



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to the consultation on legislation to address illicit peer-to-peer (p2p) file-sharing

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About Consumer Focus

Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and (for postal consumers) Northern Ireland. We were created through a merger of three consumer organisations – energywatch, Postwatch and the National Consumer Council (including the Welsh and Scottish Consumer Councils). Our role is to represent the interests of consumers, particularly the disadvantaged. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus has been working on intellectual property related issues for many years through our predecessor organisation, the National Consumer Council. We want to see a digital economy characterised by competitive, dynamic and innovative markets to which consumers have meaningful access and in which they are empowered to make informed choices. And we want to see a copyright culture that supports this by striking a fair balance between creators and consumers.

File-sharing legislation consultation

During the past year, Consumer Focus has engaged closely with the consultation process that led up to the final *Digital Britain* report published on the 16 June. In preparation for the forthcoming Digital Economy Bill the Government issued a formal consultation, entitled *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing*. Consumer Focus is taking into consideration the *Government statement on the proposed p2p file-sharing legislation* published on 25 August in responding to the consultation.

Executive summary

Legal market

Consumer Focus does not condone illicit file sharing but we see it as an inevitable consequence of the failure to meet consumers' needs. The only effective solution is new business models that meet consumers' clearly expressed demand for digital services.

The *Digital Britain* report sets out how Government intends to address the issue of copyright infringement through file-sharing networks. The Government believes that 'most people, given a reasonable choice, would much prefer not to do wrong or break the law'.

The objective of the Government's strategy is three-fold:

'Firstly, to provide a framework that encourages the growth of legal markets for downloading that are inexpensive, convenient and easily accessible for consumers.' To this end the Government announced in *Digital Britain* that it will make changes to the legislative framework and copyright licensing system, which allows for the commercial exploitation of copyrighted work.

'Secondly, to encourage suitable information and education initiatives, to ensure that consumers are fully aware of what is and is not lawful.'

Thirdly to introduce a legislative framework which will see copyright holders and Internet Service Providers (ISPs) co-operate under Ofcom supervision, 'so that rights' holders can use the civil law to the full to deter the hardcore of users who wilfully continue unlawful activity'.

Consumer Focus is broadly supportive of this strategy; it recognises that providing and supporting legitimate online services is likely to lead to the majority of people engaging in copyright infringement via file-sharing to migrate to legal services. The strategy also recognises that there is work to be done in terms of educating consumers on what copyright in the digital world means. Current copyright law is complex and many consumers lack awareness of what is and what is not legal.

The ongoing consultation process focuses primarily on the third element of the Government's strategy, ie, the notification process and the possible introduction of technical measures if the Government's strategy fails to achieve a substantial long-term reduction in copyright violation via file-sharing.

Consumer Focus has serious concerns that no progress has been made on how legitimate platforms in the digital content market can be encouraged. The Government has also failed to establish how the education element of its strategy will be delivered.

While there are encouraging signs of innovation in certain industries affected by copyright violation via file-sharing, such as television broadcasters, other industries show a lack of commitment to Government strategy. Those licensing copyrighted content for the online market, including copyright holders and collecting societies, must be willing to invest in the market in support of Government strategy. We also urge Government to support the growth of a legitimate online market by providing an effective regulatory framework for copyright licensing of online content.

The Intellectual Property Office should undertake a review of the current licensing system to identify barriers to a thriving legal UK online content market. Government should also build on the Innovative Nation White Paper and direct the Better Regulation Executive to review how the regulation of online content in the UK promotes or hinders innovation.

Furthermore we urge the Government to take forward recommendation 34 of the Gowers Review which called for increased co-operation between the Intellectual Property Office, the Office of Fair Trading and the Competition Commission to ensure that competition and intellectual property policy foster competitive and innovative markets for the benefit of consumers.

Due process

Copyright violation by consumers, not just via file-sharing, raises issues of law enforcement. The UK copyright framework was not designed to deal with consumers who have the technological ability to copy, adapt and distribute copyrighted work with ease. Law enforcement must be proportionate and carried out in a way that respects defendants' human rights, particularly the right to 'due process' which includes the presumption of innocence and a fair trial.

The right to due process is enshrined in UK law through the Human Rights Act 1998 and all public bodies need to ensure compliance with the Act. Throughout the consultation process leading up to the publication of *Digital Britain*, Consumer Focus emphasised that the right to due process must be respected. Consumer Focus was encouraged by the approach set out in the final *Digital Britain* report, which proposed a legislative framework in which copyright holders and Internet Service Providers (ISPs) co-operated under Ofcom supervision, 'so that rights holders can use the civil law to the full to deter the hardcore of users who wilfully continue unlawful activity'.

However, Government has failed to fully consider the human rights implications of its plans, particularly with regards to the possible introduction of technical measures. The *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* did not include a human rights impact assessment of the proposed file-sharing legislation and the Government has failed to make an unambiguous statement that the right to due process will be respected.

Consumer Focus is concerned that the Government's latest thinking, set out in the *Government statement on the proposed p2p file-sharing legislation*, appears to have proposed an appeals process, in the event of technical measures being introduced against consumers, that is based purely on evidence provided by rights' holders.

The most effective way to protect people from having technical enforcement measures imposed against them without just cause is to respect their right to due process, maintaining the presumption of innocence and the right to a fair trial. Consumer Focus opposes any technical enforcement measure against consumers based on mere suspicion and perceived evidence advanced by rights' holders. Consumers who are suspected of breaking the law to such a degree that technical measures are considered should be able to exercise their right to defend themselves in court.

Suspension

In its latest thinking the Government placed suspension of internet accounts back on the list of technical measures that could be introduced if the strategy to reduce copyright violation via file-sharing did not achieve the desired reductions. In the *Government statement on the proposed p2p file-sharing legislation*, it was proposed that Ofcom be given the power to ask Internet Service Providers, as a last resort, to suspend a subscriber's account.

Consumer Focus opposes the suspension of internet accounts as a punishment for consumers who violate copyright law, especially if the right to due process is not respected. The suspension of internet accounts raises serious questions about proportionality, the punishment of entire households, due process, as well as the economic and social ramifications for households and the wider economy.

While the *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* stated that technical measures would need to be 'efficacious and proportionate', the *Government statement on the proposed p2p file-sharing legislation* explains the reasons for including suspension on the list of possible technical measures primarily in terms of the need to create a deterrent. This detracts attention from evidence-based considerations on whether or not a particular technical measure would be effective in achieving the desired effect. Consumer Focus is particularly concerned that the thinking behind adding suspension to the list of possible technical measures runs contrary to the Better Regulation Principles, which state that any regulation should be: transparent, accountable, proportionate, consistent and targeted only at cases where action is needed.

Consumer Focus urges Government to ensure that rights' holders exhaust all possible remedies under existing UK copyright law as a way of deterring persistent offenders before any technical measures are considered. We also ask the Government to undertake a full economic and social impact assessment of any technical measures that hinder a household's full internet access before creating the technical measure backstop power.

We do not believe that suspension is a proportionate response to copyright violation by consumers and ask the Government not to include suspension in the list of possible technical measures that may be considered at a later date. If suspension remains on the list of possible technical measures, it must be evaluated within the context of judicial process.

Cost

Consumer Focus urges Government to ensure that UK broadband consumers, the majority of which do not engage in copyright violation via file-sharing, do not pay a de facto 'copyright enforcement tax' on an essential service. To this end the Government must ensure that those rights' holders who utilise the notification process bear the full cost arising to Internet Service Providers and Ofcom from the process, as well as technical measures that may be introduced at a later date.

