

Government Response

Consultation on legislative
options to address illicit Peer-to-
Peer (P2P) file-sharing

29 JANUARY 2009

Government Response to a Consultation on legislative options to address illicit Peer-to-Peer (P2P) file-sharing

Introduction

The consultation on the legislative options to address illicit P2P file-sharing set out a number of different approaches to significantly reduce the number of people engaged in peer-to-peer file sharing. It took forward Recommendation 39 of the Gowers Review of Intellectual Property¹ which addressed the issue of illicit use of P2P technology to unlawfully file-share copyright material. The consultation also identifies and sought views on other potential options and called for evidence on issues related to illicit use of P2P.

The Consultation

The consultation set out the Government's preferred option, which consisted of an approach which we believed could form the kernel of a self-regulatory code or codes of practice, overseen by Ofcom and backed up by a duty on ISPs to take action in relation to the use of their networks that is shown to be infringing copyright. While the co-regulatory approach was the Government's preferred approach at this stage, we also identified a number of other possible regulatory solutions, including:

- Streamlining the process by which rights holders can get personal data relating to infringers to enable them to institute legal proceedings;
- Requiring ISPs to take action against infringers when notified by rights holders of specific incidences of infringing behaviour (this was essentially the preferred option but without any self-regulatory element);
- Allocating a third party body responsibility for providing evidence of infringement and taking action or requiring action to be taken; and
- Requiring the application of filtering technology to ISP networks.

Responses to the Consultation

None of the options highlighted in the consultation won widespread support. Rather there was a marked polarisation of views between the rights holder community and consumers and the ISPs over what action should be taken.

A number of key issues were identified by respondents including copyright protection, protections afforded under eCommerce legislation and the impact on the wider economy. Consumers (individuals and consumer organisations) in particular highlighted concerns over data protection and privacy. The role of technology was addressed by most respondents, but there were conflicting views as to whether it could offer all or part of any solution. For almost all the options, questions were raised as to their legality under the existing legal frameworks and, again, views varied.

There was a degree of consensus that any solution must involve the provision of new legal sources of attractive content and the need for education on the importance of copyright in the wider economy. A number of replies suggested alternative models to those options proposed.

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

<http://www.berr.gov.uk/consultations/page47141.html>

¹ http://www.hm-treasury.gov.uk/gowers_review_index.htm

This summary includes quotes from relevant responses. These are included for illustrative purposes only to help demonstrate the key issues raised and the main points of contention. They should not be taken as representative of the responses as a whole; nor should they be assumed to be indicative of the Government's position.

Summary of views by group:

ISPs

No ISP was in favour of any regulatory solution (including co-regulation). Almost all suggested the way to deal with P2P was through the provision of legal offers, education and the use of the existing legal system to enforce the rights of copyright holders.

Illustrative quotes:

"Unauthorised P2P file-sharing of copyright material is fundamentally a market issue which needs to be addressed through a range of commercial means" - BT

"Sky considers it fundamental to any solution that it is not imposed on ISP's either through legislation or regulation. Any artificial interference with the business models of ISP's is likely to jeopardise the development of the ISP industry and reduce incentives for investment in infrastructure etc." - BSkyB

"[imposing costs on ISPs] a tax on the legitimate internet use" – Orange

Rights holders

Those rights holders which are participating in the MOU process were firmly behind the co-regulatory approach, seeing ISPs as needing to take some responsibility for copyright infringement on their networks. Others were also generally in favour, though some were concerned to have been excluded from the process, and over the potential for a 2-tier system with small ISPs being relieved of needing to adhere to the proposed Codes of Practice. Some responses to the consultation were in favour of streamlining the legal process to enable personal information to be passed directly from ISPs to rights holders. However, the Information Commissioner expressed concern about any move in that direction.

Illustrative Quotes:

"We are attracted to the underlying concept of co-regulation put forward by Government. Voluntary agreements would have been preferred, but it is amply clear that there is no light at the end of that tunnel. Government intervention is required." - MPA

"We have long held that it is the combination of informing consumers about the impact of copyright infringement, continuing to develop new digital music services and increasing enforcement against illegal activity which will be the most effective approach in tackling illegal file-sharing." – BPI

"The origin of the BBC iPlayer which utilises P2P technology was a desire to offer a compelling and legitimate on demand service by harnessing the technological benefits of P2P technology." - BBC

Consumers and Rights Groups.

