



**BT's responses to questions in
Peer-to-Peer (P2P) File-Sharing consultation
document of 16 June 2009
and
Government Statement of 25 August 2009**

Introduction

This document contains comments from BT on the broad issues arising from the 16 June Consultation Document (condoc) and the Government's Statement of 25 August (Government Statement), and answers the specific questions set out in the condoc.

It should be read in conjunction with BT's formal response of 29 September 2009 to the condoc and Government Statement.

Section 4 - The Proposed Obligations

General comments on notification obligation: paras 4.9 – 4.11

Notification – function and context

1. The focus of communications with customers about allegations made to BT and other ISPs relating to copyright infringement should be on information and education, i.e. to let customers know that an allegation exists and that they may be able to take steps to address it. It may help rights holders to exercise their own judgement on which potential infringements to pursue through recourse to their own legal rights. It must not, however, be an alternative to action by rights holders to enforce their legal rights.
2. Subjecting ISPs alone, however, to new regulatory requirements puts an unjust burden on ISPs to "solve" the issue of illicit P2P file-sharing for the benefit of others. If new regulation is to be introduced on ISPs it should be matched by intervention to require tangible action from rights holders to develop and introduce new education and awareness material, to speed-up and unlock licensing of content for new services and to provide certainty on issues which currently cloud users' understanding of their and rights holders' positions. The MoU, DBR and analysis in the EU all consistently point to the need for action on all these fronts simultaneously in order to change behaviour.

Clarity required

3. The descriptions of notifications differ between paragraphs 4.2 and 4.12 so that it is not clear what obligation would arise:
 - paragraph 4.2 refers to notifications being made by ISPs to alleged *infringers* and 4.12 to *account holders*. An ISP would only be able to address a notification to the account holder registered at the relevant time against the IP address provided by the rights holder. The account holder will not necessarily be the person engaged in alleged illicit conduct.
 - paragraph 4.2 sets out that ISPs would be required to inform alleged infringers that their conduct is unlawful but 4.12 that ISPs would set out the details of the alleged infringement. The information provided by rights holders can only amount to an allegation of unlawful conduct by the rights holder. ISPs should not be put in the position of appearing to be making the allegation and asserting unlawfulness in the notifications they make.

Nature of Regulation

4. The proposed obligation will not fulfil any business requirement of ISPs or confer any benefits on ISPs' customers and users, but is purely for the benefit of rights holders. This is a novel approach to regulation of providers and users of communications services and for Ofcom as a regulator. Legislation will need to make clear how this novel regulation will sit alongside Ofcom's other duties and the regulatory requirements it places on ISPs.

Question 1:

Is this restriction right? Is there anyone else who ought to have a right to trigger the obligation?

5. Restricting the right to holders of the UK copyright suspected of being infringed and to those who the Court would recognise as properly authorised to act on their behalf in asserting their copyright is appropriate. Care is needed to ensure that the system does not create potential harm to consumers through exploitation by others as a vehicle for perpetrating scams, phishing, harassment or other undesirable activities.
6. An alternative model is for an independent body to receive and evaluate requests and trigger notifications to consumers.

Question 2:

Should there be a time limit from the date of a specific infringement by which a request needs to be made? If so, what should it be?

7. A time limit is necessary for the system to be practical and fair and not become overloaded.
8. It will serve no useful purpose for rights holders and ISPs to deal with notifications for which ISPs no longer hold the relevant IP address data for business purposes and generate only additional and wasted costs for both.
9. We would welcome confirmation that there is no intention for regulation to apply to infringements which:
 - pre-date common commencement;
 - pre-date the coming into operation of ISPs' systems to handle notifications; and
 - extend the scope of regulation to infringements beyond UK copyrights.
10. We comment below that volume limits in legislation are essential and the reasons why. Our comments apply with equal force to the issue of time-limits.
11. Unless legislation includes obligations on rights holders to exercise prioritisation and restraint in the notifications they make to ISPs, its impact on consumers will be disproportionate and the proposal unworkable.

Question 3:

Is this list right? Is there anything else that should be specifically added to this list? Should there be any more detail on any of these points in the legislation, or is it OK to leave that for the code?

12. We agree with the inclusion of the first two bullets of the list as being appropriate for ISPs to send to customers, to accompany details of the alleged infringement that they forward from rights holders. It is not clear that it is appropriate for ISPs to be **required** to provide information on legitimate content and why copyright is important.
13. Notifications should not be used as a marketing vehicle for rights holders that confers competitive advantage on those who participate in the notifications regime. We are also concerned that rights holders may use the term "legitimate content" narrowly or couch information in terms that may alienate recipients.

14. However, if requirements are introduced requiring notifications to provide information about legitimate content or about copyright and why it is important, then they should only refer to neutral sources, e.g. material produced by the Intellectual Property Office, or in conjunction with consumer/education groups.

Question 4:

Does this need to be set out in any more detail in the legislation, or is it sufficient to require it to be set out in the code?

15. The consequences for consumers either in receiving such notifications or having technical measures taken against them potentially up to suspension of their service, flow from the information gathered by rights holders. This information, in the form of a list of IP addresses that have been harvested from P2P networks using a variety of methods and software, is currently untested as evidence of copyright infringement. Whether the subscriber is liable for the actions of those who use the connection is similarly untested. It is, therefore, important that the use of this information in establishing an infringement (either civil or criminal) is reflected in any resulting legislation and that such use is compliant with data protection rules.
16. The proposal that the threshold for evaluation of the rights holders' notifications should equate to the civil law one of "on the balance of probabilities" an infringement has taken place may be acceptable for targeted information and education, and for alleged infringements under civil law. Such a standard is entirely inappropriate for allegations of criminal activity where the standard is "beyond all reasonable doubt" and it is questionable whether the civil law standard should be enough to impose penalties in the form of technical measures that potentially impact on many other people in addition to the alleged infringer.
17. Any sanctions imposed must be as a result of judicial oversight to ensure the appropriate standard of proof has been established for the offence committed and the corresponding penalty imposed. Such sanctions or penalties, including suspension of a connection, could result in a serious hindrance to the day-to-day lives, financial loss, social and educational exclusion for both the infringer and, perhaps more importantly, to other users of the same connection.
18. It would not be appropriate for ISPs to play a role in determining whether the evidence would satisfy a particular burden of proof and it would be manifestly unjust to simply leave this to rights holders. Moreover, Ofcom would not have either the expertise or the necessary judicial role to achieve this.
19. Consumers affected by such notifications would need a fair and just right to reply and appeal against receiving such notifications and their names being included in any list of repeat or serious infringers, especially if this results in legal action being taken against them. Such an appeals process would need to be properly funded, easy to use and swift in dealing with consumers who believe they have been unfairly or wrongly targeted and identified. Consideration needs to be given to how this process for assessment of the "evidence" for notification and for identifying repeat "infringers" fits in with any resulting judicial process where an alleged infringer is subsequently sued or prosecuted.

Question 5:

This obligation is specified without any volume limit. Is that right? Should there be a restriction on how many notices a rights holder can serve, or that an ISP needs to honour (either from a specific rights holder or in total)?

