders. Although the legislation will provide a framework through which rights holders can seek to protect their copyright, they are under no obligation to use it. This was an issue also highlighted by some consumer groups.

Issue + comments	Ranking
<p>Enforcement/getting the right person</p> <p>Wireless networks are vulnerable to be “hi-jacked” How can you identify the infringer where more than one person uses the connection (ie in multi occupancy dwellings) Techniques such as IP masking, proxy servers, WiFi snipers etc can make it hard/impossible to detect or link an infringement to an IP address We cannot know how P2P technology will develop over short to medium term – new or modified P2P protocols currently being developed will make identification of illegal activity harder but provide better level of service (eg OneSwarm, ItsHidden and Anomos)</p>	1
<p>Related legal actions</p> <p>Certain law firms have been sending out letters claiming that the recipients have illegally made available, on file-sharing networks, certain computer games, and music and hard core pornographic films. Respondents believe the tactics used by these firms are suspect, many individuals allege they have been wrongly</p>	2

accused, and complaints have been taken up by consumer awareness groups such as <i>Which?</i>	
<p>Insufficient/inaccurate evidence of harm to industry</p> <p>Industry evidence not verified (notoriously inaccurate) and simply propaganda Independent evidence base needed foreign owned industries should not drive new UK legislation; – no guarantees that our artists and culture will get any richer by these actions Underlying economic drivers should be taken into account and not simply sector specific indicators</p>	3
<p>Shoring up old business models*</p> <p>Media companies not adopting new technologies shop prices perceived to be “outrageously” high– Content industry is preventing new business models which are needed asap Government acting as debt collector for the entertainment industry could be counterproductive, sheltering them from adapting to changing market conditions when new services like Spotify are changing peoples attitudes.</p>	4
<p>Basis of action proposed</p> <p>Balance of probabilities not proof – beyond reasonable doubt should be benchmarked burden of proof lies with rights holders ISPs should not be obliged to take down customer without court judgement; this goes against innocent until proven guilty Whole process would be subject to ECHR challenge</p>	5
<p>Internet better off not policed</p> <p>Making ISPs do so [act as police] will slow down internet development Tackling on-line piracy is technically unfeasible Piracy consumes vast bandwidth without generating extra revenue</p>	6=
<p>Go after providers or hosting companies not file-sharers</p> <p>Why not shut down websites that allow this to happen? Sanctions only against those abusing P2P networks</p>	6=

<p>Doesn't help Digital Britain digital inclusion/participation agenda</p> <p>These measures conflict with "vital" digital access especially for those who rely on home broadband connection to do their job Internet access vital for the infirm who rely on access to shopping etc Internet a tool to aid "financial inclusion" in locating best value products</p>	8
<p>Judgement without trial or recourse</p> <p>Must allow redress (for false accusation) or appeal – to independent tribunal – allow compensation for false accusation and consequences of unfounded blocking - Should not bypass appeal process</p>	9
<p>File-sharing leads to increased music sales</p> <p>Increased Games company profits increased concert sales for new bands; potentially even greater income to be made from ubiquity</p>	10=
<p>File-sharing is important business tool*</p> <p>LINUX, GNU and other open source developments use P2P for updates etc Many files shared are not copyright material</p>	10=

Government Response

Since the Gowers Review reported in December 2006 we have been discussing with stakeholders the nature of the problem of P2P file-sharing, their concerns and possible courses of action. We have held two formal consultations on possible Government action and been involved in the very useful and constructive industry “Memorandum of Understanding”. The Digital Britain Report helped place the P2P issue in its wider context. Our thinking has developed over this time and we are very grateful to all stakeholders for their time and input

The 16th June 2009 consultation and 25th August statement represented how we proposed to address the legislative part of the solution to the problem. This needs to be in the context of industry, with Government input, ensuring that the equally important areas of education and new business models provide the lasting solution and give consumers the content they want at a price they are willing to pay.

Legislative Obligations

We have carefully considered all the responses to the consultation. As set out in the consultation we will introduce two obligations on ISPs:

- 1 To send letters to subscribers identified by rights holders as allegedly responsible for a breach of copyright.**
- 2. ISPs will be required to collect anonymised information on serious repeat infringers (based purely on the notifications provided by rights holders). This information will be made available to rights-holders together with personal details on receipt of a court order.**

These are straightforward obligations that should remove any uncertainty over the Government’s regulatory intentions, although obviously there will be issues of practical detail that remain to be addressed. We consider that, given the rapid pace of change in technology and consumer habits, it would be sensible for these practical details to be agreed between industry parties in the form of a code rather than laid down in legislation. The Code would cover, among other issues, practical supporting measures including appeals and standards of evidence and it would require Ofcom approval. If industry is unable to develop such a code then Ofcom will be required to develop and impose such a code.

