



THE CITY OF LONDON LAW SOCIETY

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Communications and Content Industries
Department for Business, Innovation and Skills
UG28-30
1 Victoria Street
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By email: mike.klym@bis.gsi.gov.uk / adrian.brazier@bis.gsi.gov.uk

Dear Sirs

Re: Response of the City of London Law Society ("CLLS") to the Department for Business Innovation and Skills' consultation on legislation to address illicit Peer-to-Peer file sharing (the "Consultation")

This response is made on behalf of the CLLS. The CLLS acts as the local law society of the City of London. It represents the professional interests of City solicitors, who make up approximately 15% of the profession in England and Wales, by commenting on matters of law and practice and by making representations on the issues and challenges facing the profession and their clients. Whilst it is not appropriate for us to comment on the commercial/political aspects of the consultation (as our members act for both rights holders and internet service providers ("ISPs")) we consider that there is some benefit in the CLLS submitting a response to the consultation putting forward our legal opinion on the proposals.

Our detailed responses to the questions raised by the consultation are set out below. We also have the following overall comments:

(a) ***s97A Copyright, Designs and Patents Act 1988***

Currently rights holders have the ability to obtain an injunction against a service provider where that service provider has actual knowledge of another person using the service to infringe copyright. It is not clear how this section will work with the new provisions as there may be some conflict.

(b) ***Costs***

We think the Government should further consider the extent to which rights holders require a court order (or how to obtain one) more cheaply and quickly to obtain the names of serious infringers, which would significantly reduce the cost and administrative burden for rights holders and not prejudice ISPs' businesses.

The proposed legislation relates to potential civil proceedings against an individual. However, the act of uploading infringing content is also likely to amount to an offence under s1072A of the Copyright, Designs and Patents Act 1988 ("CDPA"). ISPs processing information (including collating such information in a database and disclosing information to rights holders) on serious infringers are likely to be processing "sensitive personal data" under the Data Protection Act 1998 ("DPA") (defined under the DPA as including information as to the commission or alleged commission of an offence). This means that ISPs will need to comply with the conditions applicable to processing sensitive personal data. These include obtaining the consent of the individual unless they fall within any of the exceptions. We think that ISPs can rely on the exception under Schedule 3 (6) (a) and (c) of the DPA, where the processing is necessary for the purposes of or in connection with legal proceedings (including prospective legal proceedings) or is necessary for defending legal rights. We think this applies equally to the disclosure of sensitive personal data to rights holders as it does to the preparation and management of a database of serious infringers. The acknowledgement that this exception applies would remove the additional burden of rights holders having to apply to Court for a Norwich Pharmacal order to obtain the names and addresses of the individual infringers.

NOTIFICATION OBLIGATION

Question 1: Is there anyone else who ought to have a right to trigger the obligation?

We think that it should be clear that, in respect of a copyright work, both the copyright owner and an exclusive licensee of copyright in the work should be able to trigger the obligation on the ISP.

Question 2: Should there be a time limit from the date of a specific infringement by which a request needs to be made?

We think that there are arguments that there should be shorter time limits for making a request for notification than the periods set out in the statutes of limitation, in order to avoid the ISPs having to retain information for lengthy periods. In order for the procedure to have maximum impact, notifications will need to be sent as close in time as possible to the infringing act. Further, we assume that the new provisions will not fetter a right holder's ability to take direct action against a serious infringer without using the notification procedure, where the right holder considers that is appropriate.

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?

We think that the ISP will have difficulty providing a list of where to access legitimate content as more legitimate services become available (including potentially the ISP's own service). Perhaps there should be a more general statement about the fact that P2P file sharing is illegal and customers should seek to find content from legitimate sources. The BPI or IFPI may be able to assist by keeping an up to date list of licensed websites.

Question 4: Does this need to be set out in more detail in the legislation, or is it sufficient to require it to be set out in the code?

It should be clear to rights holders what standard of evidence is required, whether this is in the legislation or the code. However, to avoid dispute, we also think the standards should be agreed between the ISPs and the rights holders, which means it may be preferable to have the standards set out in the code.

Question 5: This obligation is specified without any volume limit. Is that right? Should there be any restriction on how many notices a rights holder can serve, or that an ISP needs to honour?

We do not think there should be any restriction on how many notices a rights holder can serve or an ISP should honour but the rights holders should not abuse the system. If the procedure becomes unmanageable due to volume this should be identified during the initial one year review period and Ofcom should determine whether additional or alternative measures are required.

