



Peer-to-Peer (P2P) File-Sharing

Department for Business, Innovation and Skills

Consultation Document

Copyright infringement and the Digital Economy

1. Copyright infringement is wrong and it makes sense for those parties affected to want to curtail it. The particular nature of online infringement via peer-to-peer (P2P) file-sharing, has led to demands from certain rights holders for ISPs to help reduce the extent of such illicit activity. A highly public debate between the respective industries involved, consumer groups, academics, regulators and politicians has taken place in many countries over several years on the impact of illicit file-sharing and potential means of reducing it. No agreed consensus has emerged and Governments in these countries have adopted very different positions. In the UK this has most recently resulted in the two-stage plan under Digital Britain published on 16 June, which was itself amended significantly on 25 August – to reduce the role for Ofcom, to introduce account suspension as a potential remedy and to put cost apportionment on the face of the Bill. This is BT's response to these plans.
2. We support the Government's ambition to create a fully-digital Britain in which every citizen has the opportunity and ability to enjoy the benefits of being online. A digital economy in which consumers have a competitive choice in how they connect, in what services they receive and how they access content, will need innovation and investment across the global communications and content industries. Copyright rules and the consequences of infringement need to be explained in ways digital consumers can understand to enable them to be better respected, such that we can all move on from the current fractious arguments.
3. The key question is how to achieve this vision. Unfortunately, the simple fact is that arriving at a consensus on which all can agree has been impossible so far. This is partly because interests are not the same across the relevant industries, or even aligned within individual content or technology industries. Moreover there are significant consumer rights issues at stake here, and potential ramifications for industries reliant on the internet for their operations.
4. Any approach must be just and fair to consumers. No consumer should be affected by any measures unintentionally and individuals are entitled to know the information on which any allegations are based, to reassurance that actions against them are not based on presumptions of guilt and to unbiased hearings throughout.
5. Having previously expressed a preference for a voluntary industry approach, the UK Government appears to have decided in favour of legislation – at the same time as the EU Commission is viewing legislative approaches with increasing caution. Moreover the UK Government's stance seems to have shifted significantly from persuasion to coercion in relation to consumer behaviour.

BT supports some Government proposals

6. Although the true extent of illicit file-sharing and its overall economic impact on the content industries is not completely transparent or independently verified, the sheer heat of the policy debate appears to have led the Government to the view that some form of legislative intervention is worth trying. If so, it should be transitory. To this end, Stage 1 of the Government's plan – if it delivers a mix of notifications, targeted legal action, education campaigns, new content access services and providing consumers' interests in the round can be assured – seems broadly sensible.
7. BT has already demonstrated its commitment to this multi-faceted approach, by being a signatory to the Memorandum of Understanding (MoU) between several industry players and Government departments in July 2008 to try out different approaches to the issue. This principally resulted in some 12,000 notifications being sent to BT broadband customers over three months (and many thousands more to the other signatory ISPs' customers, all based on information supplied by music labels) explaining that their account may have been used to share copyrighted music without permission and what steps they could take to prevent this in future. BT received a

range of feedback from subscribers to these notifications, with several saying they were pleased to be informed and would take some action, whilst others said they had no knowledge of the incident identified or queried how this data was obtained. It was intended that the MoU would also result in a major public education initiative about copyright and its infringement, moves to enable new business models and analysis of the potential ways to deal with repeat infringers. BT expected to see rights-holder led innovation and progression on the first two aspects but this was not forthcoming and a shift of direction by the Government in early 2009 curtailed the MoU discussions.