The cost to ISPs arising from the notification process, and especially any technical measures, would have a negative impact the achievement of universal access, and on Internet Service Providers' ability to implement the next generation of broadband anticipated by the Government in *Digital Britain*.

The Government's strategy to reduce copyright violation via file-sharing has been introduced primarily to benefit the rights' holders, who have lobbied aggressively for the Government to intervene on the basis that will bring significant financial benefits to their industry. It seems reasonable that those who benefit from the legislation should meet the costs.

If this is not the case there is no incentive for the development of new services to support the online market. In short, rights' holders will find it cheaper to enforce copyright measures than to invest in the growth of the legal market online.

Technical measure backstop power

The *Digital Britain* report states that the backstop power to introduce technical measures should only be considered against persistent offenders if the growth of the legal market, education, notification letters and court action fail to reduce copyright violation via file-sharing. Consumer Focus supports this approach and urges Government to only consider technical measures if the strategy laid out in *Digital Britain* has failed.

The *Government statement on the proposed p2p file-sharing legislation* outlines the possibility of giving the Secretary of State a two-part power of direction with regards to the backstop power. While Consumer Focus does not oppose the idea that the Secretary of State should be given the formal power to direct, we are alarmed by the suggestion that Ofcom's advice will not be binding. The Secretary of State will be able to make a decision based on undefined wider factors.

If the Secretary of State chooses to exercise the power to direct, it must be accompanied by full disclosure of the reasoning and process. Further, the decision should be based on evidence established by Ofcom. The Government must ensure that the process triggering 'technical measures' is evidenced based, transparent, open and accountable.

Ofcom's duties

Consumer Focus has concerns over the broad nature of the proposed new duty for Ofcom. The *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* proposes that the Digital Economy Bill establishes a duty on Ofcom to take steps aimed at reducing online copyright infringement.

Copyright infringement online happens in a variety of ways, including message boards, articles of media organisations and individual blog postings. The new duty being proposed is too broad in scope and will be interpreted as a general duty to reduce online copyright violation. Consumer Focus does not support this and asks the Government to provide a tightly defined duty for Ofcom to reduce copyright violation via file-sharing.

The debate around the scale and damage caused by file-sharing suffers from a lack of reliable figures. Ofcom should take a role in providing the evidence base for future debates on the issue. In order for Ofcom to assess whether the Government's strategy to reduce copyright violation via file-sharing is effective, it will need to establish and monitor reliable base line figures.

This data must not only measure the volume of file-sharing but also copyright violation which occurs via file-sharing. Ofcom should establish reliable data on the economic impact of file-sharing, specifically in regard to economic damage and lost sales. Furthermore, Ofcom should quantify and track the growth of the legal market in online file-sharing content with a view to monitoring progress of the first element of the Government's strategy as set out in *Digital Britain*.

Ofcom should publish this data so that all stakeholders in the debate have access to reliable figures, preferably on a quarterly basis. Such data is invaluable in gaining an understanding of ongoing developments and in identifying opportunities to develop the legal market in copyrighted content.

Ofcom's proposed role in reviewing evidence of the effectiveness of the Government's strategy in advance of any considerations of introducing technical measures is essential. Ofcom's assessment needs to consider the effectiveness of the notifications and of targeted legal action by rights' holders against repeat infringers. It must also take into account education initiatives and whether rights' holders have done enough to offer legal services designed to attract users to the legal market.

In regard to its proposed role in approving, monitoring and enforcing the Code of Practice, Ofcom must ensure that it complies with its other statutory duties. Sections 3, 4 and 10 of the Communications Act 2003 establish Ofcom's principle duty as carrying out its function 'to further the interests of citizens in relation to communications matters; and to further the interests of consumers in relevant markets, where appropriate by promoting competition'.

Recommendations to Government

The Digital Britain strategy

- require the Intellectual Property Office to undertake a review of the current licensing system to identify barriers to a thriving legal UK online content market
- build on the Innovative Nation White Paper and ask the Better Regulation Executive to review how the regulation of online content in the UK promotes or hinders innovation
- take forward recommendation 34 of the Gowers Review which called for increased co-operation between the Intellectual Property Office, the Office of Fair Trading and the Competition Commission to ensure that competition and intellectual property policies foster competitive and innovative markets for the benefit of consumers
- take forward recommendation 35 of the Gowers Review as part of the Government's strategy to reduce copyright violation via file-sharing so that the Intellectual Property Office, in co-operation with stakeholders, provides consistent and authoritative information about copyright to consumers
- ensure the Intellectual Property Office takes forward its work on fair dealing provisions for consumers in UK copyright law, particularly with format-shifting

The right to due process

- undertake a human rights impact assessment which would ensure that the legislation and process to be implemented by the Digital Economy Bill does not violate citizens' human rights
- make a clear commitment to respect the right of citizens' to due process
- ensure consumers' right to due process is not violated by a 'graduated response' established through bilateral commercial agreements

Legal process

- implement the notification process as proposed in the Consultation which respects consumers' right to privacy and due process
- ensure that rights' holders pursue claims against UK consumers in a way that respects consumer rights and particularly the right to due process

Technical measures

- ensure rights' holders exhaust all remedies under UK copyright law as a way of deterring persistent offenders before any technical measures are considered
- undertake a full economic and social impact assessment of any technical measures which hinder a household's full internet access before creating the technical measure backstop power, particularly in regard to suspension

- ensure that the suspension of internet accounts is not on the list of possible technical measures that may be considered at a later date
- to ensure that the process triggering 'technical measures' is evidence based, transparent, open and accountable

Cost

- ensure that UK broadband consumers do not pay a de facto 'copyright enforcement tax' on an essential service
- ensure that rights' holders who utilise the notification process bear the full cost arising to Internet Service Providers and Ofcom from this process

Ofcom's duties

- introduce a tightly defined duty for Ofcom to reduce copyright violation via file-sharing as set out in the Government's strategy
- ensure that Ofcom, as part of its new duty, establishes reliable baseline figures on copyright violation via file-sharing and that these are updated and published on a quarterly basis
- ensure that Ofcom, when evaluating the performance of the Government's strategy, evaluates all aspects including notification letters, targeted legal action by rights' holders against repeat infringers, education initiatives, and whether rights' holders have done enough to offer legal services designed to attract users to the legal market
- follow Better Regulation Principles and establish an evidence base for the assertion that technical measures are effective in reducing copyright violation via file-sharing
- ensure that Ofcom conducts a full assessment of whether technical measures are efficacious and proportionate before they are introduced
- ensure that Ofcom, in approving, monitoring and enforcing the Code of Practice, maintains due regard to its statutory duties under the Communications Act 2003, particularly in furthering 'the interests of citizens in relation to communications matters'
- ensure Ofcom does not approve a Code of Practice which violates relevant EU directives, consumer protection law, data protection law or human rights law
- ensure Ofcom enforces rights' holder's compliance with the Code of Practice and publishes any incidences of non-compliance
- ensure that consumer groups and legal experts are involved in the negotiations to establish the standard of evidence to be specified in the Code of Practice
- ensure Ofcom reviews under what circumstances an IP address would meet the 'balance of probability' standard of evidence

Notification letters

- ensure that the wording and content of notification letters is established as part of the Code of Practice and respects consumer's right to the presumption of innocence
- ensure Ofcom establishes and runs a advice line for consumers who have received notification letters, and that consumers have the ability to officially contest warning letters

The Digital Britain strategy

The strategy set out in *Digital Britain*

The final *Digital Britain* report sets out the Government's strategy for reducing copyright violation via file-sharing.