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

Again, we do not think there should be any restriction on how many notices can be sent. At least during the initial one year period all infringers should be notified and the impact of the notifications on customer behaviour can then be fully assessed and the number of serious infringers gauged. It is hoped that ISPs and rights holders would be able to agree to focus their efforts only on the more serious infringers if the volumes are too high to cope with, rather than ISPs being left to decide for themselves the numbers of notifications they should be expected to send out. This issue should be identified in the Code as one that would require the parties to co-operate and decide on the most effective use of their respective resources.

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?

We note that the proposal is for Ofcom's costs to be shared between rights holders and ISPs and that Ofcom can require the ISPs/rights holders to jointly contribute to fund costs, including Ofcom's costs. In the evidence base section, however, the benefit to the Government of the scheme is estimated to be £35 million from 2010 onwards. There is an argument therefore that the Government should bear some of the costs, for example, at least a proportion of Ofcom's costs.

SERIOUS INFRINGER OBLIGATION

Question 8: Do you see any legal difficulty with linking a new notification with a previously gathered set of anonymised data in this way?

Question 9: There is some evidence that further warning letters result in a further reduction in people file-sharing. Do you think multiple letters should be sent and, if so, what should trigger these?

We think multiple warning letters is probably fair and necessary in order to have maximum impact. We assume that rights holders will have to identify new examples of infringement before a second letter is sent but we understand that the second letter may refer to earlier examples of infringement. On this basis, we think that provided that the individuals are warned in the first letter that data on their activities is going to be collected and used by the ISP in this way, there would not be any legal difficulty, in particular under the Data Protection Act 1998, with this approach.

Will there be a minimum number of letters that the ISP has to send before the individual is added to the serious infringers list and the rights holder can obtain a court order?

Question 10: Do you agree to the approach on costs set out here? Are there any additional factors that should be taken into consideration here?

See general comments above.

OFCOM POWER TO IMPOSE OTHER OBLIGATIONS

Questions 11 and 12: Do you agree with the list of further measures that could be imposed and the conditions to which their application must satisfy. 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?

We agree with the list of further measures. It is not clear to us, however, how the rate of reduction will be calculated. Is the universe used in the example intended to be comprised of the number of separate infringers, or the total volume of downloads? Not all infringers are equal in this respect so a success rate of 35% against infringers responsible for only a few downloads will not satisfy the rights holders if the serious infringers are not stopped. The Government will also need to consider ways in which serious infringers are known to evade measures. For example, it is known that infringers are likely to encrypt content in order to avoid filtering technology.

We also think that the factors that need to be taken into account before such further measures are implicated need to be worked out in more detail. For example, will there be an expected amount of court action to be undertaken by the rights holders.

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?

We agree with the list of things that Ofcom must satisfy itself of before approving the 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?

We agree that the code needs to be in place in time for common commencement. We do not know if less than 12 months is a realistic timeframe.

Question 15: Is there anything else the code must cover in order to enable effective operation of these obligations?

We think the list covers the requirements of the code, other than those additional items contained in this letter.

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?

We agree there should be no statutory basis for a rights agency and industry can develop it as required. We assume it will be funded by industry.

Question 17: What are your views on the timeline and the ways it could be reduced?

Question 18: Do you agree that this is an appropriate role and structure for the rights agency?

Question 19: Do you agree that we should proceed with an intention to exempt small businesses? If so, have we chosen the right criteria?

We agree there should be an exemption for small businesses. We agree with the Named Inclusion Order approach, provided that this is kept up to date quickly enough to prevent sophisticated file sharers jumping from ISP to ISP.

Alternatively smaller ISPs could pay costs proportionately, so that all ISPs are under an obligation but smaller ISPs costs are capped at a proportion of their turnover and extra costs are funded by the rights holders (or from an industry pot).

Question 20: Do you consider there to be a case for considering any exclusions on other grounds including technical or proportionality?

Power to direct the introduction of technical measures

We think that it is imperative to urgently establish the efficacy and deterrent effect of each of the proposed technical measures which ISPs may be obliged to introduce, due to the need to reduce peer-to-peer file-sharing quickly and if the Secretary of State can do this more quickly than the regulator then this seems like a sensible approach. However, it is still not clear how the Secretary of State will determine whether or not there has been a 70% reduction in file-sharing before introducing technical measures.

Suspension of accounts

If suspension of a users account is added to the list of technical measures Ofcom may oblige ISPs to introduce, it is not clear to us how this would work in a way which is fair to both consumers and rights holders. If suspension can be achieved without a rights-holder obtaining a court order, this would put a disproportionate amount of control in rights-holders hands and if rights holders will require a court order, this will increase the burden and costs on rights holders, acting as a disincentive.

Yours sincerely

**Ian Starr
Chair
Intellectual Property Law Committee**

**THE CITY OF LONDON LAW SOCIETY
INTELLECTUAL PROPERTY LAW COMMITTEE**

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