We are confident these two obligations will have a substantial impact on unlawful file-sharing, and should meet our target of reducing by around 70% the number of people engaged in it. Where people are particularly serious infringers of rights it is proper that legal action should be taken, and the Government hopes that rights holders will take the opportunity of targeted legal action offered to them.

However we cannot be sure that these measures will be as effective as we expect. If they do not achieve our objective of a significant reduction in unlawful file-sharing, we need to be able to act quickly to impose further proportionate measures.

3 Secretary of State to have a power to direct Ofcom to evaluate the effectiveness of technical measures and a power to introduce, via secondary legislation, a third obligation on ISPs to impose technical measures on serious infringers.

As a first step we will need reliable and accurate information on file-sharing in order to properly evaluate the changing nature of the issue and on the effect the obligations are having. Therefore Ofcom will be required to first establish the authoritative baseline of illicit file-sharing activity and thereafter provide Government with regular reports on subsequent activity levels. In addition they will be required to produce a yearly report on the effect of the obligations, what efforts have been made on education and on the level of court activity by rights holders. The Secretary of State can also request such a report as required.

Secondly the legislation will give the Secretary of State the power to oblige ISPs to impose specified technical measures on a subscriber once their alleged level of infringement has placed them on the serious infringer list. This raises some important issues – not least in terms of ensuring that subscribers have a clear route of appeal – and if technical measures are applied we intend to allow a further appeal from the original appeals body set up by Ofcom to a First Tier Tribunal.

Originally we indicated that the list of technical measures would be exhaustive (ie only those specified could be used). We will now make this list indicative and will require Ofcom to evaluate and make recommendations on what measures might be appropriate, effective and proportionate if and when it is deemed necessary to introduce a third obligation on technical measures.

Other issues

Suspension

We asked for views on whether or not to add suspension to the list of possible technical measures. On balance we have decided to include it as an example of a measure Ofcom might be asked to provide advice on, and which could be applied if the circumstances required it. However, this would be a last resort measure, and in practice measures other than suspension are likely to be applied first.

Costs

The August statement explained our decision to set out how costs would be allocated in the actual legislation. It also set out a proposed model with all parties covering their own costs except for the operating costs associated with the processing and sending of notifications which would be split 50:50 between rights holders and ISPs.

It was clear from the responses that our proposed formulae fell short in a number of ways and did not command support. The legislation will therefore amend our proposal so that all costs will be covered by the party that incurs them. However rights holders will be charged a standard flat fee for each notification they send to an ISP. This flat fee will be based on the average cost to an ISP of processing a notification (to be established via an audit by Ofcom). The fee will apply to all ISPs in scope. It will also be set at such a rate so that in effect ISPs and rights holders share the cost of notifications.

By setting a flat fee rate ISPs will be encouraged to adopt a more efficient process in order to minimise their costs. They will also have an incentive to reduce file-sharing (and therefore the number of notifications they receive) on their network. It should also enable rights holders to plan and budget.

Scope

We asked in the consultation whether the obligations should apply to all ISPs or whether there were strong arguments for an exemption, either for SMEs or on proportionality grounds.

We did not consider a straightforward SME exemption was justified. Individual file-sharers operating on an SME ISP can cause significant damage. Exempting SMEs would offer them a competitive advantage over those ISPs in scope, while acting as a perverse disincentive for a SME ISP to grow. Similarly we do not think an absolute exemption for mobile ISPs is appropriate. It is true that at present file-sharing (legitimate or unlawful) accounts for a very small proportion of traffic on a mobile network. Mobile faces different (harder) technical challenges and it is also true that the nature and cost of a mobile broadband service makes bandwidth heavy file-sharing an unrealistic option. However given the trends in both price and performance of mobile broadband this could change in a relatively short time.

However we consider that those networks where file-sharing is not identified as a problem should not have to comply with the obligations. For those networks the cost of compliance would be disproportionate. We intend therefore to introduce a threshold level (based on the number of notifications in a given period sent to an ISP and the proportion of the total population of file-sharing notified) below which the obligations will not apply. The operation of the threshold will be set up under the code. This should give ISPs not in scope an incentive to take measures to

ensure that file-sharing does not increase on their network, but will ensure that as soon as an ISP, whether fixed or mobile, becomes part of the problem they will be required to become part of the solution.

Future proofing

Although the consultation was specifically on the issue of how to tackle unlawful P2P file-sharing (as set out in para 2.13 of the consultation), several respondents did raise concerns on future trends, both in terms of technology and infringing behaviour. We are confident that the underpinning code will be flexible enough in dealing with changes in file-sharing technology but recognise that other technologies with different characteristics may arise and facilitate continued copyright infringement. Therefore the intention is the Secretary of State will direct Ofcom to also include the latter in the reports it prepares for the Secretary of State about online copyright infringement by subscribers to internet access services. In turn the Secretary of State would be able via secondary legislation to update the Copyright Design and Patents Act should it prove necessary, for example, to enable rights holders to take effective action against infringers.

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