'The civil infringement of taking someone else's intellectual property or passing it on to others through file-sharing without any compensating payment is, in plain English, wrong. However the Government also believes, and the evidence suggests, that most people given a reasonable choice would much prefer not to do wrong or break the law. The objective of the Government's policy is therefore three-fold.

Firstly, to provide a framework which encourages the growth of legal markets for downloading that is inexpensive, convenient and easily accessible for consumers.

Secondly, through encouraging suitable information and education initiatives, to ensure that consumers are aware of what is and is not lawful.

And thirdly, we aim to provide for a graduated response by rights 'holders and Internet Service Providers so that they can use the civil law to the full to deter the hard core of users who wilfully continue unlawful activity. The Government intends to provide, initially for Ofcom, a duty to secure a significant reduction in unlawful file-sharing by imposing two specific obligations: notification of unlawful activity and, for repeat-infringers, a court-based process of identity release and civil action. The Government is also providing for intermediate technical measures by Internet Service Providers, such as bandwidth reduction or protocol blocking, if the two main obligations have been reasonably tried but, against expectations, shown not to have worked within a reasonable but also reasonably brisk period.¹

The current consultation process relates primarily to the third element of the strategy suggested in *Digital Britain*, which will allow rights' holders to use 'civil law to the full to deter the hard core of users who wilfully continue unlawful activity'.² Consumer Focus has serious concerns that no progress has been made on how legal markets could be developed in the context of illicit file-sharing. The Government has also failed to establish how the education element of its strategy will be delivered.

Growth of legal markets

The Government has remained silent on how the first element of the strategy will be implemented. It advocates 'a framework that encourages the growth of legal markets for downloading that are inexpensive, convenient and easily accessible for consumers'. This silence is regrettable since there is an opportunity for Britain's creative industries to flourish by taking advantage of digital technologies. As technology ownership among consumers has risen, the online based consumption of digital content has moved from a niche to a mass market, with US based iTunes and Sweden based Spotify in the vanguard.

¹ BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.17

² BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.17

The online audience consumes artistic content such as music primarily through the digital and online environment, and there is a clear demand for the online delivery of content. The UK has seen an encouraging early take up of legal online business offerings, such as streaming via YouTube which has about 15 million unique UK users,³ and Spotify which since its UK launch in February 2009 has reached more than a million users.⁴ While the demand for innovative digital content offerings is beyond doubt, there is a persistent innovation gap when it comes to legal online content business models in the UK.

The growth of legal markets is a cornerstone of the Government's strategy to reduce copyright violation via file-sharing. Many British consumers treat file-sharing services such as LimeWire as trusted brands which offer convenience and good service.⁵ Rights' holders must re-engage these consumers. The strategy set out in *Digital Britain* has the potential to develop the legal market and benefit the economy.

'Central to this new proposition is a series of commercial agreements and business models that give the consumer or the fan highly affordable and convenient content.'

'...surveys indicate there is real interest in new business models that offer a similar experience and content to file-sharing.'⁶

Consumer Focus does not condone the sharing of content in violation of copyright, but we see the rise of sites such as Limewire and The Pirate Bay as an inevitable consequence of the digital market failing to meet consumer demands and needs. The demand and supply cycle has driven some digital content actors to take steps towards filling the supply vacuum currently being exploited by the informal market. No company or industry can expect to maintain profitability by maintaining the same business model for 30 years and the industries affected by file-sharing, particularly the music industry, must re-engage with consumers who consume artistic content outside the legal market.

'A recent study in Scandinavia has shown that the biggest users of unlawful peer-to-peer material are also the biggest paid-for consumers of music. Where there are easy, affordable and lawful routes consumers will take them. *Digital Britain* therefore proposes an equitable framework to bring content-creators, rights' holders, aggregators, distributors and consumers together to create workable and effective online download markets of scale. Central to this new proposition is a series of commercial agreements and business models that give the consumer or the fan highly affordable and convenient content.'⁷

Since *Digital Britain* was published a number of consumer studies have been published which support the strategy set out in *Digital Britain*. For example, a survey carried out by The Leading Question, in conjunction with Music Ally, found that the overall per centage of those file-sharing regularly (ie, every month) has dropped by nearly a quarter. The biggest drop was found among 14 to 18-year-olds of which 26 per cent regularly file-shared, down from 42 per cent in December 2007.

³ Ofcom, [The Communications Market Report 2009](#), August, pg.287

⁴ Mark Chacksfield, [Spotify hits a million UK users](#), TechRadar, 28 April 2009

⁵ Rory Cellan-Jones, [The culture of copying](#), BBC News, 29 May 2009

⁶ BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.111

⁷ BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.110

There is evidence to indicate that young people are increasingly migrating to the legal market, such as streaming sites,⁸ which the British Phonographic Industry (BPI) described as 'great music discovery tools and a new way for artists to get paid and drive new sales'.⁹

There are encouraging signs that broadcasters which find their most popular shows distributed in violation of copyright on file-sharing sites, are making their content available through legal streaming and file-sharing services, such as BBC iPlayer and 4oD. The BBC's intention to make the technology behind BBC iPlayer available for other broadcasters to establish their own services has the potential to revolutionise UK broadcasting and significantly grow the online broadcasting market.¹⁰

For more than a decade the music industry, by their own admission, has refused to harness the opportunities presented by digital technologies.¹¹ Recent developments indicate that the music industry is still unwilling to recognise the growth potential of the legal market online. Geoff Taylor, CEO of the BPI, recently concluded that, 'We could hardly have more legal download services than we already do'.¹²

Sony Music and EMI, which have been approached by Virgin Media over the possibility of releasing their content within an unlimited download subscription service designed to attract those consumers currently file-sharing, have criticised such services as fundamentally flawed, saying they would cannibalise existing digital sales rather than successfully converting persistent file-sharers.¹³

Universal says that its research indicates that such a service would not cannibalise existing digital sales.¹⁴ While we appreciate that discussion around the development of new services needs to take place, we are concerned that not all rights' holders take a proactive attitude in trying to find workable solutions aimed at reintegrating the millions of consumers who see illicit services as a convenient service proposition.