Question 6:

Alternatively should volumes be agreed (say) 6 months in advance between rights holders, ISPs and Ofcom to allow ISPs to prepare accordingly?

20. The regulatory burden (operation and compliance) created for ISPs will be unmanageable if the obligation is open-ended. Limits on volume and prior agreement on actual volumes are needed:
 - to enable ISPs to manage fulfilment of the obligations placed on them; and
 - to provide a mechanism to avoid rights holders' using the system to create unacceptable burdens (resource and costs) on ISPs.
21. It would be unacceptable to create obligations on ISPs such that dealing with notices from rights holders might prevent or cause prejudice to their business operations for customers, and services such as they provide to law enforcement agencies.
22. The requirements must be realistic and recognise that ISPs cannot operate on the basis of providing a 24hour/365 days a year/guaranteed no-fall-over system of infinitely expandable scale. They can only operate on the basis of reasonable endeavours to handle particular volumes of notifications.
23. Although rights holders may present a number of cases for an ISP to deal with, technical restrictions mean that there is no guarantee that the ISP will be able to identify the account holder in every case. For large volumes it is likely that a significant number of account holders will remain unidentified.
24. The only practical way to implement the obligation would be to provide for transition periods to phase in the number of rights holders who can make use of the process. Scoping a system to handle every potential rights holder who might wish to make use of the process from day one, will involve complexity, additional and, or irrecoverable costs and build in delay.

Question 7:

Is this approach to costs the right one? Is there anything else in relation to costs that should be taken into account in the legislation? Should the legislation specify exactly how costs are to be shared or is it right to leave some flexibility in how the legislative requirements are reflected to the code?

ISP costs

25. The approach to ISPs' costs is illogical and untenable. Copyright exploitation and its enforcement are the basis of rights holders' business models. It necessarily involves judgement calls about the cost and benefit of particular activities. Every rights holder has to decide what resources they will use to combat infringement of their rights in comparison with developing new ways to exploit their rights. All the costs incurred (capital, marginal and opportunity costs) constitute the costs of carrying out their business, and have to be weighed against the benefits which they expect to accrue.

There is no basis for transferring any such costs on to ISPs or any other intermediary unless as part of a business relationship.

26. Communications providers who provide internet access are in a different business. Internet access enables users to reach and utilise an enormous range of services and applications which are created, largely, by others. The Internet and internet access do not exist as dedicated channels for distribution of copyright works on behalf of rights holders. ISPs do not have the right or responsibility to determine the content of the communications that users of their systems choose to make and the resultant websites and applications with which they choose to interact. ISPs have confidentiality and data protection and privacy obligations towards users of their systems and the content carried on them. ISPs are an “innocent third party” who do not commit copyright infringements by conveying communications which may be in breach of copyright when they provide internet access.
27. The Government’s proposals would create costs (investment, ongoing, opportunity, legal) which are purely for the benefit of rights holders and are capable of damaging ISPs’ relationships with customers and with other large and small organisations who rely on the internet for their activities. There is, therefore, no basis for proposing that ISPs should bear any such costs. To do otherwise would amount to Government dictat that one private industry should subsidise another.
28. The consultation does not provide any reasons to depart from sound economic (cost causation and cost benefit) and policy principles by adopting a cost “apportionment” model in this case. This is in stark contrast to the funding model adopted by Government where communications providers are required to assist public law enforcement authorities. In these cases, e.g. under RIPA and more recently for data retention, the principle applied is to provide reasonable cost recovery of all costs to communications providers for performing requirements that are additional to their business activities.
29. This “beneficiary pays” model is highly successful in providing effective incentives for the party creating costs to be realistic and reasonable in their demands, so as to secure cost-effectiveness and timely progress. This is a particularly significant factor in this case since the lack of speedy progress to reach a mutually acceptable position voluntarily has been because rights holders’ have pursued demands that any burdens and risks created for ISPs to intervene for their benefit is proportionate and that ISPs should bear all costs of doing so.
30. Currently, when discussing a potential content deal with a rights holder, an ISP may consider introducing something to tackle infringement because it can recover the costs of doing so on a commercial basis from the other party. Regulation and the cost apportionment model eliminates any such commercial opportunity.

Ofcom costs

31. Cost sharing would be appropriate in respect of the work undertaken by Ofcom on the Code of Practice and on evidence gathering and analysis to assist the Secretary of State’s key decisions in this area. As with the MoU, BT can see that Ofcom’s independence would be more assured if its costs were borne collectively by all the companies covered by or signed up to the Code of Practice.
32. The exact allocation of costs among differently sized ISPs and rights holders would require further examination. There is every likelihood that a significant element of Ofcom’s costs may arise from the need to deal with consumers’ issues about substantiation of allegations made and escalation of warning letters, i.e. matters which originate with rights holders and which ISPs will not be in a position to handle. If this is the case, cost apportionment should reflect that (applying standard cost

causation principles) and the regime needs to have a mechanism to adjust apportionment accordingly.

Serious Infringer Obligation: paragraphs 4.19 – 4.21

Question 8:

Do you see any legal difficulty with linking a new notification with a previously gathered set of anonymised data in this way? If so, what specifically is likely to be the problem?

Use of the “serious infringer” term

33. The proposed serious infringer obligation will not function appropriately if Government, Ofcom, users, ISPs and rights holders do not use and apply the term “serious infringer” in the same way. The proposal does not make clear what the meaning and attributes of a “serious infringer” are intended to be. For example, whether it will depend on the number of different files involved, recurring notices for the same files, their perceived commercial value, if the “serial uploaders” targeted by the recorded music industry in its UK litigation campaign will be a threshold. The fact that an IP address has been the subject of more than one notification will not equate to “serious infringement” but only to being the subject of “serial allegations”.
34. A too-ready application of the “infringer” term carries concerns that the regime proceeds on assumptions of wrongdoing and does not respect due process and natural justice for those accused.

Linking notifications with anonymised data

35. The data is not anonymised in the hands of the ISP and relates to an account-holder’s IP address, and this person may or may not be the infringing person on one or more occasions. The process must be designed to address this. It will be flawed if it inaccurately labels an account-holder as a serious infringer as a matter of course – fairness, due process and proportionality to the account-holder will not be satisfied.
36. Linking accounts to IP addresses and time stamp is not fault free. The technical design of the system, potential pattern of use by customers and the reliance on the link between a time stamp and an IP address may well point to a particular account holder, but it will be impossible to guarantee that this identification is 100% accurate.
37. The systematic collation of such data probably amounts to some form of monitoring of the customers affected. It will be important for ISPs and customers to have clarity and guidance from the ICO on the following:
- what constitutes fair and lawful processing by an ISP to maintain notification data. – duration, purpose, what can be disclosed to a rights holder or to anyone else
 - whether the data processing involved with linking a new notification with previously gathered data, e.g. creation of databases, data matching and data retention, constitutes “monitoring”
 - how any data protection risks created can be minimised
 - is IP address data always anonymous in the hands of a rights holder
 - are rights holders undertaking fair and lawful data processing
 - how to handle potentially sensitive data, such as sexual material
 - the extent to which grouping requirements is acceptable, e.g. mix-and-match between different companies in one industry sector for the purpose of labelling an IP address as serially infringing, as well as the potential mix-and-match between different industry sectors.