Serious concerns were raised over privacy and data protection. Significant concern focused on the reliability of the evidence of infringements. This issue was seen as a market failure and not a regulatory one. There was no support for the co-regulatory option; again education, legal offers and the enforcement of existing rights were identified as the way forward.

Illustrative quotes:

"It is important that any educational campaign is not focused on the commercial interests of any party, rather that it promotes a balanced message carefully outlining the key facts, risks and also legal ways of sharing music online." - Childnet

“Consumer Focus does not condone illicit p2P file-sharing but we see it as an inevitable consequence of [the content industry] failing to meet consumers needs. The market has filled the vacuum but in ways that do not involve or remunerate the content industry.” - Consumer Focus

“ORG would be keen to see legal sanctions against those who falsely accuse individuals of illicit P2P file-sharing.” - Open Rights Group

Individuals

Over 25% of responses were from individuals. There was no support for a co-regulatory regime, with concern raised over privacy and data protection. There was widespread doubt over the ability to solve the issue via technology.

General

Respondents not involved in the MOU process voiced serious concern over the lack of transparency. Many felt unable to comment fully due to a lack of detail in the consultation proposals. Another common theme was the need for a proper impact assessment and cost benefit analysis before any decision to regulate. There was also some disagreement about the ability of technical approaches to tackle the problem effectively.

There was general agreement among respondents that there was no one solution which would effectively tackle unlawful file-sharing. Rather almost all parties recognised there was a need for new sources of attractive legal content offering consumers what they wanted, in the format they wanted and at a price they were willing to pay. There was the need for education, not only on the effect of unlawful file-sharing but more widely on copyright and media literacy. Finally, there was some agreement on the need to use the existing legal framework to protect copyright. Some stakeholders felt these would suffice by themselves, others felt there was still a need for additional measures (legal and technical) to back these up.

Illustrative quotes:

“We are extremely confident in our view filters are not capable of doing this [accurately checking copyright status and distinguishing between lawful/unlawful transactions].” – LINX

“The assumption that false positives are inevitable is inaccurate. Audible Magic’s proven fingerprint technology currently achieves a demonstrated level of zero false positives.” - Audible Magic

Government Response

We have carefully considered all the responses to the consultation and we believe that our preferred approach, as set out in the consultation, would have a significant disadvantage in terms of substantial regulatory uncertainty, rendering it impossible for ISPs to understand the nature and the extent of the obligation to be imposed on them.

Furthermore, there were significant consumer concerns about how consumer protection would be properly addressed, while developing the self-regulatory aspect through a code of practice raised significant questions as to how to accommodate other rights holders, the smaller ISPs and consumer bodies. Indeed, many of the respondents said they were unable to comment fully on the preferred solution because they were not a part of the process arising from the MOU to tackle unlawful file sharing agreed between record labels, film studios, major UK ISPs and the Government in July.

Finally any co-regulatory code would need to be developed with the participation of all stakeholders from the rights holders, ISP and consumer communities. The parallel MOU process demonstrated the inherent difficulties involved where the stakeholders have little shared interests. It is clear that it would be extremely difficult to develop a co-regulatory code which fairly represented the interests of all parties and was effective in addressing unlawful file-sharing.

We have therefore concluded that it is not possible to proceed with the preferred solution as set out in the consultation.

However, it is clear that rights holders are suffering financial losses, and that their losses due to unlawful P2P file-sharing are growing. To take three sectors as an example, in the UK in 2007, the music industry claimed losses of £180m; the film industry £55m; and TV £22m. As a result, we are still committed to taking action to ensure a significant reduction in the incidence of file sharing. The option that most closely matched the preferred solution, but without some of its disadvantages, was option A2, to require ISPs to take action against infringers when notified by rights holders of specific incidences of infringing behaviour. This option also suffered from regulatory uncertainty insofar as it was not clear to ISPs what actions they would be required to undertake.