The growth of the legal market in online content is also hindered and delayed by issues around the licensing of copyrighted content for online use, such as streaming. According to Keith Harris, chairman of MusicTank (a business development network for the UK music industry), there is an urgent need to license new streaming services.¹⁵

In September this year a six-month standoff between YouTube and PRS for Music over the rate PRS charges for licensing music for online streaming was finally resolved.¹⁶ The dispute sparked an intense debate over how collecting societies can support emerging music streaming sites.¹⁷

Andrew Shaw, PRS's managing director, said, 'We need to ensure the music artists are paid for their work, but we also wanted to make sure that the framework was in place to enable the digital market to grow'.¹⁸

⁸ Alexander Topping, [Collapse in illegal sharing and boom in streaming brings music to executives](#) guardian.co.uk, 12 July 2009 &

The Leading Question & music ally, [Filesharing music among UK teens down by a third](#), 13 July 2009

⁹ Alexander Topping, [Collapse in illegal sharing and boom in streaming brings music to executives](#) guardian.co.uk, 12 July 2009

¹⁰ Will Cooper & Adrian Pennington, [BBC to open iPlayer technology to third parties](#), NewMediaAge, 11 September 2009

¹¹ Geoffrey Taylor, [Ten years of Napster](#), BPI, 26 June 2009

¹² Patrick Foster, [Musicians hit out at plans to cut off internet for file-sharers](#), The Times, 10 September 2009

¹³ Alex Farber, [Record Labels cast doubt on Virgin Media's music model](#), NewMediaAge, 10 September 2009

¹⁴ Alex Farber, [Record Labels cast doubt on Virgin Media's music model](#), NewMediaAge, 10 September 2009

¹⁵ Duncan Geere, [EMI refuses to stream at new PRS rate](#), PocketLint, 30 June 2009

¹⁶ [Music videos return as YouTube end PRS dispute](#), NME News, 3 September 2009

¹⁷ [PRS for Music cuts online streaming rate, Jonathan from Spotify is delighted](#), TechDigest, 26 May 2009

¹⁸ [New rate for music digital streaming](#), BBC News, 26 May 2009

However, beyond vague promises of 'some changes to the legislative framework around copyright licensing' and to allow access to orphan works¹⁹ no concrete proposals have been put forward by the Government on how it will ensure rights' holders and collecting actively support a thriving market in digital content.

It is, perhaps, no accident that hardly any of the new innovative digital content business models, such as Spotify and iTunes, are UK based. Last.fm, which is UK based, has recently outlined the problems it sees with the current licensing system. Last.fm founder Martin Stiksel, commenting on a dispute between YouTube and the Performing Right Society, said, 'It is a fundamental problem that we have been facing, in that online music licensing is getting more complicated and more expensive.' He went on to say, 'We have to find commercially workable rates otherwise illegal services will win and take over.'²⁰

'It should be as easy as possible to buy, sell, license, securitise (grouping rights together into a tradable asset) and observe intellectual property rights, both within the UK and for UK firms abroad. Moreover, competition authorities must have the ability to curb any abuse of monopoly power stemming from intellectual property rights.'²¹

The Gowers Review of Intellectual Property recommended that there should be increased collaboration between the Intellectual Property Office, the Competition Commission and the Office of Fair Trading to establish an understanding of how healthy competition can flourish in the information market, and how intellectual property can both stimulate and stunt dynamic competition.²² The issue is also being considered at EU level and in May this year the EU Competition Commissioner publicly demanded that the music industry should move quickly to change licences which restrict online music stores such as iTunes from offering the same songs for sale across Europe.²³

We ask the Government to:

- require the Intellectual Property Office to undertake a review of the current licensing system to identify barriers to a thriving legal UK online content market
- build on the Innovative Nation White Paper and ask the Better Regulation Executive to review how the regulation of online content in the UK promotes or hinders innovation
- take forward recommendation 34 of the Gowers Review which called for increased co-operation between the Intellectual Property Office, the Office of Fair Trading and the Competition Commission to ensure that competition and intellectual property policies foster competitive and innovative markets for the benefit of consumers

Education and information provision

The second element of the strategy outlined in Digital Britain is supposed to encourage 'suitable information and education initiatives to ensure that consumers are fully aware of what is and is not lawful'.²⁴ The education efforts are described as central to the equitable strategy taken by *Digital Britain*.

¹⁹ BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.17

²⁰ Jane Wakefield, [Last.FM joins Google's rights row](#), BBC News, 10 March 2009

²¹ HM Treasury, [Gowers Review of Intellectual property](#), November 2006, pg.36

²² HM Treasury, [Gowers Review of Intellectual property](#), November 2006, pg.12

²³ Aoife White, [EU pushes music industry to open up online rights](#), Associated Press, 26 May 2009

²⁴ BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.17

‘...persuasion and information for the lawfully-inclined consumer and parent on how to access [legal] content and straightforward advice on dos and don’ts, since very few people carry around a detailed knowledge of the intricacies of copyright law.’²⁵

There is still considerable confusion among consumers on what is copyright violation in the online environment. A recent BMRB survey we commissioned found that 73 per cent of the UK population are ‘never quite sure what is legal and illegal under current copyright law’.²⁶ File-sharing is no exception.²⁷

‘A question I sometimes ask myself as I look at my own children. Does it make sense to expect a 12-year-old surfing the Internet to know what they can and can’t do with the content they find – not just in their own country, but internationally? Yes, we must teach them to respect the law. But can we really expect them to master it before they go online?’

And I think most ordinary people just aren’t sure what they can and can’t do – or why they shouldn’t do it.

The teenager on a download site. If there isn’t a way to explain to them in plain English that they’re doing wrong, how can we expect them to understand that they are?’²⁸

The Rt Hon David Lammy MP
Minister of State for Higher Education and Intellectual Property

Consumer Focus is supportive of the education element within the Government’s strategy to reduce copyright violation via file-sharing. The Gowers Review highlighted information provision as a crucial element of intellectual property enforcement and recommended that the Intellectual Property Office strengthened its role, ‘focusing in particular on the wider impacts of intellectual property crime, and the exceptions to rights’.²⁹

Until recently copyright was primarily the concern of businesses simply because consumers were not able to violate copyright on any significant scale. However, digital technologies now allow consumers to violate copyright on a significant scale and a ‘rip, mix and burn’ culture has taken root where consumers adapt digital works to create what is known as user-generated content. In this context it is vital that consumers are engaged on copyright.

The Government has failed to give any indication of how consumer education on copyright is to be taken forward. This is worrying given that no Government department or agency appears to be taking responsibility for the issue. The IPO has begun to consider consumers as part of its remit by describing part of its role as balancing ‘the needs of consumers and users’.³⁰ However, it provides little information on copyright to consumers, focusing instead on business.

²⁵ BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.110

²⁶ BMRB survey, commissioned by Consumer Focus. Conducted among 2026 respondents from the 17th to the 23rd September 2009.

²⁷ Rory Cellan-Jones, [The culture of copying](#), BBC News, 29 May 2009

²⁸ David Lammy, [Copyright, enforcement and the creative industries: keeping ahead of the game in the 21st Century Economy](#), IPO, August 2009

²⁹ HM Treasury, [Gowers Review of Intellectual property](#), November 2006, pg.8

³⁰ IPO, [Tougher penalties for online Copyright Infringement proposed as part of Digital Britain package](#), Press Release, 17 June 2009

We ask the Government to:

- take forward recommendation 35 of the Gowers review as part of the Government's strategy to reduce copyright violation via file-sharing so that the Intellectual Property Office, in co-operation with stakeholders, provides consistent and authoritative information about copyright to consumers.

Ongoing reform of copyright law

With the arrival of digital technologies, copyright has moved from being a relatively obscure area of law to an area of public policy that is routinely in the news. The issue of en masse copyright infringement by consumers, particularly file-sharing, raises significant issues around enforcement and around how copyright law can maintain its relevance in the digital age.

There are ongoing initiatives to update copyright, but initiatives such as introducing a tightly defined fair dealings provision for format-shifting, for example when a consumer copies a CD they have purchased onto their iPod or computers, have stalled due to resistance from some rights holders. UK copyright law must adapt to the evolution of online technology.