38. Furthermore, ISPs will want direct approval from the ICO as a condition of the Code of Practice that a rights holder's data processing to identify suspected infringers is data protection compliant. If a rights holder's processes are put in doubt by the ICO, ISPs should be able to cease handling cases for that right holder until and unless ICO clearance is provided. An ISP should be able to recover costs from rights holders if it is subject to legal challenge on data protection and for handling customer queries on data protection aspects of the regime.
39. The purpose of the obligation will not be met unless rights holders pursue their legal rights (including disclosure orders) using the information in the "serious infringer" list. The period for retaining such information must be time-limited and any obligation on ISPs to process data lapse where rights holders do not use the data for the intended purpose or do not commit to do so under the Code.
40. Equally, it will be important that rights holders only use information for the intended purpose and do not share information about the specific business of individual ISPs gleaned as a result of this process. Competition policy concerns could arise if this occurs.

Question 9:

There is some evidence (research and empirical) that further warning letters result in a further reduction in people file-sharing. Do you think multiple letters should be sent (up to a maximum of (say) three) and, if so, what should trigger these? (for example, should this be on a strict, one infringement one letter basis or should there be specified levels (e.g. 1st letter on 1st infringement, second letter on 10th, third on 20th)

For clarity we would anticipate that multiple letters would escalate in tone.

Please note the Impact Assessment includes the assumption that multiple letters are sent to persisting infringers. Costs in the IA have been calculated under the assumption that a single letter is sent to 70% of infringers and 10 letters are sent to the remaining 30% over a period of 10 years.

41. It would be inappropriate to categorise anyone as a "serious infringer" on the basis of a single warning or in relation to a small number of files. So a system for more than one warning letter is needed. The number and trigger will need to be determined such that it produces fairness and proportionality, taking into account factors such as robustness of a rights holders' identification system, e.g. accuracy, proportion of false positives, and challenges that may be made to notices issued. An arbitrary figure is unlikely to achieve that.
42. BT does not see any notifications it makes to its customers as a pre-cursor to a graduated response/ "3 strikes and out" or technical measures regime to discipline customers. A 'multiple-letter' formulation (and a three-stage one in particular) fosters the perception that the regime is designed to do just that and, therefore, perpetuates the notion that that is the ultimate objective of the notification regime. We have the same concern about the proposal anticipating that multiple letters would escalate in tone.
43. Safeguards will be needed to protect the position of a recipient wishing to question the validity or accuracy of allegations, to prevent further notifications building up whilst queries are unresolved. A mechanism to suppress/remove invalid and properly challenged notices from the tally of notifications triggering characterisation as a "serious infringer" will also be needed. It would be useful to get Ofcom's and the Ministry of Justice's views on how this can be achieved.

44. In addition, the impact assessment suggests that information on alleged infringers might build up over 10 years (“remaining 30% over a period of 10 years”) but we believe that this is far too long a time period to retain such information on customers. It exceeds the limitation periods for bringing most civil actions and goes beyond the time limits set for many spent criminal convictions.
45. Under the MoU trial, ISPs were the ultimate arbiters of the tone and content of the notifications sent to their customers. Under the regime proposed, it seems that this will not be the case and it is anticipated that multiple letters would escalate in tone. Notifications must not cause unnecessary distress to consumers and damage to customers’ relationships with their ISPs under this regime. To this end we propose that:
- consumers do not perceive that ISPs themselves are making or adopting infringement allegations;
 - consumers are clear that escalations in tone of the remedies that rights holders may seek to pursue against them emanate from rights holders and not from ISPs;
 - escalations in tone are justified and reasonable;
 - no threats of disconnection, suspension and imposition of technical measures are conveyed.

Question 10:

Do you agree to the approach on costs set out here? Are there any additional factors that we should take into consideration here?

46. As with question 7, the proposed approach to costs is unjustifiable – paragraph 4.22 says that because Government is creating responsibilities on ISPs that creates a reason for ISPs to bear such costs. Since such responsibilities have been created to facilitate rights holders’ enforcing their legal rights, there is no justification for costs arising to be borne by anyone other than the rights holders.
47. We reject the characterisation that ISPs’ businesses have a shared and equal responsibility to assist rights holders to exploit their business assets by means of enforcement actions. Consequently, we reject the proposal in the Government Statement that it is appropriate to legislate for a 50:50 split of costs. Transferring costs which should properly be borne by rights holders onto ISPs’ customers is not acceptable.
48. Placing these costs on ISPs will increase the costs of broadband provision for all customers. This will impact those who are not engaging in P2P copyright infringement and so detracts from the Digital Britain objective to increase digital inclusion, especially as some of those currently not taking up internet access will be in age and social groups which would be unlikely to utilise P2P applications.

Ofcom power to impose other obligations

Question 11:

Do you agree with the list of further measures that could be imposed and the conditions to which their application must satisfy?

BT’s overall view

49. As indicated in BT’s response to the Government’s July 2008 P2P consultation, BT does not support technical measures as a fruitful route to explore. The core

proposition, to require ISPs to control the content of the communications that their networks carry, is fundamentally unsound.

50. BT's networks exist to support a very wide range of online communications services and applications and it is wholly inappropriate to distort that provision for the purpose of benefiting one set of economic actors – the paid-for content sector. Nothing has come to light since that consultation to suggest these measures would be proportionate or effective in tackling copyright infringement online.
51. BT's views accord with those from the overwhelming majority of respondents to the July 2008 P2P consultation – namely that technical measures would be ineffective, arbitrary and expensive. The only positive responses came from content providers who seek such measures and the vendors of claimed technical solutions who wish to profit from a mandated technical solution. The Government itself has acknowledged widespread consumer and citizen resistance on privacy and network utility grounds.
52. A range of potential technical measures were discussed under the MoU between ISPs and rights holders (with Government officials in attendance) and there was no agreement between the parties on the workability or effectiveness of particular measures. It was disappointing, therefore, that the same list of technical measures appeared in the condoc. We do not agree with the list of further measures, that it is appropriate to contemplate their imposition, or with providing a ready-made route in legislation to invoke them. The latter implies that their deployment is indeed tenable and appropriate.