Evidence presented both before and in response to the consultation suggests that notification by an ISP to a consumer that their account has been identified as engaging in infringing behaviour can have excellent results, with a decline in illicit file-sharing of around 70% or more quoted by some. This approach has also been trialled by the music industry and the six largest ISPs in the UK in recent months during the MOU arrangements.

Consequently the Government has decided to move forward with an approach based on option A2, but with a specific obligation being placed on ISPs to notify alleged infringers of rights (subject to reasonable levels of proof from rights-holders) that their conduct is unlawful.

We hope that this will have a substantial impact on unlawful file-sharing, perhaps reducing by around 70% the number of people engaged in it. However, we also recognise that some people will not want to stop file-sharing and will continue in the face of notifications from their ISP. Where people are particularly serious infringers of rights it is proper that legal action should be taken. To date, rights holders have found it impossible to identify the particularly serious infringers and have been as likely to take a first time or once-off infringer to court as a serial committed infringer.

We intend to require ISPs to collect anonymised information on serious repeat infringers (derived from their notification activities, *not* from monitoring their customers' activities), to be made available to rights-holders together with personal details on receipt of a court order.

These are straightforward obligations that should remove the concerns about legal uncertainty, although obviously there will be issues of practical detail that remain to be agreed. We still believe that, particularly 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 rather than imposed by legislation. We have therefore decided that the industry will be required to put in place a Code of Practice dealing with on unlawful file-sharing, supported by backstop powers overseen by Ofcom. The Code would cover, among other issues, practical supporting measures including appeals and standards of evidence. It would also cover cost-sharing.

Next Steps

We intend to consult on this approach shortly, setting out our proposals in detail. As part of that we will also carry out an Impact Assessment and cost benefit analysis upon which we will invite comment. We recognise that this is new and difficult territory, and we want to get it right. So we will review the impact of any new measures and will not hesitate to examine other options if these do not prove to be effective.

Annex A

Responses from
ACLS
Alliance against IP Theft
Audible Magic
BBC
Bennet Lincoff
Berwin Leighton Paisner LLP
BPI
British Video Association
Broadband Stakeholder Group
BSkyB
Business Software Alliance
BT
Channel 4
Childnet
Consumer Focus
Carphone Warehouse
Davenport Lyons
Detica
ELSPA
Equity
E-Business Regulatory Alliance
Educational Recording Agency
FAST
IFPI
Information Commissioner's Office
Ingenious Media plc
Intel Corporation
ISPA
ITV
JANET (UK)
Law Society of Scotland
Licensing Executives Society
LINX
McEvedy
MCPS-PRS Alliance
Microsoft
MMF
Mobile Broadband Group
Motion Picture Association
NBC Universal
Open Rights Group
Orange
PPA
PPL
Premier League
Publishers Association
Red Lambda (Rob Bird)
Royal Mail
Skype
Society for Computers & Law

Television Against Piracy
THUS
Tiscali
UCISA
UK Film Council
UK Music
Virgin Media
We7
Wedlake Bell
Yahoo!
Zer0day

A further 21 people responded as individuals. BERR is grateful for all the responses made to the consultation.

Annex B - Summary: Intervention & Options

Department /Agency: BERR	Title: Impact Assessment of response to consultation on unlawful peer-to-peer file-sharing	
Stage: Response	Version: Final	Date: 29 th January 2009
Related Publications: Impact Assessment of Legislative Options to Address Illicit Peer-to-Peer File-Sharing		

Available to view or download at:

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

Contact for enquiries: Adrian Brazier/Mike Klym

Telephone: 020 7215 1295/4165

What is the problem under consideration? Why is government intervention necessary?

Government intervention is being proposed to address the rise in unlawful file-sharing which can reduce the incentive for the content industries to invest in the development, production and distribution of new creative content artists because they cannot reap all the returns from their investment.

What are the policy objectives and the intended effects?

The government intends to legislate to place an obligation on ISPs to, when informed by rights holders, notify subscribers that their internet account appears to have been used to infringe copyright. It will place a second obligation on ISPs to maintain records (based on the information the rights holders provide them with) of the most frequent offenders and to make anonymised data about them available to rights holders. This will allow rights holders to take targeted action against the most frequent infringers. Devolution: Both copyright and communications are reserved policy areas.