'Consumers, and that means anyone with access to a computer or a cell phone, have taken a look at copyright and don't like what they see. That creates challenges for you in the film industry and for government.'³¹

The Rt Hon David Lammy MP
Minister of State for Higher Education and Intellectual Property

UK copyright law is currently so restrictive when it comes to consumer use that UK consumers violate copyright in a multiplicity of ways without visiting a file-sharing site. Violation of copyright law can range from a teenager using a 30 second sample of a Lily Allen song with their own digital home video and posting it on YouTube, through to format-shifting of CDs to iPods.

'The way we publish and consume works has changed. Consumers eagerly reached out to grab the potential of 21st-century technology while business and governments sleepwalked into it. They built a digital culture based on access, even if it cuts across the law.'

'The CD owner who wants a copy on his MP3 player. Is he breaking the rules or just refusing to be ripped off?'³²

The Rt Hon David Lammy MP
Minister of State for Higher Education and Intellectual Property

The glaring gaps in current copyright law when it comes to everyday consumption and interaction of digital works have given rise to a bizarre situation where 16 per cent of the British population are breaking copyright law by copying a CD or DVD they have bought to an iPod, mobile phone or other mobile device for their own personal use.³³

³¹ David Lammy, [Copyright, enforcement and the creative industries: keeping ahead of the game in the 21st Century Economy](#), IPO, August 2009

³² David Lammy, [Copyright, enforcement and the creative industries: keeping ahead of the game in the 21st Century Economy](#), IPO, August 2009

³³ BMRB survey, commissioned by Consumer Focus. Conducted among 2026 respondents from the 17 to the 23 September 2009.

If the Government wants to encourage consumers to respect copyright, especially in the digital age with file-sharing, it needs to ensure that copyright regains relevance and purpose in the eyes of consumers.

We ask the Government to:

- ensure that the Intellectual Property Office takes forward its work on fair dealing provisions for consumers in UK Copyright law, particularly in regard to format-shifting

The right to due process

The Government's human rights obligations

Copyright violation by consumers, not just via file-sharing, raises issues of law enforcement. The UK copyright framework was not designed to deal with consumers who have the technological ability to copy, adapt and distribute copyrighted work with ease. Law enforcement must be proportionate and carried out in a way that respects defendants' human rights, particularly the right to 'due process' which includes the presumption of innocence and a fair trial.

The Human Rights Act 1998 gives effect to the European Convention on Human Rights and specifies that 'primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.³⁴

UK courts furthermore have the ability to make a declaration of incompatibility of primary legislation with a Convention right.³⁵ The Convention establishes that the UK Government, as party to the Convention 'shall secure to everyone within their jurisdiction the rights and freedoms defined in... this Convention'.³⁶ The Human Rights Act 1998 also established that it 'is unlawful for a public authority to act in a way which is incompatible with a Convention right'.³⁷

Throughout the consultation process leading up to the publication of *Digital Britain* Consumer Focus has emphasised that the right to due process needs to be respected. The origins of the right to due process can be traced back to the Magna Carta³⁸ and this right enshrined in Article 6 of the Convention. Due process includes the right to presumption of innocence and a fair trial³⁹ and is guaranteed in civil and criminal proceedings. Due process is an 'absolute Convention right' which means it cannot be infringed upon in any circumstances.⁴⁰

Consumer Focus was encouraged by the approach set out in the final *Digital Britain* report, which respects the right to due process by proposing a legislative framework which will see copyright holders and Internet Service Providers (ISPs) co-operate under Ofcom supervision, 'so that rights' holders can use the civil law to the full to deter the hardcore of users who wilfully continue unlawful activity'.⁴¹

Government has failed to fully consider the human rights implications of its plans, particularly in regard to the possible introduction of technical measures. The *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* did not include a human rights impact assessment based on proposed file-sharing legislation. Given the complexity of the process that will be established when the Digital Economy Bill becomes law we believe it is necessary to conduct a full human rights impact assessment, with particular emphasis on the right to due process.

³⁴ [Human Rights Act 1998](#), Article 3(1)

³⁵ [Human Rights Act 1998](#), Article 4(1) & (2)

³⁶ [European Convention on Human Rights](#), Article 1

³⁷ [Human Rights Act 1998](#), Article 6(1)

³⁸ [The Magna Carta](#), Article 39

³⁹ [European Convention on Human Rights](#), Article 6

⁴⁰ Liberty, [Article 6: Right to a Fair Trial](#), Your Rights

⁴¹ BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.17

We ask the Government to:

- undertake a human rights impact assessment to ensure that the legislation and process to be implemented by the Digital Economy Bill does not violate citizens' human rights

Weaknesses in the evidence used by rights holders

Consumer Focus believes that due process is mandatory in validating evidence offered by rights' holders against consumers. As we have previously outlined to Government, there are serious concerns about the reliability of evidence used by rights' holders. Some rights' holders and law firms are already pursuing consumers based on questionable evidence and the Internet Service Providers Association (ISPA) has stated that ISPs are not convinced that the right people are identified. *Which? Computing* has collected evidence about ongoing actions by law firms ACS Law and Davenport Lyons on behalf of rights' holders against consumers. It has asked the Solicitors Regulation Authority to investigate whether Davenport Lyons had breached rules contained in the Solicitors' Code of Conduct, including ignoring evidence presented by consumers in their defence.⁴²

In December 2008 the BBC *Watchdog* programme investigated the way the law firm Davenport Lyons obtains its evidence and it emerged that the law firm is taking action based on IP addresses harvested from file-sharing sites. Michael Coyle, a lawyer representing nearly 400 people who received letters demanding the payment of £500 to £600 by Davenport Lyons, said that an IP address as evidence for copyright violation is not conclusive enough.⁴³

Guardian Money also documented the cases of hundreds of UK consumers being accused by Davenport Lyons of downloading two hardcore adult movies from file-sharing sites. Michael Coyle from Lawdit solicitors, which represented individuals who had received letters from Davenport Lyons, questioned the methods of the law firm which acted against UK consumers on behalf of a German rights' holder in adult movies.

Michael Coyle, Solicitor and Director of Lawdit said: 'All they do is find the internet connection, demand the service provider reveal the name and address (not all do) and then send out a letter demanding cash. But the technology is flawed. It is easy to hijack a wireless router especially in a built-up area or a block of flats, so it is never clear who used what.'⁴⁴

An IP address identifies an internet account and James Blessing, council member of the Internet Service Providers Association (ISPA), commenting on the Davenport Lyons case, pointed to a number of problems with using ISP addresses as evidence for copyright violation. These range from errors in the process of harvesting IP addresses, and hijacked wireless accounts, to the fact that, unlike telephone numbers which are static and unchanged, the IP addresses assigned to consumers are often dynamic.⁴⁵

Consumer Focus believes that if due process is not followed there is an unacceptable risk that a high number of consumers could find themselves subject to enforcement measures based on flawed evidence. Particularly in the case of suspension, which is the most severe punishment that has been suggested, evidence provided by rights' holders needs to be tested in court and consumers must be presumed innocent until proven guilty.

⁴² [More innocent consumers accused of file sharing](#), *Which? Computing*, 2 July 2009

⁴³ Joe Mather, [Davenport Lyons – threatening letters](#), *BBC Watchdog*, 8 December 2009

⁴⁴ Tony Levene, [Porn bill for couple who can't download](#), *guardian.co.uk*, 29 November 2009

⁴⁵ Jane Wakefield, [A hard look at file-sharing evidence](#), *BBC News*, 5 December 2008

The Consultation suggests that the Code of Practice will establish a minimum standard of evidence based on which rights holders can ask ISPs to send out notification letters. We think that this provision is absolutely crucial and provide more details on this subject in the 'Reasonable standard of evidence' section of our consultation response.