25 August statement

53. The proposal in the Government Statement to enable a more rapid move to technical measures will create incentives for rights holder **not** to prioritise, innovate and invest in building more appealing new offerings and education or to make a notification regime work. There will be no commercial imperative to do anything other than engage in even more persistent lobbying to enable transition to Stage two measures.
54. It is essential, prior to the introduction of any such obligations on ISPs, that rights holders grasp the nettle of significantly adapting their business practices (licensing, release windows, approaches to DRM and technical measures they can deploy) and approach to consumers to exploit the opportunities for growth that new technologies offer.
55. We do not consider that the significant departure proposed in the Government Statement is merited to address the issues at stake. Its exercise would be accompanied by the same concerns that the Government Statement itself has provoked, i.e. about fairness, transparency and integrity of the consultation process initiated on 16 June. Government policy seems to have been swayed specifically in support of rights holders' interests ahead of the receipt and considered evaluation of inputs from other interested stakeholders.
56. Proposals for policy-making made "on the hoof" mid-consultation are unwelcome. To go further and embed into legislation a regime to actively facilitate law-making on the same basis is positively harmful. Lack of scrutiny, haste and decision-making in which the role of objective evidence gathering and evaluation is diminished leads to bad decisions. Policy makers are unlikely to command public respect and will be distrusted and this could translate into a groundswell of users actively prepared to evade controls introduced through such decisions.
57. Creating a permanent, overhanging threat of more requirements on ISPs which can be activated on a discretionary basis at any time is unnecessary and

disproportionate. Moreover it will indicate to rights holders the value of pressing their case ever further to relocate responsibilities and costs from their businesses onto the communications industry. The extra degree of Government intervention would exacerbate the market distorting effects of the condoc proposals on normal competitive conditions for commercial dealing between rights holders and ISPs.

58. This proposal raises far-reaching policy implications about the interference of the State (directly and via regulation through public authorities) in the operation and development of the internet and communication services with consequent far-reaching implications for citizens generally as well as for ISPs and their customers specifically. The failure to agree the EU Communications Package this summer, which has revolved around concerns about measures to restrict internet access such as proposed here, indicates their significance and it is clear that such concerns are growing over time.
59. This option should not be pursued without a separate and full public consultation taking place and, if still considered appropriate, new primary legislation. If it were to be pursued as secondary legislation, it should be on the basis of affirmative resolution by both Houses of Parliament.

Role for Ofcom

60. We support the principle of an objective, evidence-based body such as Ofcom which has duties towards consumers and citizens being involved in assessing developments. However, placing the communications regulator Ofcom in the position of instructing ISPs on how to run their networks and services for a new purpose sits uncomfortably alongside its existing duties relating to promotion of the UK communications market and protection of consumers' and citizens' interests. It is not clear that the issue at stake justifies creating this distortion.
61. The independence of the national regulator from Government is a solid principle of the EU Communications Directives and underpins the majority of Ofcom's duties in respect of electronic communications services. The proposal in the Government Statement to direct Ofcom to act to introduce technical measures does not follow that principle. Situations will arise when Ofcom may be required to act in a way that engages both its independent regulator as well as its non-independent, "under direction of Government" role. Clarity will be needed on how any conflicts and inconsistencies resulting from that interaction will be resolved and the resulting consequences for ISPs, for consumers and citizens.

Costs and efficacy of technical measures

62. There are many claims and counter-claims about the potential deployment of "technical measures". Broadly, BT's assessment is that such measures would be disproportionate and ineffective.
63. There is a significant range of technical measures proposed in the condoc and Government Statement. None of the measures proposed will provide a guarantee of success against infringing traffic, and all have material drawbacks associated with them, especially used in volume. Some proposed measures are completely untried and the claimed performance is speculative. The July 2008 P2P consultation failed to identify any technical measure which had a high chance of success of tackling all infringing traffic and many had significant collateral effects against either non-infringing traffic or non-infringing customers.
64. The main issues are ease of circumvention, disruption to innocent as well as infringing traffic, effects on non-infringing customers, degrading network efficiency, raised fault and unreliability profiles and cost. It is also difficult to be able to measure the effectiveness of technical measures.

65. In addition, attempting to monitor all traffic in order to identify some illicit traffic is fraught with technical and service quality issues, including:
- positively identifying illicit content via bulk traffic monitoring is not practical;
 - users today are mobile in nature, moving from network to network, fixed line to mobile and back again. It is very difficult to positively identify a person; and
 - for each measure an ISP takes, there are armies of programmers willing to create a countermeasure. The vast majority of users of P2P techniques are not technical users and these countermeasures are quickly disseminated to non-technical end-users through automatic updates. .
66. It is not practical to attempt to eliminate encryption techniques as customers have a clear and legitimate need to privacy for transactions they perform online. Any of the legitimate techniques employed could be used to hide illicit uses.
67. If technical measures were pursued, it would also create a variety of legal challenges and risks for ISPs, in particular in relation to interception and privacy and the curtailment of services affecting its own customers and those communicating with them.

Account suspension

68. Rights holders appear to believe that direct action by ISPs to prevent customers from using the internet is the most desirable and best method of solving their issues with online copyright infringement, on the basis that it neuters any online activity, does not entail rights holders being directly involved in the sanction or the costs and risks associated with applying it.
69. We understand “account suspension” to be a euphemism for functional disconnection. This would be disproportionate and an unwarranted direct interference in the ISP-customer relationship for the benefit of a third party’s business. The impact of the sanction will affect use of any services supported by a customer’s internet connection and affect users who have not engaged in infringing activity. The only circumstances in which such a sanction would be applied should be through the court system.
70. We disagree with the proposal in the Government Statement for including legislation to direct suspension of accounts for the reasons indicated above.

Question 12:

Is 12 months about right to allow a proper assessment of the efficacy of obligations? If not, what would be a better period, taking into account the need to react both expeditiously and on the basis of good evidence?

71. 12 months should be a minimum period for assessment in relation to initial warning notices, not least to provide an incentive for rights holder engagement in Stage 1.
72. It has been the practice of law firms, such as Davenport Lyons and ACS Law, to seek large scale disclosure orders, but our perception is that they are not setting out to target “serious infringers” as such, but to pursue every suspected infringer detected by the identification systems they use. That practice may not be chosen by all rights holders. As far as we are aware, large scale requests are still a new phenomenon and not a commonly established practice.

73. If a large volume of large scale requests are made, then providing names and addresses back to rights holders will take longer than it would do to provide fewer names and addresses. It may, therefore, be outside of a 12 month period that the steps indicated in the last three bullets of the table occur.

Code of practice

Question 13:

Do you agree with this list of things that Ofcom need to satisfy themselves of before approving a code? Is there anything else that Ofcom should be obliged to consider before approving such a code?

Question 14:

Do you agree that a code needs to be in place in time for common commencement? Is it realistic to expect such a code to be developed in less than 12 months, could it be done sooner, and if not what would be a realistic estimate?

