

## Consumer Focus Board

<b>Paper 10.1</b>
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**Title:** Intellectual property: fair use exception campaign

**Purpose:** For discussion

**Date of meeting:** 7 May 2009

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**Attachments:** 0

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### 1 Overview

- 1.1 Intellectual property (IP) forms one of three strands of our work plan objective to 'define and implement a rolling campaign on consumer 'digital rights' in the information society. In broad terms we are seeking a balanced IP regime which encourages innovation by providing a fair return to creators and investors whilst imposing the minimum necessary constraints on competition and consumers.
- 1.2 One current focus of activity is advocacy for the inclusion of a fair use exception in the UK copyright regime, which would allow consumers to lawfully copy certain material for non-commercial purposes. The Gowers Review supported such a principle, but it has so far not been implemented by Government.
- 1.3 Digital Britain and other Government initiatives provide a fresh opportunity to renew pressure for a fair use exception. However, there is strong resistance from industry and the Government is currently sympathetic to their views.
- 1.4 This might be considered a high risk issue for Consumer Focus due to Government positioning, the role of BERR as a sponsor department and high media interest in the issues. In light of this, the Board paper discusses two options for the campaigning style we should adopt:
- Overt front foot public campaigning, plus behind-the-scenes work
  - Principally behind-the-scenes work, but with some reactive media work

### 2 Action for the Board

- 2.1 To consider the appropriate campaigning approach for our IP work.

### **3 The key issues**

- 3.1 Consumer Focus wants to see a balanced IP regime which encourages innovation by providing a fair return to creators and investors whilst imposing the minimum necessary constraints on competition and consumers. The current copyright rules do not deliver this. They permit companies to extract long-term excess profits from consumers, place excessive restrictions on competition, inhibit innovation by preventing other creators (including consumers) from building on past innovation, and impose unreasonable and unrealistic restraints on consumers' post-purchase activities. Indeed, a recent Consumer International survey has rated the UK copyright regime as by far the worst in a survey of 16 countries in terms of recognising consumers' interests.
- 3.2 One area where UK law would appear to be unfair, is that the current copyright regime does not provide for a fair use right or exemption to undertake what most people would consider normal activity such as format shifting – for example, transferring music from CDs to an iPod. Many consumers are not aware that this activity is illegal. The precise definition of a fair use exception is a key issue, but a crude simplification is that it would not allow activity which would cause economic harm to rights holders, such as widespread file-sharing from websites such as The Pirate Bay, which Consumer Focus does not condone.
- 3.3 In December 2006, the Gowers Review identified a number of areas where exceptions could and should be extended within the framework of European and international copyright law. The IPO consulted on proposals in January 2008, but NCC argued for these to be expanded because they unreasonably exclude some consumers copying activities that cause no or minimal economic harm to rights holders. The proposals now appear to have been kicked into the long grass.
- 3.4 Consumer Focus has seized on Digital Britain and related initiatives to renew the call for a fair use exception. However, we appear to be facing an uphill battle as the industry lobby is particularly strong and has done a good job to date in influencing Government initiatives.

#### **Campaigning approach**

- 3.5 This might be considered a high risk issue for Consumer Focus due to Government positioning, the role of BERR as a sponsor department and high media interest in the issues. In light of this, the Board paper discusses two options for the campaigning style we should adopt.
- 3.6 To date we have mostly worked behind-the-scenes on IP issues, although we have achieved some media presence. Activity has included responding to consultation documents, speeches, conducting meetings with relevant Ministers and officials, participating in the Consumers International study, and responding opportunistically to stories in the media. This level and style of activity has allowed us to begin to build a profile for Consumer Focus as a key player on digital issues generally, but it has not yet been sufficient to achieve policy change on a fair use exception in particular.

3.7 We consider there is now a strong case for moving to a more assertive and proactive style of campaigning. This would involve a concerted campaign designed to win public and political support for the introduction of a tightly defined fair use exception in UK law. The issues involved would appear to lend themselves naturally to this style of campaigning, but this step would carry risks in terms of our relationships with Government. Further, it is difficult to predict our likely success given the strong industry lobby and the wider policy imperatives driven by the Digital Britain timetable.

#### **4 Proposal**

The Board is asked to consider the following options:

A - Overt front foot public campaigning, plus behind-the-scenes work

B - Principally behind-the-scenes work, but with some reactive media work

#### **5 Resources**

5.1 The Fair Markets Team leads a cross-organisational strategy on digital policy and has close liaison with the other interested teams, including Disadvantage, International, Community and Public Services, and CPACE. Fair Markets leads on UK IP, whilst International leads on our European and global IP work.

#### **6 Next Steps**

6.1 Timing is critical. Some key decisions will be made in the final Digital Britain report (expected to be finalised by end of May, with publication mid June), although this will not be the last opportunity to influence on fair use. The implementation programme for Digital Britain is expected to be lengthy because of the need for legislation and the potential for legal challenges.

6.2 Based on the Board's discussion of the options, our intention would be to develop and implement a campaign on fair use in short order. However, this is a fast moving area and we will need to adapt priorities accordingly.