We ask the Government to:

- recognise that there are continuous shortcomings in the evidence advanced by rights' holders and that the right to the presumption of innocence is mandatory

The need for due process

According to the *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* the Code of Practice is designed to underpin the process established by the Digital Economy Bill. It will 'provide for a dispute resolution mechanism between rights' holders, consumers and ISPs'.⁴⁶

It further elaborated that:

'As reflected above the Government is conscious that there needs to be protection in place for consumers who consider that they are being targeted wrongly. This should be established for operation during the operation of the original obligations. While there may be few strenuous objections to being notified, the warning that any further notifications received from rights' holders will be noted in order that serious infringers can be identified for possible legal action by rights' holders might well result in consumers seeking explanations and correction where they consider the evidence to be faulty. It also seems reasonable and appropriate that, should further obligations be imposed, consumers have access to a clear and transparent (and independent) appeals' mechanism since such measures may be taken against them without the benefit of a judicial hearing. In those circumstances it may be appropriate for an enhanced consumer appeal process to be introduced along the lines of an ombudsman.'⁴⁷

'The extent to which those potentially subject to such technical measures will have an effective right of appeal which provides remedies and redress in appropriate circumstances will be a key consideration for Ofcom in deciding whether to exercise the power, and this will need to be reflected in the code.'⁴⁸

Consumer Focus is deeply concerned over the ambiguity of these statements. While we agree that a process should be established through which consumers can contest the warning letters they may have received, we reject any proposition that 'measures may be taken against [consumers] without the benefit of a judicial hearing'.

Consumer Focus is concerned that the Government's latest thinking, set out in the *Government statement on the proposed p2p file-sharing legislation*, has added further ambiguity by not making a clear statement about whether allegations that consumers have violated copyright via file-sharing will be heard in court.

⁴⁶ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.20

⁴⁷ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.22

⁴⁸ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.14

A letter to The Times by the Secretary of State stated that 'temporary account suspension' would only be a last resort and 'would only follow a well-established series of warnings and clear evidence that they were taking action to defend their own rights'.⁴⁹ The letter stated that the Government wants 'to know more from digital rights groups and consumers about other steps that should be taken to protect people who may feel that they are at risk of being accused without good cause' and that 'having a fair, fast and effective appeals process will obviously be essential'.⁵⁰

The most effective way to protect people from having technical enforcement measures imposed against them 'without good cause' is to respect their right to due process, with the associated presumption of innocence. However, by talking about an 'appeal process' it appears that citizens may find themselves subject to technical measures based on evidence presented by rights' holders, and then have the right to appeal.

This does not comply with the right to due process and will not protect consumers from being wronged. Neither Ofcom nor the Intellectual Property Office have the remit to provide a fair and independent judicial appeal process and the Government has not outlined who, in their view, would be suitable to provide the suggested judicial process other than the courts.

A number of European countries have witnessed the industry implementation of a graduated response. In the Netherlands and Spain the approach has been struck down by local courts because it raises significant issues with regards to due process, privacy and proportionality.⁵¹ Earlier this year the French Constitutional Council overturned part of the proposed Hadopi legislation on the grounds that it violates the right to presumption of innocence because the administrative process envisaged by the law did not provide for the evidence provided by rights' holders to be tested in court.⁵²

In July this year it emerged that the only Internet Service Provider in Hull, Karoo, owned by KCOM, had implemented a policy of suspending customers from the internet with no warning, based on evidence provided by rights' holders. In order for the suspension to be lifted, customers were asked to sign a form admitting guilt and promising not to repeat the offence.⁵³ After the media and consumer groups challenged this practice KCOM ceased implementing technical measures against consumers suspected of copyright violation by rights' holders.⁵⁴

In a statement, Karoo said: 'We will no longer suspend a customer's service unless we receive a court order from a copyright owner taking legal action. As a result it is the responsibility of the legal system, not Karoo, to ensure the accuracy of the information provided by the copyright owners.'⁵⁵

Consumer Focus is concerned that the *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* is ambiguous about how due process will be respected in the event of technical measures being imposed against households.

⁴⁹ Peter Mandelson, [Taking something for nothing is wrong](#), The Times, 29 August 2009

⁵⁰ Peter Mandelson, [Taking something for nothing is wrong](#), The Times, 29 August 2009

⁵¹ Jacqueline Klosek & Tamar Gubins, [United States: Combating Piracy And Protecting Privacy: A European Perspective](#), Goodwin Procter, 9 October 2008

⁵² BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.13

⁵³ [Plug-pulling ISP changes policy](#), BBC News, 24 July 2009

⁵⁴ MarkJ, [ISP Karoo Requires Court Order to Disconnect Illegal Broadband File Sharers](#), ISP Review, 14 August 2009

⁵⁵ MarkJ, [ISP Karoo Requires Court Order to Disconnect Illegal Broadband File Sharers](#), ISP Review, 14 August 2009

We agree with the Communications Consumer Panel that 'rights' holders should have to obtain a court order before any action is taken to restrict or suspend anyone's broadband access.⁵⁶

It is alarming that some stakeholders within the debate interpret the Government's latest thinking to mean that consumers suspected of copyright violation will have technical measures taken against them without being allowed to defend themselves in court.

'UK Music is pleased that Government is proposing accelerated and proportionate action to meet their stated ambition of reducing illegal file-sharing by 70-80 per cent within two to three years. Throughout this debate, UK Music has voiced concerns that the original time frame of proposed legislation, and particularly the trigger mechanisms that would grant Ofcom reserve powers to implement technical measures, would have failed to meet these ambitions. More than that, these trigger mechanisms would have required our members to take legal action against individuals – a move the UK music industry has consistently resisted.'⁵⁷

Consumer Focus opposes any technical enforcement measure against consumers based on suspicion and evidence advanced by rights' holders. Consumers that are suspected of breaking the law at such a degree that technical measures might be considered should be given the chance to defend themselves in court. Unfortunately the Government has failed to make a clear statement to the effect that technical enforcement measures will only be imposed on an individual after due process has been exhausted.

We ask the Government to:

- make a clear statement that the Government will respect citizens' right to due process

Technical measures through bilateral commercial agreements

Consumer Focus is concerned that Government appears to suggest in the *Digital Britain* report that technical measures could be imposed against consumers as part of a business arrangement.

'The Government will look to Ofcom to work with Government departments and other regulators to produce guidelines on how technical measures could be sensibly incorporated within bilateral commercial agreements in a way which will not conflict with other policies, such as those covering privacy.'⁵⁸

Just before the publication of *Digital Britain* Virgin Media announced its intention to launch an unlimited download subscription service with the aim of offering a legal model to consumers currently engaging in copyright violation via file-sharing. While Consumer Focus supports the spirit of the service, we are concerned that the deal between Virgin and Universal may contain provisions for the possible suspension of customer accounts if evidence is found that they may have violated copyright through file-sharing.