74. One of the early decisions taken during the MoU process in 2008 was to schedule the drawing up of a Code of Practice to take place after the working groups (on notifications, education and awareness, new business models and measures for dealing with repeat infringers) had largely completed their activities. The participants agreed that definitive Codes had to be informed by reports from these working groups. The premature curtailment of the MoU in January 2009 meant that, in the event, no work took place to draw up a Code.
75. This learning ought to inform the Government's approach towards what Ofcom must consider in approving a Code and the timing of that approval, especially if the relevant stakeholders cannot agree on its terms and therefore Ofcom itself has to prepare the Code. To this end we recommend that:
- Ofcom should be obliged to complete an assessment of the scale and nature of online copyright infringement in the UK before it approves or prepares a Code. Without this provision, it is hard to see how Ofcom will be able to comply with section 121 of the 2003 Communications Act as set out in para 4.32 of the condoc (particularly points (d) to (g) concerned with proportionality, discrimination, transparency and objective justification). Given the importance of pre-establishing the baseline, we suggest that Government asks Ofcom to complete this work by April 2010 (i.e. outside the current legislation);
 - Ofcom should be obliged to satisfy itself that obligations rest appropriately on both ISPs and rights holders in the Code on issues such as prior dialogue and agreement on the volume of notifications to be remitted by each rights holder to each ISP and the like; and
 - Ofcom should be obliged to consult publicly on the draft Code before approval since consumer confidence will be essential for its success. Ofcom should be required to ensure that the exclusion of consumer interests, which was an unfortunate feature of the MoU process, is not repeated.
76. Provided Ofcom can complete its baseline assessment by April 2010, it is reasonable to require Ofcom to have the Code in place for common commencement.

Question 15:

This list seeks to set out all the requirements of the code to enable the operation of the first two obligations. Does it do so? Is there anything else that the code must cover in order to enable the effective operation of those obligations and if so, what?

77. The assurance given in paragraph 4.33 of the condoc is welcome, but only as a minimum. The assurance should extend to cover **consistency with** and not just **contravention** of all applicable laws – judicial decisions as well as statutes – and to provide explicit assurance of consistency with competition law.
78. The position of an ISP in any regime should be explicitly stated in any resulting legislation, Code or other communications, e.g. notifications:
- that it is an innocent intermediary in its role as a mere conduit for internet provision;
 - that the information it processes to fulfil the notification obligations does not impute that it has any liability for, or any knowledge of, infringing activity.
79. BT has raised a number of issues throughout this response which may also need to be covered by the Code. In respect of point (f) of the list (“serious infringer” obligation) BT’s analysis of data protection issues means that there are challenges to characterising the data which ISPs would process as “anonymous”, irrespective of whether it can be correctly characterised as “anonymous” in the hands of rights holders.

Question 16:

Are there any other restrictions or requirements that should be placed on Ofcom in pursuit of their role in relation to this code?

80. The proposed duty on Ofcom set out in paragraph 4.1 of the condoc “to take steps aimed at reducing online copyright infringement” is entirely new and expressed in very general terms. BT’s response to the Digital Rights Agency strawman in April 2009 outlined how different it is from Ofcom’s current duties which relate to development of a competitive communications market in the UK but has no role to deal with copyright or to regulate online markets or content industries generally¹. A copy of that response is attached at Annex A.
81. In the circumstances, the proposed duty appears to be unjustifiably broad. It would ripple through regulatory distortions into a very wide range of markets beyond the ones which are the immediate subject of the condoc because it will affect all internet usage by consumers, citizens and the organisations that they communicate with online. It is not apparent that these implications have been recognised and addressed in the condoc and regulatory impact assessments.
82. Government should review from this perspective before pressing ahead with legislation of such breadth. The intention for this legislation to cater for every rights holder and every technological eventuality seems too wide a target.
83. In addition, Ofcom’s current role in respect of consumers and citizens is directed wholly towards protection and enhancement of consumers’ and citizens’ interests relating to communications markets. It has no duties to interfere with the use that consumers make of communications systems or the content of those

¹ Its remit for broadcasting derives from its role in administering spectrum and the extension of its regulatory role to “TV-like” Video-on-Demand services because of their similarity to traditional TV services is limited to that, and does not extend to online content generally.

communications, or to discipline and punish them for how they do so, either directly or through the communications providers that it regulates. The proposals cut across this in various ways.

84. Any new legislation and Codes must specifically address how Ofcom will be required to manage and reduce conflicts from arising and how to resolve them if they do so. It is essential to provide transparency and clarity to all concerned and the Hampton Principles and Regulators' Compliance Code are too general to do this.
85. We welcome the recognition in paragraph 4.35 of the condoc that Ofcom's enforcement powers should apply to rights holders and not simply to ISPs. If the vires exists to make rights holders directly subject to Ofcom's powers, then we would also expect the legislation and Code to extend to placing other direct requirements on rights holders relating to education, licensing, verification of allegations and to enforce their rights pursuant to the "serious infringer" regulatory obligations created for this purpose.
86. Clearly, rights holders must compensate ISPs if ISPs incur problems and costs that result from actions they are required to take and are caused by inadequacies for which rights holders are responsible. The mechanism to achieve this needs to be an integral part of the legislation and the Code and not through a separate "indemnification"² route outside of the proposed regime as implied by the last line of paragraph 4.35. ISPs are entitled to have certainty that the costs of dealing with such problems will be directly and promptly recoverable through the operation of the regime. If ISPs were to be forced to institute separate legal steps to do so it would load an unfair cost and resource burden on them and confer unfair benefits on offending rights holders, including insulating such rights holders from the direct consequences of their failures.
87. There is no indication of the basis (the principles and criteria) on which fines will be levied. These must not be based on any principle of compensating rights holders for alleged losses from copyright infringement by users as that would amount to creating a back-door route to enforcing copyright against ISPs outside of the current legal framework provided by copyright and e-commerce laws. There is also no indication of the types of breaches of a Code that would invoke the fining sanction so the reasonableness and proportionality of what is under consideration and the compliance risks being created cannot be assessed.
88. ISPs should not expect to run the risk of fines for issues arising from technical malfunctions, i.e. kit going down. There are bound to be teething troubles in developing and introducing new systems, putting them into operation and their ongoing maintenance as well as with coping with the addition of new rights holders into the system or very large or unexpected volumes of notifications. All such issues may affect ISPs' ability to meet intended time-scales. These matters should not entail the risk of fines.
89. BT would expect cooperation with law enforcement investigations to take precedence over copyright activity. Support for law enforcement – including data disclosure, dealing with Denial of Service, virus or other network attacks, support for life and limb services (such as the Health Service) and core support for critical network operations should always have priority. In these circumstances dealing with either copyright requests or retaining information may have to be temporarily suspended.

² The mechanism for indemnity is unclear. Would each ISP have to enter into separate contracts for indemnity with each rights holder company utilising the regulatory regime? What will be the role of their trade associations in providing and fulfilling indemnity obligations?

90. ISPs need reassurance that they will not risk fines under a Code by applying these priorities.

Question 17:

What are your views on the time line suggested above, and the ways in which it could be reduced? Are there other ways in which this could be shortened without hazarding essential safeguards and the need for decisions to be made on the basis of the best available evidence? Do you think a 6 month review point during the initial assessment period would be useful?

91. We do not know whether the work to build the operations needed to send out notifications on vastly increased scale from the MoU trial, to create and operate a data monitoring and linkage system and to have such systems up-and-running, will be feasible in accordance with the time line set out.
92. Clearly, Codes and cost issues are contentious, and we do not agree that the proposals set out in the Government Statement are an appropriate way to shorten the timeline.
93. A review point during an initial assessment period which is not confined to the notification process but also includes the state of play on education, availability of new services, and consumer reactions might be useful.