What policy options have been considered? Please justify any preferred option.

The Government has previously consulted on a range of possible legislative options and examined the consequences of "do nothing". The current proposal is based on the responses to that consultation and assumes that notifications allied with legal action (or the threat of) against the most frequent infringers should reduce file-sharing by around 70%. However the legislation will need to be accompanied by a Code of Practice to set out agreed standards and procedures relating to the notification process. These will include consumer protection, standards of evidence, cost sharing etc.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? There will be a consultation on this approach during the spring

Ministerial Sign-off For SELECT STAGE Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Stephen A Carter

.....Date: 28 January 2009

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' Evidence from the earlier consultation produced a wide range of figures. However it appears that a cost per letter (notification) would be of the order £3-£10. A key variable is the overall volume of letters. The industry MOU set a target of reducing file-sharing by 70% in 2-3 years.			
	One-off (Transition) Yrs				
	£				
	Average Annual Cost (excluding one-off)				
	£ 9-30m	Total Cost (PV)	£ 10 yrs (tbd)		
Other key non-monetised costs by 'main affected groups' Rights holders bear the cost of identifying infringers. Again this is highly dependent on the volume. Currently we do not have these costs.					

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' Achieving a 70% reduction would reduce losses by around £175m pa. Research suggests that about 70% of those currently file-sharing would switch to a legal, paid for content source if the chance of detection was higher. Any significant shift to paid-for content would produce additional revenue and increased VAT revenue.			
	One-off Yrs				
	£				
	Average Annual Benefit (excluding one-off)				
	£ 175m p.a.	Total Benefit (PV)	£ 10 yrs (tbd)		
Other key non-monetised benefits by 'main affected groups'					

Key Assumptions/Sensitivities/Risks

Price Base Year 2008	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	UK				
On what date will the policy be implemented?					
Which organisation(s) will enforce the policy?	BOfcom				
What is the total annual cost of enforcement for these organisations?	£				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	N/A				
What is the value of the proposed offsetting measure per year?	£				
What is the value of changes in greenhouse gas emissions?	£				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Micro</td> <td style="width: 25%; text-align: center;">Small</td> <td style="width: 25%; text-align: center;">Medium</td> <td style="width: 25%; text-align: center;">Large</td> </tr> </table>	Micro	Small	Medium	Large
Micro	Small	Medium	Large		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Yes/No</td> <td style="width: 25%; text-align: center;">Yes/No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	Yes/No	Yes/No	N/A	N/A
Yes/No	Yes/No	N/A	N/A		

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	Net Impact £

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

File-sharing is a recent phenomenon whereby users on a computer network share content files containing audio, video, data or anything in digital format by means of a series of ad hoc connections without the need of a central file server. File-sharing is becoming increasingly widespread, driven by increases in the number of households with internet and broadband access, quicker upload and download speeds, and improved connectivity, capability and reliability of service.

Under the Copyright, Design & Patents Act 1998 making copyright material available for copying without the agreement or permission of the copyright owner is an offence, as is copying without permission. However it is only possible to identify the copyright infringer through personal data held by the ISP. Accessing this data requires a court order.

The sheer scale of P2P file-sharing means it is not practicable to take all those involved to court – it is estimated there are some 6.5m people in the UK who are active file-sharers. Further, due to the nature of the technology, it is not possible for rights holders to identify who are the most frequent or serious file-sharers, making targeted legal action impossible.

Legislation is needed to require ISPs to notify subscribers that they appear to be engaged in unlawful activity so that they can alter their behaviour. It is also needed to help rights holders to take targeted action about the most serious infringers.

(iii) Risk assessment

Some 6.5m in the UK are estimated to engage in unlawful file-sharing. It impacts on a number of creative industry sectors which collectively account for around 6.4% of UK gross value added.

3. Options

The Government has previously consulted on a range of possible legislative options and examined the consequences of “do nothing”. The current proposal is based on the responses to that consultation and assumes that notifications allied with legal action (or the threat of) against the most frequent infringers should reduce file-sharing by around 70%.