Virgin Media's chief executive Neil Berkett, in an interview with the BBC, said that after a range of measures had been used as part of a graduated process, Virgin Media would

⁵⁶ Communications Consumer Panel, [Communications Consumer Panel calls on Government to realise the Digital Britain vision](#), 10 September 2009

⁵⁷ Robert Ashton, [Suspension now a option against filesharers](#), MusicWeek, 25 August 2009

⁵⁸ BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.110

ultimately put a suspension on customers. The British Phonographic Industry commented that 'the fact that Virgin Media will apply a graduated response system to tackle persistent illegal downloaders demonstrates that graduated response is a proportionate and workable way forward.'⁵⁹

The term 'graduated response' is commonly used to describe a process by which internet accounts are suspended after a number of warning letters based on evidence supplied by the rights' holder. The process does not respect the right to presumption of innocence and the suspension takes place without the evidence being tested in a fair trial. The graduated response is an alternative administrative process to the normal judicial process through which copyright is enforced.⁶⁰ It is important that the Government does not allow private entities to establish an administrative copyright enforcement process through bilateral commercial agreements. This would bypass the judicial process available to rights' holders and violate a citizen's right to due process.

Consumer Focus understands that Virgin Media's music service is still in development and we will observe developments carefully. The small print in the terms and conditions can not over-ride human rights law. We are concerned that the graduated response may be incorporated in the terms and conditions of the contract.

As per the Human Rights Act 1988, UK courts cannot enforce contracts that contravene Convention rights.⁶¹ If enforcement measures are imposed against consumers without respect for the right to due process on the basis of the terms and conditions, the contract will not be upheld. Ofcom, as a public authority, must act consistently with Convention rights. It is paramount that Ofcom, or any other Government department, does not sanction bilateral commercial agreements that do not comply with due process.

We ask the Government to:

- ensure that consumers' right to due process is not violated by a 'graduated response' established through bilateral commercial agreements

⁵⁹ [Anti-piracy music deal for Virgin](#), BBC News, 15 June 2009

⁶⁰ Jim Burger, [Filtering & graduated responses against online video infringers](#), DVD Intelligence, 6 June 2009

⁶¹ Mindy Chen-Wishart, Contract Law, Oxford University Press, 2007, Pg.45

Legal process

Notification process

The *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* sets out a detailed process which would allow rights' holders to send warning letters to consumers thought to be infringing copyright and to identify repeat infringers, potentially taking them to court. The process as set out in the Consultation respects consumers' right to privacy and due process, and Consumer Focus is supportive of the approach.

'How the notification process and possible court action could work:

- Rights' holders identify cases of infringement and send details including IP addresses to ISPs
- ISPs verify standards of evidence and link infringement to subscriber account
- ISPs send (multiple) letters to subscribers identified as infringing; those identified as the most frequent added to the serious infringers' list
- Rights' holders use the serious infringers' list as the basis for a large scale 'Norwich Pharmacal'⁶² order to obtain the names and addresses of those on the list
- Rights' holders send 'final warning' letter direct to infringer asking them to stop file-sharing; clear warning of likely court action if the warning is ignored
- Rights' holders take court action against those who ignore final warning⁶³

Following the Digital Economy Bill becoming law Consumer Focus will closely engage in the Ofcom-led process to formally enshrine this approach. We have commented in greater detail on the Code of Practice that is to be negotiated in 'The Code of Practice' section of this consultation response. Furthermore we have strong concerns over the scope of Ofcom's new duty, which we have outlined in 'The scope of the new Ofcom duty', and the question of how rights holders' compliance with the proposed Code will be ensured, which we outline in the 'Compliance with the Code' section.

We ask the Government to:

- implement the notification process as proposed in the Consultation which respects consumers right to privacy and due process

⁶² A Norwich Pharmacal order is a court order that requires a respondent to disclose certain documents or information to the applicant. The respondent must be a party who is involved or mixed up in a wrongdoing, whether innocently or not, and is unlikely to be a party to the potential proceedings. An Norwich Pharmacal order will only be granted where 'necessary' in the interests of justice. Orders are commonly used to identify the proper defendant to an action or to obtain information to plead a claim.

Lawdit [Norwich Pharmacal](#), 3 April 2009

⁶³ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.19-20

Level playing field

There is a clear benefit in the introduction of legislation on file-sharing, not least in ending more than three years of conflict over the issue. The actions by KCOM, which suspended its customers in Hull without respecting their right to due process, and those of Davenport Lyons, demonstrate the need to establish a process which is fair and proportionate. A balance must be drawn between the protection of consumer rights and the ability of rights' holders to pursue their claims.

In the *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* the Government states its intention for all ISPs to be covered by the forthcoming file-sharing legislation. However, it also outlines the possibility that small ISPs may be exempt under the 2008 Enterprise Strategy, which requires policy makers to consider whether alternative approaches are appropriate for firms with fewer than 20 full-time employees.⁶⁴

Given the actions taken by KCOM on behalf of rights' holders it is important that any exemption does not open up the possibility for rights' holders or their lawyers pressuring small ISPs into applying technical measures against consumers without regard to the right to due process.

Above and beyond this Government must ensure all rights' holders that wish to pursue claims against UK customers do so in compliance with UK law and with due regard for consumer rights. Government needs to send a strong signal to rights' holders that technical enforcement measures can't be imposed on consumers as part of a bilateral commercial agreement.

We ask the Government to:

- ensure that that all rights' holders pursue claims against UK consumers in a way that respects consumer rights and particularly the right to due process

⁶⁴ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.26

Suspension

Suspension as a silver bullet

In the *Government statement on the proposed p2p file-sharing legislation* the Government proposes that Ofcom be given the power to ask ISPs 'as a last resort, to suspend a subscriber's account', which is described as 'powerful enough to have a significant deterrent effect on infringing behaviour'.⁶⁵

Consumer Focus opposes the suspension of internet accounts as a punishment for consumers who violate copyright law, especially if the right to due process is not respected. The suspension of internet accounts raises questions about proportionality, the punishment of entire households, due process, as well as the economic and social ramifications for households and the wider economy.

Throughout the engagement process that preceded the *Digital Britain* report some representatives within industries affected by file-sharing have put their hope in the power of suspension as a silver bullet solution to copyright violation via file-sharing.

'FAST IIS has lobbied the Government for increased penalties for serious copyright infringers, digital copiers and 'pirates'. We believe the most effective way to demonstrate the seriousness these infractions have to the creative industries is to cut off the tool that enables them to take place. In the same way that dangerous drivers are banned from their vehicles, why should persistent content thieves harm this important UK sector, risking jobs and cutting taxable revenue? The issue is that we the industry are having to take second best because the Government doesn't have the will to impose stringent penalties on what is no different to shoplifting in effect.'⁶⁶

Consumer Focus remains unconvinced that technical measures are needed as a deterrent above and beyond the enforcement measures that UK law provides. If a person is found guilty of copyright violation UK copyright law allows the courts to impose the following remedies: stopping that defendant making further infringing use of the material by granting an injunction, awarding the copyright owner damages, and making the infringing person give up the goods to the copyright owner. Should an individual fail to obey the injunction and continue to violate copyright, they would be in contempt of court, which is punishable by a fine and/or imprisonment. It is not clear to us why a stronger deterrent is needed.

If rights' holders utilise existing law, as envisaged by the final Digital Britain report, persistent offenders could find themselves in prison as UK courts take contempt of court very seriously. Consumer Focus has asked rights' holders why they do not use existing copyright law to prosecute persistent offenders.