Sunset Provision

94. The indicative time line includes provision for a “sunset/review requirement in new Act” set at Zero + 60 months. The Impact Assessment, however, includes indications of requirements over a 10 year period. Either period is very long in terms of regulation of new and dynamic markets. We think an earlier review than Zero + 60 months will be needed in any event.

Role of a self regulatory body

Question 18:

Do you agree that this is an appropriate role and structure for the rights agency?

95. BT, along with many others, largely rejected the Digital Britain Interim Report “straw-man” suggestions for a Digital Rights Agency on the grounds of its purpose, costs, duplication, competition law concerns and the role of the IPO (see Annex A of this response). All these concerns may also apply to the concept in paragraph 4.42, even if is somewhat different from what was proposed previously.
96. The term “self-regulatory body” is inappropriate and inaccurate and confusion remains on whose interests it would represent, in formulating codes or other developments. Although reference is made to a non-specific “industry body”, the relevant paragraphs suggest the overall thrust would be on “rights” and “rights holders” issues.
97. The interests of all consumers (whether accused of infringement or not) must be paramount in any regime and their buy-in is essential to its success. No useful purpose would be achieved by excluding the possibility of their input and engagement from the outset of development of Codes, which paragraph 4.43 seems to suggest would be the case. Good handling of data protection issues engaged by the regime is particularly significant to address fairness and monitoring concerns, so again the ICO should be engaged.

98. If the Government intends to proceed with legislation in which Ofcom would play a central role and would have to approve Codes in any event, it is likely to be more efficient for all if Ofcom were to be involved in Code development at the outset of the new regime, instead of pursuing a 2-stage or parallel Code development process from Day 1.

Impact on Small Businesses

Question 19:

Do you agree that we should proceed with an intention to exempt small businesses? If so, have we chosen the right criteria? Do you have a preferred method of exemption? Please give reasons if you object or if you foresee any unintended consequences not discussed here.

99. Some broadband customers will avoid particular ISPs if they believe they will be at the receiving end of notifications or more serious actions. The competitive nature of the UK broadband market means customers can easily migrate between ISPs.
100. Applying regulatory obligations selectively to ISPs will, therefore, distort competition between ISPs, placing those ISPs who are subject to obligations at a competitive disadvantage compared with those who are exempt. In any event, selectivity will diminish the effectiveness of actions.
101. The underlying issue is whether regulation of *any* UK ISP is proportionate and justified under Better Regulation Principles. We do not consider the Government has made a convincing case that it is and tackling the issue of how the regulatory burdens that it proposes to create could be ameliorated for ISPs other than the “big five” is, therefore, irrelevant.

Question 20:

Do you consider there to be a case for considering any exclusions on other grounds including technical or proportionality? Please give reasons.

102. This question is based on conclusions Government has reached on its Impact Assessment. We do not agree with the methodology and conclusions of the Impact Assessment which is the basis of the “proportionality” arguments set out in paragraph 4.60. It does not provide an adequate justification for the introduction of legislation and regulation which will distort growth and development of the market in a number of ways – certainly not the building in of the legislative options outlined in Stage 2 and the Government Statement.
103. For example, in the Impact Assessment on which the proposals are justified:
- the proposed actions are assumed to create an estimated “£200m minus the value of the cost of the actions” value to the UK economy but this is merely an estimated private benefit of that magnitude to rights-holding enterprises and not a “social benefit”;
 - the costs of the actions are, in contrast, real costs to society. The assumed one-off costs of £35m plus ongoing costs of £30-50m are also significant underestimates³;
 - to the extent that any measures are incomplete in scope, and exclude some of the means of P2P file-sharing, they will allow illegal P2P file-sharing to continue as such actions will still be possible by users changing their ISP or using other

³ We do not know the origin of the figures used for the calculations made. BT estimates that its costs alone would be far in excess of the figure estimated in the Impact Assessment for the costs to all UK ISPs.

“unregulated” technology. In other words, the assumed benefits of the scheme will be undermined by seepage.

104. It should also be recognised that the estimate of 10% as the displacement effect due to illicit file-sharing is effectively a compromise figure simply designed to steer a mid-way course between the 0% to 20% estimates thrown up in a range of studies. However, many of the studies:
- do not have a UK-focus, i.e. are not evidence of the UK market;
 - have been derived from studies of P2P sharing of music, i.e. should not be subject to straightforward extrapolation to other content sectors for a variety of reasons, including the relatively small size of the files characteristically involved and differences between how the content is made available and consumed;
 - have been generated under the aegis of rights-holding associations and are subject to the perception that they are “self-serving”⁴.
105. The problem with the methodology used by BIS is also that it will generate a net benefit figure down to the level of extremely small displacements. Even a displacement effect as low as 3% will pass the Impact Assessment as being proportionate by choosing to apply this methodology. It is not credible that such a small figure warrants so much intervention.
106. A more cost-effective and proportionate way to change customer behaviour would be to focus firmly on the development of new and attractive services at a quicker pace, with rights holders positively harnessing the market intelligence generated by P2P file-sharing activities to this end.

Exclusion of MNOs

107. If the proposals are pursued, their objectives will not be achieved by excluding MNOs from obligations. The benefit that the Impact Assessment posits - a significant reduction in numbers engaged in online copyright infringement - will not accrue.
108. We agree with the outline at page 54 of the condoc of the competitive advantages that would be created for MNOs in comparison to fixed ISPs if MNOs were to be excluded from regulation. Customers would be likely to migrate away from fixed ISPs to the more competitive and (for them) risk-free services that the exclusion would enable them to develop. Mobile broadband is now well-established and set to increase further. It also attracts the social and age groups who are likely to be amongst the highest users of applications such as P2P file-sharing. The association of the mobile market with content such as music and video is well-established and it is commonplace for MNOs to offer such services.
109. We have raised concerns elsewhere in this response about distortions of competition that we consider will be created by its introduction and negative impacts on the achievement of the aims of Digital Britain. If the Government were to exclude MNOs from the scope of such regulation, but not ISPs, BT’s concerns would be compounded. Such a decision would create significant distortions in the development of broadband markets in the UK and cause specific competitive harm to BT. There is no convincing or compelling case to discriminate and produce such effects.