However the legislation will need to be accompanied by a Code of Practice to set out agreed standards and procedures relating to the notification process. These will include consumer protection, standards of evidence, format of notification etc. We anticipate these will be developed by industry and other stakeholders and will require Ofcom approval.

The main risk associated with this proposal is that the legislation will not achieve a lasting reduction of file-sharing of the amount anticipated.

4. Benefits

Industry estimates suggest that unlawful file-sharing costs a conservative £250m per annum to those sectors currently most affected (music, films and TV). However the problem is growing and other sectors are also becoming affected, notably games and software.

Achieving a 70% reduction would reduce losses by around £175m pa. Industry research suggests that about 70% of those currently file-sharing would switch to a legal, paid for content source if the chance of detection was higher. Any significant shift to paid-for content would produce additional revenue and increased VAT revenue.

Business sectors affected

The whole creative economy relies on copyright and copyright protection. This accounts for 6.4% of GVA. The main sectors are music, film, TV although software, publishing and games are also affected. Firms range from the very large to SMEs and sole traders.

ISPs would be directly affected, including the mobile operators. Again some are very large corporations by numerically most have a t/o of less than £500,000. The big six dominate the market with over 95% market share. In terms of overall size the communications sector is similar to that of the creative economy.

Issues of equity and fairness

Most of the costs (losses) fall to the music, film and TV sectors. They would be the principle beneficiaries of the measure. ISPs would incur most of the costs of the legislation. Cost sharing would therefore be one of the main issues that the Code would need to address, including the extent to which such costs might be passed on to consumers.

5. Costs

(i) Compliance costs

Evidence from the earlier consultation produced a wide range of figures. However it appears that a cost per letter (notification) would be of the order £3-£10.

A key variable is the overall volume of letters. The industry MOU set a target of reducing file-sharing by 70% in 2-3 years. Taking the 6.5m population this would require some 500,000 letters from each of the six major ISPs (which cover around 95% of the market) per year.

£3/letter gives a per annum cost for the ISPs of c£9m

£10/letter gives a per annum cost for the ISPs of c£30m

(ii) Other costs

Rights holders bear the cost of identifying infringers. Again this is highly dependent on the volume. Currently we do not have these costs.

ISPs would also incur capital costs. However it is not clear from the responses whether these have been factored in to the “per letter” cost. Some ISPs have also said they will incur costs in training call centre staff to respond to enquiries relating to notification letters.

6. Consultation with small business: the Small Firms' Impact Test

We will need to investigate whether the legislation would have a disproportionate impact on the smaller ISPs. It might be possible to introduce a “de minimus” level below which the regulation would not bite.

Many rights holders are SMEs and any switch to legal content sources would result in increased SME revenue.

7. Competition Assessment

At this stage the legislation does not appear to raise significant competition issues. The six major ISPs account for 95% of the market, and would all be equally affected (as would any other major player).

8. Enforcement and sanctions

How will the proposal be enforced?

Any ISP failing to discharge their obligation would be subject to civil action by the rights holders.

Will the legislation impose criminal sanctions for non-compliance? If so, on what scale? Is the Lord Chancellor's Department content (it is their job to manage the courts)?

The legislation could reduce the level of court action as it would allow rights holders only to target the most frequent or serious infringers. At present rights holders are unable to take such selective action.

9. Monitoring and review

How is the effectiveness of the legislation to be measured and when?

The Code will establish baseline figures against which the effectiveness will be measured. Given the fast-changing nature of technology we intend to build in review dates in the legislation, along with sunset clauses to make sure that the legislation remains relevant and effective.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes/No	Yes/No
Small Firms Impact Test	Yes/No	Yes/No
Legal Aid	Yes/No	Yes/No
Sustainable Development	Yes/No	Yes/No
Carbon Assessment	Yes/No	Yes/No
Other Environment	Yes/No	Yes/No
Health Impact Assessment	Yes/No	Yes/No
Race Equality	Yes/No	Yes/No
Disability Equality	Yes/No	Yes/No
Gender Equality	Yes/No	Yes/No
Human Rights	Yes/No	Yes/No
Rural Proofing	Yes/No	Yes/No

Annexes