

GOVERNMENT STATEMENT ON THE PROPOSED P2P FILE-SHARING LEGISLATION

Following the Digital Britain report we published a consultation on 16th June 2009 setting out how we proposed to legislate to tackle the problem of unlawful peer-to-peer (P2P) file-sharing. The objective of the legislation and the nature of the obligations we proposed remain unchanged. However, our thinking on the process supporting the objectives and the obligations has developed, and we thought it would be helpful to share these thoughts with stakeholders at this point, so that they can take them into account when responding to the consultation.

We would therefore welcome comments on these latest ideas in addition to comments on the existing consultation. In light of this we will be extending the deadline for responses to 29th September 2009.

In the consultation we set out proposed legislation that would introduce two obligations to be imposed on ISPs by Ofcom – to send notifications to subscribers alleged by rights holders to be infringing copyright, and to monitor the number of notifications each subscriber is associated with; the ISP would then make this data available to rights holders on receipt of a court order. We also proposed a mechanism whereby Ofcom would be granted reserve powers to oblige ISPs to utilise specified technical measures against repeat infringers should these two obligations prove to be deficient in reducing infringement. **It is the mechanism around this introduction of potential further technical measures where our thinking has evolved. In addition we are considering the case for adding into the list of technical measures the power, as a last resort, to suspend a subscriber's account. Finally, we feel it would be better if we were able to be more specific in the legislation about the way costs are shared by industry parties.**

Power to direct the introduction of technical measures

We would welcome comments on the proposal that the Secretary of State be given a two-part power of direction. The first part would enable him to direct Ofcom to carry out preparatory work on the mechanics of introducing technical measures, including an assessment of their efficacy on different networks, as well as developing the code that will apply to implementing such additional measures, and to consult on their conclusions.

The second part would allow the Secretary of State to direct Ofcom to introduce the measures they had determined were effective and proportionate should he conclude that such measures are necessary to achieve the overall objective. Ofcom will still have a duty to monitor the overall position and report on the effectiveness of the original obligations in order to provide an evidence base for the Secretary of State's decision, but this advice would not be binding on the Secretary of State and he would be able to take into account other, wider factors and other sources of information before taking any decision on the introduction of technical measures. Any technical measures deemed necessary and appropriate by the Secretary of State would be introduced by Ofcom via secondary legislation. It would be important to ensure as far as possible that innocent people who may be affected by such technical measures would retain access to the Internet services they need, including online public services.

There are two key arguments that we think are persuasive in making this change in comparison to the more explicit "baseline and trigger" approach previously proposed for Ofcom in the 16 June consultation (sections 4.23 - 4.28):

- **Timescale** – the previous proposals, whilst robust, would take an unacceptable amount of time to complete in a situation that calls for urgent action. We continue to believe that these two obligations will make a significant difference in the level of unlawful P2P activity, and represent the most effective way in dealing with unlawful file-sharing.

But this is a complex area which has not been tackled in legislation before, and we acknowledge that if the original proposals are shown not to be fully effective, this could mean it would be a very long time before further steps could be taken.

- **Evidence** – although we have no doubt Ofcom would have carried out their research under the original proposals in their usual thorough manner, measuring unlawful P2P activity across a range of networks and different content is extremely difficult. On reflection, using a precisely defined “trigger” as the basis for introducing technical measures would not be sufficiently flexible (for example it would not allow the wider health of the broadband or content markets to be taken into account), and under-estimated the inherent difficulties of measuring this unlawful activity with precision.. The key will be to base decisions on robust and transparent evidence of the general direction and pace of change. In reaching his decision, the Secretary of State will have to carefully weigh the evidence available to him and make any order on the basis of defensible information based largely but not exclusively on the reports from Ofcom. But even so, the Secretary of State can do this much quicker than the process which the regulator would have to go through if acting alone.

Suspension of accounts

The original proposal lists six technical measures that Ofcom might require ISPs to impose on repeat infringers. Since the issue of the consultation some stakeholders have argued strongly that none of those technical measures is powerful enough to have a significant deterrent effect on infringing behaviour. Also we cannot know how P2P technology might develop in the short to medium term, and we want to ensure that Ofcom has a full tool-kit from which to select the most appropriate measure should technical measures be deemed necessary. Taking those points into account, although we continue to regard the uptake and use of Internet services as essential to a digital Britain, we are considering the case for adding suspension of accounts into the list of measures that could be imposed. This does not necessarily mean that

suspension would be used - this step would obviously be a very serious sanction as it would affect all members of a household equally, and might disrupt access to other communications, so it should be regarded as very much a last resort. Accordingly a thorough examination of the proportionality and effectiveness of the measure (as with any of the other measures) would have to be undertaken before ISPs would be required to implement it, even if the decision to move to technical measures is taken. As ever we would need to ensure any such measure fully complied with both UK and EU legislation

Costs

The initial obligations to notify and collect data on notifications will not apply until a code is in place, endorsed or written by Ofcom. In the consultation (section 4.18 and question 7) our preference was for cost allocation to be decided as part of the code discussion. However, since the consultation was published all parties have made it clear this would be a very complex and controversial issue which would dominate and delay development and agreement of a code. In order to expedite the process of agreeing the code, and to introduce greater legal certainty, we think it would be more helpful to all parties if we specified how costs should be borne for the initial obligations on the face of the Bill.

We are minded to allocate costs so that essentially individual parties will have to bear the costs they incur as a result of these obligations apart from the operating costs of sending notifications, which will be split 50:50 between ISPs and rights holders. However, we recognise this does raise a number of issues and therefore would welcome views from stakeholders as to how costs should be apportioned.

Timetable

We recognise that this comes mid-way through the on-going consultation. However we consider it very important that all interested parties are made aware of these developments in our thinking now so that they can make their

views known. We also recognise the impact the holiday season has on stakeholders and their ability to respond.

At the same time we need to be able to properly consider responses in time to take account appropriately of views and evidence in the construction of the legislation. In order to allow us to do so and to give people more time to consider their response, we will be extending the deadline to 29th September 2009. We would also welcome additional comments from those stakeholders who have already submitted a response.

Further information:

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