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⁴ For example, <http://www.sabip.org.uk/sabip-ipreview.pdf> (bullet 1 on page 56)
http://www.theregister.co.uk/2009/09/04/sabip_7m_stat_sponsored_by_bpi/
<http://arstechnica.com/tech-policy/news/2009/04/rep-howard-berman-calls-for-new-ip-law-using-dodgy-data.ars/2>
<http://www.michaelgeist.ca/content/view/4000/125/>; <http://www.straight.com/article-232999/conference-board-canada-admits-plagiarism-will-redo-reports>

Copyright in a digital world? What role for a Digital Rights Agency? BT's views on the Digital Rights Agency

Introduction

1. We understand the Government's desire to inject radical ideas into the debate on copyright development and protection in the digital economy. There is a clear attraction to the creation of an all-encompassing, future-proofed regime to address a variety of copyright connected issues. We note that the complete regime, including the proposed legislation under Action Point 13, is not explained fully in the document published on 13 March. This document is, nonetheless, welcome in providing more information about the Government's thinking. It will undoubtedly stimulate initial feedback to inform the evolution of the Government's approach and BT offers below some initial views in response.
2. BT would value further dialogue with Government and other stakeholders on the Digital Rights Agency (DRA) concept as we have significant misgivings about the proposals. We judge that if enacted they would likely have the opposite impact to the Government's stated intention. A great deal of industry time and no little resource could be expended in defending outdated business models under the DRA model, and this will inevitably divert our focus from developing and investing in new business models and the infrastructure to support these.
3. In this regard, BT's views on the legal and practical difficulties of a wide, self-regulatory industry body to develop, champion and protect copyright in the digital economy are the same as those expressed in our response to the Government's consultation in July 2008 on this subject. This response sets out four broad areas of concern and suggests an alternative way forward on this aspect of the Digital Britain Review. Our concerns about the DRA proposal are:
 - it would inhibit market-led sources of innovation and growth;
 - it would engender significant competition policy risks for participants;
 - the suggested inclusion of technical measures to combat copyright infringement online is ill-informed and could undermine network investments;
 - the regulatory construct envisaged is, in our opinion, flawed and in particular would hinder Ofcom's role as the principal, independent regulator of the UK communications industries;
 - the DRA would involve unreasonable cost burdens.

Achieving sustainable innovation and growth in a digital age

4. The Government's stated aim is to try to find a means to facilitate a major change of approach across the whole value chain as to how content is provided, packaged and sold to consumers. No-one can dispute this laudable objective, but we suggest the Government's approach to achieving it is likely to have the opposite effect, i.e. to militate against innovation in favour of protecting established business models.
5. Developments in the last decade have shown that major innovations, including new applications and uses of networks, in the digital economy have emanated from all parts of the value chain - individual users, start-ups, established content, network and technology companies. Competitive, open markets have been important incubators of such innovation.⁵ The role of ISPs such as BT is to provide an infrastructure on which existing and new applications developed by these sources can be supported.

⁵ Spotify is a current example. It is a new business which is engaged in an on-going process of adapting its business model to respond to consumers' preferences for access to music online, extending the range of applications and services and how they are made available to do so:

http://blogs.telegraph.co.uk/shane_richmond/blog/2009/02/18/spotify_interview_with_founder_and_ceo_daniel_ek
http://blogs.telegraph.co.uk/shane_richmond/blog/2009/02/18/spotify_interview_with_founder_and_ceo_daniel_ek_part_two
<http://www.guardian.co.uk/technology/blog/2009/apr/06/spotify-to-launch-api>

6. The track-record of incumbent content companies, particularly in recorded music and films, in making timely adjustments to products and services when faced with changes in technology and consumer behaviour is not impressive. Moreover the continuing prospect of Government intervention to require internet access providers to assist or compensate such rights holders perpetuates this inertia by removing incentives for the latter to experiment with new business models without securing such assistance or compensation. This prospect also creates incentives for rights holders in other fields (e.g. games), who have not so far adopted the same approach as the recorded music and film industries to seek similar assurances.
7. In this context, the Government's proposal to create an all-encompassing, future-proof framework will not, in our view, result in an environment which encourages growth and innovation sustained by rivalry in the market. Instead, the presence of Government, through legislation and regulation and by choosing to underpin its "facilitation" of DRA on these bases, will build in a permanent distorting feature.
8. The working title of the DRA creates the perception of a focus on rights holders' interests. Experience suggests that traditional, single focus, copyright-holding entities (whether companies or their trade associations) will be best placed to devote resource to it. In comparison, users (as consumers and citizens), new entrants and businesses whose interests are not confined to creation or exploitation of copyright works will not have such a singular focus and will, therefore, carry less weight in the DRA.
9. BT's experience is that the process of negotiations with content companies (with a view to developing attractive new content services for BT's customers) is affected by the Government's proposed intervention. Put simply, the costs and benefits of alternative deals cannot be determined by either side in the negotiation until there is a clearly stated public policy objective set out as a result of this review.
10. BT's over-riding concern, therefore, is that the DRA construct is likely to be counter-productive because it will chill innovation in content creation and distribution. Such an agency is likely to set the UK on a path in which development of new markets for products and services is sub-optimal and distorted compared to a genuinely market driven solution.

Competition policy risks for DRA participants

11. Information exchange and business arrangements secured as a result of participation in the DRA will subject participants to ongoing risks of competition law challenges. If such arrangements are embodied in enforceable Codes of Practice participants would incur the additional risks or regulatory enforcement action for not abiding by a Code of Practice.
12. A recent EU Commission decision, the CISAC case, illustrates these risks. Music collecting societies were found to have breached competition law, because rights holders could not contract freely with the collecting society of their choice, and because in practice licences were limited to the domestic territory of each collecting society. Efficiency arguments deployed by the defendants failed to persuade the Commission and the objective of maximising competition prevailed. It cannot, therefore, be assumed that efficiencies achieved by the DRA would avoid serious competition law issues or make arrangements reached under its aegis deserving of exemption.
13. BT has consistently maintained the view that business models are best developed through commercial negotiation between relevant parties. This enables the largest number of potential models to vie for success with consumers in the market. This route ensures that information disclosure on commercial and operational issues is suitably confined, the potential for co-ordinated behaviour to arise from discussions involving a large number of companies and their trade associations is avoided, and businesses take autonomous decisions on the risks (commercial and legal) that they are willing to take.

14. BT has no doubt that active and positive engagement to meet consumers' and citizens' concerns and to address their evolving requirements is the key to unleashing growth of online products and services. We, therefore, welcomed the clear acknowledgement of the significance of this in the Digital Britain Interim Report. The Digital Rights Agency document, however, seems to be silent on how this crucial aspect would be achieved.
15. For businesses, assessment of ways to address consumers' and citizens' needs for increased awareness/education and for more appealing services will be achieved efficiently in the course of commercial, business development processes rather than artificially under the DRA.

The pursuit of technical measures is a significant concern

16. Among the most concerning aspects of the consultation document is the suggestion that the DRA would be a forum for discussing and agreeing the application of technical measures to be applied by ISPs to combat copyright infringement online. As indicated in BT's response to the P2P Condoc⁶, BT does not support technical measures as a fruitful route to explore. BT's networks exist to support a very wide range of online communications services and applications and it is wholly inappropriate to distort that provision for the purpose of benefiting one set of economic actors – the paid-for content sector.
17. BT's views accorded with those from the overwhelming majority of respondents to the P2P consultation – namely that technical measures are ineffective, arbitrary and expensive. The only positive responses came from content providers who seek such measures and the vendors of claimed technical solutions who wish to profit from a mandated technical solution. The Government itself acknowledged widespread consumer and citizen resistance on privacy and network utility grounds.
18. There is an abundance of information available on the world-wide web on technological developments, claims and counter-claims about the potential deployment of "technical measures". BT's evaluation of the technical and operational viability of such measures and their implications for its architecture, security, user experience and costs are commercially confidential. BT's assessment of these features and of the legal challenges and risks that deploying technical measures may entail are matters for BT's autonomous judgement. It is inappropriate to subject these issues to exposure "by committee" through the DRA.