Some elements of the Government's plans need rethinking

8. The second stage of the plan is, however, misguided in two main ways. First it seems set to undermine consumers' rights to due process before a sanction is applied. It flies in face of due process, including under copyright law, and would institute a regime in which an alleged infringer could face punishment or redress without any kind of judicial scrutiny. Second it seems to rest on a false expectation that technical measures are bound to succeed. Some approaches such as capping a subscriber's broadband speed or suspending an account entirely, which limit or stop all traffic could result in limiting illicit file-sharing. However, no measure will target infringement specifically without fettering the ability of consumers and their households to use legitimate content and services.
9. If implemented as currently planned, Stage 2 would be likely to result in millions of aggrieved broadband consumers facing rising costs and a poorer internet experience, heavy costs for ISPs resulting from otherwise unnecessary network interventions, continuing unseen infringement taking place in encrypted environments and consequently little improvement in rights holder revenues and in building more constructive relations with consumers. These measures would also have significant unintended consequences for commercial, public and Government activities reliant on broadband networks.
10. We are especially concerned that the changes proposed on 25 August look set to undermine the whole framework, including Stage 1. Put simply, they will remove incentives from rights holders to act in good faith during Stage 1 since they will focus instead on forcing the Secretary of State's hand to move swiftly on to Stage 2. Ministers' stated intention to enable a more rapid move to Stage 2 will particularly reinforce this tendency. Without good faith and determined efforts of the rights holders to try to make Stage 1 work – through a combination of authentic notifications, determined legal action against repeat infringements, general education initiatives and new business models – there will be little incentive for ISPs to co-operate either. A vicious circle of mistrust between those involved will surely result, with deleterious consequences for all the industries involved, let alone consumers. We therefore urge the Government to reconsider Stage 2 of its original 16 June plan and all three of the 25 August proposals.

BT's preferred approach

11. Experience of the MoU, a commitment to see the interests of all our consumers protected (both those accused of infringement and the great majority who are not) and BT's expert knowledge of broadband network technology lead us to make the following specific recommendations to Government:-
 - i. Implement a mandatory notifications regime applicable to all UK ISPs and accessible for all holders of UK copyright who comply with a Code of Practice. It should be overseen jointly by the ICO (Information Commissioner's Office) and Ofcom (since both regulators have expertise and legitimacy here) with the involvement of the IPO (Intellectual Property Office), to ensure that a fractured and inconsistent approach to copyright is not established.

- ii. The regime should include provision for time and volume caps on notifications and agreements on activity levels in advance so that rights holders and ISPs can act efficiently. Widespread publicity about the introduction of a notifications process and its interaction with legal action by rights holders (and eventually the demonstrative effect of high-profile court cases), the implementation of new business models and compelling education initiatives (for example about the potential exposure to viruses and other malware) stand the best chance of changing attitudes and behaviour among the relevant users.
- iii. Rights holders should bear the full costs of Stage 1 – for matching their data with ISP activity logs, for issuing notifications and for ISPs’ dedicated contact handling services – for three main reasons: it fits with the established ‘beneficiary-pays’ practice elsewhere in this and other industries; it ensures the majority of customers, who will never face such accusations, do not face broadband price increases; and it will ensure that rights holders face an economic level playing field in determining the balance of resources expended on different approaches to reducing infringement. Put simply, if an ISP-subsidised route to limiting such activity is created, then it is disproportionately attractive to rights holders to adopt it compared with developing new business models or broad education initiatives. This surely cannot be the Government’s intention, since it must recognise that persuasion and working with the grain of social and technology developments is always preferable to coercion in changing public behaviour.
- iv. All Stage 1 activities need to be given reasonable time to be developed, bed in and take effect. All stakeholders deserve to be assured of a timeframe that the Government commits to before asking Ofcom to undertake a thorough review. Twelve months after implementation should be the minimum for this to ensure good faith dealing. Ofcom should be the principal adviser to Government on developments including the impact of the notifications/legal action stream of activity, general education campaigns and new business models.
- v. If the Government is determined that transition beyond Stage 1 should be a decision for the Secretary of State, a central role for Ofcom should help to ensure that decision is independently informed, evidence-based and proportionate – though it cannot guarantee these.
- vi. The legislation should include a firm sunset provision to enable the cessation of mandatory arrangements altogether if they do not achieve the intended purpose, have serious unintended consequences or their effect is an unacceptable distortion of the market.
- vii. If the Government, with Ofcom advice, decides to require ISPs to apply specific technical interventions against their customers accused of infringement, it must ensure that the accused consumer has access to due process in order to make their case before a court or appropriate legal tribunal both on the substance of the allegation and the proportionality of different remedies. The introduction of account suspension to the list of available remedies (even if seen only as a ‘last resort’ by Government), makes the need for due process even greater given the very significant resulting loss to a household. Every ISP expected to apply these remedies will understandably want the assurance of a judicial decision in order to deal with challenges that their consumers may raise if required to apply them.
- viii. Broadband consumers should also be protected from price rises to pay for technical measures designed to benefit the rights industry. To this end ISPs should be able to recoup the cost of technical measures from rights holders directly.