The regulatory construct

19. The Government's proposals lack clarity in the form of the regulatory construct being deployed, the roles of Ofcom, the DRA, the IPO and ICO and therefore the regulatory burden being placed on industry. Given its importance to the wider communications sector, we are particularly concerned that the role envisaged for Ofcom in the new construct will damage its credibility as an independent regulator.
20. BT does not accept the concept that the DRA would be a form of industry self-regulation since it is envisaged that the Codes of Practice developed through the DRA would be linked to endorsement and enforcement by Ofcom in respect of ISPs. The consultation document clearly presents legislation and regulation as a back-stop intervention should the DRA not prove effective, which means that the regulatory construct is (at the least) co-regulatory.
21. There are several different sectors involved in creating digital content and in making it accessible to users. It is hard to conceive therefore that corraling organisations involved in this area into the DRA would generate consensus, around rights management and protection. The limits of any self-regulation would therefore soon be reached and the back-stop role of Ofcom called into action.

⁶ July 2008 BERR Consultation on legislative options to address illicit peer-to-peer (P2P) file-sharing

22. In contrast with the DRA proposals, Ofcom's involvement in the P2P MoU process was voluntary and was not on the basis of Ofcom having any powers or duties to exercise in copyright matters. It is not a copyright licensing agency; it has no remit to be directly involved in copyright enforcement; it has no role in relation to business models and practices of content rights' holders in the music, film or other creative content industries apart from for public service broadcast television. Ofcom has no role in directing investments of communications providers in content-related services and applications.
23. It is a very significant step, therefore, for the Government to propose to designate Ofcom as a regulator under the package of measures in Action Points 11 – 13, since, by implication of Ofcom's powers, it suggests that the principal target for regulation is communications providers. We do not consider that it is at all appropriate "to facilitate a major change of approach across the whole value chain as to how content is provided, packaged and sold to consumers" to single out communications providers, from the whole value chain, as the object of new regulation. It is clearly inconsistent with the "self-regulation" message proclaimed in the document.
- 24 Any changes to Ofcom's current role as indicated will have widespread repercussions and long-term implications, for Ofcom itself and the nature of regulation of Digital Britain.
- 25 Implementation of the complete regime along the lines outlined in the document would result in placing Ofcom in the invidious position of enforcing codes which Ofcom has drawn up and endorsed (to varying degrees) which would instruct ISPs such as BT on how to run their networks. It seems incredible that after several decades of regulation having avoided such draconian steps and with the UK having the most open and competitive markets in the world that it is now felt this route represents a proportionate or reasonable step.
- 26 It would also involve Ofcom in supporting particular business models agreed through the DRA, which itself risks all involved in breaching competition law. It is extremely hard to see how all this can be reconciled with Ofcom's current role and its duties in relation to consumers and citizens. Constructing an appropriate funding mechanism for the new role would present significant challenges too.
- 27 The Government should hesitate to embark on this policy route without a much stronger and more robust analysis and evidence-base for doing so than has currently been presented to date in the P2P Condoc, Digital Britain Interim Report and the current document. It should resist the temptation to pick on the nearest available regulator at hand and change its role – the issues at stake are far too significant to rush into a quick-fix solution.

Funding implications

- 28 The DRA encompassing any one of the roles suggested in the document would not be cheap to set-up and maintain. The current economic climate makes it particularly difficult to justify expenditure on an activity such as this when the business disadvantages to BT from participation are more apparent than the potential advantages.
- 29 Consistent with BT's view in its P2P Condoc response, funding costs should be borne by rights' holders who would be the beneficiaries of the activities of the DRA.
- 30 Any notion of introducing internet taxes or levies should not be pursued as it will run counter to the core Digital Britain aim of increasing uptake of broadband services. Whilst there may be some justification for such an approach if the consumer were to receive better services as a result, to raise prices for consumers for the products and services that they consume for this purpose has no consumer benefit. Those who even realise that they are paying a copyright levy on their purchases also often assume it is a licence to make private copies or worse, a licence to pirate copyrighted material. Their imposition, therefore, would exacerbate rather than solve current problems.

BT's preferred way forward

- 31 BT's position remains that the focus of its communications with customers about allegations made to BT about copyright infringing behaviour are for information and education, i.e. to let them know that an allegation exists and that they may be able to take steps to address it.
- 32 BT has no intention that such activity is or should be considered by others to be a pre-cursor to introduction of technical measures, "graduated response"/ "3 strikes and out". BT's willingness to continue this activity beyond the MoU process is contingent on a number of factors including scale, volume, costs (including exposure to new liabilities), compliance with data protection requirements and acceptability to customers.
- 33 We await the proposals relating to Action Point 13 with interest. BT's current assumption is that they will be rooted in the principle of facilitating the ability for rights' holders to exercise their own judgement on which potential infringements to pursue through recourse to their own legal rights. No option should arise for ISPs to sanction customers as an alternative to action by rights' holders to enforce their legal rights.
- 34 BT has devoted significant resources in support of the MoU. We are therefore concerned at repeating the exercise on an even broader scale through participation in the DRA.
- 35 Instead of pooling a large number of issues into the DRA, the Government could consider organising a series of meetings through IPO, BERR and DCMS, at regular intervals, where interested parties have the opportunity to be made aware of and keep track of developments which relate to copyright in a digital world.
- 36 Its objective would not be to force parties to reach consensus or to produce Codes of Practice. Rather, it would be an enabling process: different parties could share their experiences and assess for themselves key developments to inform and update their own approach and thereby provide a stimulus for them to explore and pursue options outside of such meetings. The work currently underway by IPO and SABIP to review the copyright framework could be discussed and developed further in such fora.
- 37 Consumer and citizen interests and experts should be invited. It could be a useful forum to discuss and review different educational campaigns, including their impact on consumers and citizens, and stimulate new ideas and approaches to try out.
- 38 Such a mechanism should enable competition risks to be curtailed dramatically, should not create significant resource and funding commitments for any interest group, or entail the creation of standardised business models or new regulation.
- 39 BT's willingness and ability to recognise changes in technology and users' expectations and their requirements and to respond to these in timely fashion by adapting its operations and services is fundamental for the growth of Digital Britain and of BT itself. It is demonstrably ready and willing to do so.
- 40 BT's over-riding focus is on the delivery and uptake of digital network infrastructure in the UK which will support the communications needs of all its citizens and businesses. This is a massive and complex endeavour which impacts on the development of all of BT's broadband operations and involves BT in taking significant investment decisions in a particularly adverse economic climate.
- 41 BT is prepared to remain engaged with the process as it develops as the issues under consideration and the conclusions that Government reaches will be of continuing significance to our business.
- 42 The diversion of BT's resources from the issues which are at the core of BT's contribution to Digital Britain in order to deal with "solving" copyright-holders' problems of adapting to

evolving consumer needs in a digital age is far less welcome given our fundamental belief that the market will find solutions to these current issues.

British Telecommunications plc
9 April 2009