The suspicion is that this would generate bad publicity and be perceived as big corporations acting maliciously. Perhaps rights' holders take the view that it would be less

⁶⁵ BIS, [Government statement on the proposed p2p file-sharing legislation](#), 25 August 2009

⁶⁶ Federation Against Software Theft, [Software Watchdog Queries Value In Cutting Online Pirates' Bandwidth](#), 2 June 2009

damaging for them if the Secretary of State imposed controversial and legally questionable technical measures instead.

We ask the Government to:

- ensure rights' holders exhaust all remedies under existing UK copyright law as a way of deterring persistent offenders before any technical measures are considered

Wider social and economic impact

The suspension of an internet account is a serious punishment that must be proportionate to the crime committed. Technical measures which limit or eliminate consumers' ability to effectively use the internet, thereby restricting access to public and private online services, must be considered in terms of the social and economic impact on the affected household and the wider economy. The Government has failed to quantify the likely economic cost to the UK economy, or the social cost to households, resulting from technical measures being imposed.

If a household finds itself subject to technical measures due to the actions of one member, it would limit the entire household's access to essential public services which are increasingly delivered online, such as directgov.uk, the DVLA, jobcentreplus.gov.uk and HM Revenue & Customs. Similarly a household would be cut off from commercial online services such as Amazon, eBay, Tesco Direct, easyJet and Ryanair. They would also be prevented from accessing online banking and from paying their utility bills online.

Furthermore, households would also be cut off from communication channels such as email accounts that are hosted externally by Yahoo or other providers. If breadwinners in the household rely on internet connection, for example if they work from home or run a small business, Government must consider whether the economic damage caused by imposing technical measures is proportionate to the copyright violation being committed.

In *Digital Britain* the Government has recognised the economic importance of internet access for a household, the wider digital economy and the economics of next generation British internet network.

'Access to the home is required; businesses will increasingly be operated from the home, and commercial services to the home are likely to drive network revenues for the foreseeable future.'⁶⁷

Some stakeholders are careful to call for 'temporary suspension',⁶⁸ rather than disconnection. But word games can't disguise what amounts to a draconian punishment. Suspending or limiting UK consumers' access to the internet would impact any industry that relies on the internet to deliver goods and services to customers. The possible impact of technical measures on UK industries needs to be considered, especially in the case of suspension. There is a risk that any technical measure imposed on consumers in order to protect the commercial interest of industries affected by file-sharing would have a disproportionate economic impact on other UK industries, and indeed the UK economy.

Because of the disproportionate economic and social impact on households, particularly in regard to suspension, Consumer Focus urges Government to assess the impact of any technical measure that may be considered at a later date as part of the backstop powers.

⁶⁷ BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.169

⁶⁸ Katie Allen, [Internet suspension of illegal downloaders could become law](#), guardian.co.uk, 6 September 2009

We ask the Government to:

- undertake a full economic and social impact assessment of any technical measures that hinder household's full internet access before creating the technical measure backstop power, particularly in regard to suspension
- exclude suspension of internet accounts from the list of possible technical measures that may be considered at a later date

Human rights

Consumer Focus is also concerned over the impact an internet suspension would have on the right to freedom of expression. As we have stated in *Creative industries and consumers' rights*, which was supported by ISPs and consumer groups, suspending users from the internet would place serious limits on their freedom of expression.

Constraints to freedom of expression are usually imposed only as the result of custodial sentences, or incitement to racial hatred, or libel.⁶⁹ The right to freedom of expression can be found in early human rights documents, such as the *1789 Declaration of the Rights of Man and of the Citizen*.⁷⁰ Also known as the freedom of speech, freedom of expression protects the right to communicate and is enshrined in Article 10 of the European Convention on Human Rights, which has effect in the UK through the Human Rights Act 1998. According to the Convention the right to freedom of expression includes the freedom to 'receive and impart information and ideas.'⁷¹

European human rights law, established through the Convention and case law, is applicable in the UK. The conditions under which the right to freedom of expression may be limited, irrespective of the medium through which opinions, information and ideas are expressed, must be specified in law.⁷²

Suspending an internet connection is the equivalent of suspending a telephone line. There are considerable concerns over the proportionality of suspending internet accounts of those violating copyright. To our knowledge the suspension of internet accounts on the basis that the internet is the medium through which a law has been violated is unprecedented in UK law. Not even individuals convicted of distributing indecent images of children have their internet account suspended.

The severity of account suspension, and the need to establish an appropriate judicial process through which such a measure may be considered, has been highlighted by the French Constitutional Council, when it recently overturned part of the proposed Hadopi legislation. The Constitutional Court had concerns about how restrictions on the right to expression are established. In its ruling the Constitutional Court held that the proposed law infringed Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen (which has constitutional status in France), that is the freedom of communication and expression. The Court held that the right also applies to the online world because the Internet is an important means of communication.

⁶⁹ [Creative industries and consumers' rights](#), The Times, 3 September 2009

⁷⁰ [Declaration of the Rights of Man and of the Citizen](#), Article 11

⁷¹ [European Convention on Human Rights](#), Article 8

⁷² Council of Europe, Case Law Concerning Article 10 of the European Convention on Human Rights, 28 November 2001, pg.6-9

The ruling stated that the power to 'limit the exercise by any person of one's right to express oneself and freely communicate' cannot be given to the administrative authority that would have, as per the legislation, implement suspension of internet accounts. The ruling stated that these powers can only be incumbent on a judge.⁷³

Suspension of internet accounts may also violate the Art 8 of the Convention, which enshrines respect for 'private and family life, his home and his correspondence'⁷⁴, as many social relationships are now formed or maintained partly or wholly by way of the Internet.

We ask the Government to:

- ensure that possible account suspensions evaluated in a judicial process and do not place disproportionate restrictions on the right to freedom of expression

⁷³ [The French Constitutional Council Censures the 3 Strikes Law](#), European Digital Rights, 17 June 2009

⁷⁴ [European Convention on Human Rights](#), Article 8

Technical measures backstop

Trigger for technical measures and power to direct

The Digital Britain report lists the following possible technical measures:

- blocking (Site, IP, URL)
- protocol blocking
- port blocking
- bandwidth capping (capping the speed of a subscriber's Internet connection and/or capping the volume of data traffic which a subscriber can access)
- bandwidth shaping (limiting the speed of a subscriber's access to selected protocols/services and/or capping the volume of data to selected protocols/services)
- content identification and filtering – or a combination of these measures⁷⁵

Digital Britain states that introducing technical measures should only be considered against persistent offenders if the growth of the legal market, education, notification letters and court action do not result in the desired reduction in copyright violation via file-sharing. Consumer Focus supports this approach and urges the Government to only consider technical measures if the strategy set out in *Digital Britain* has failed.

The *Government statement on the proposed p2p file-sharing legislation* outlines the possibility of giving the Secretary of State a two-part power of direction. The first proposed power would allow the Secretary of State 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'.⁷⁶

In the event of the Government's strategy to reduce copyright violation failing, Consumer Focus is not necessarily opposed to giving the Secretary of State the formal power to direct Ofcom to assess whether imposing technical measures would be 'efficacious and proportionate'.⁷⁷ However, Consumer Focus retains serious concerns over the details of the proposed power to direct as outlined in *Government statement on the proposed p2p file-sharing legislation*.

In our view Ofcom should carry out such an assessment in advance of introducing technical measures as a matter of course. The Government stated that the Secretary of State may make a decision based on wider factors such as 'the wider health of the broadband or content markets'.⁷⁸ In our opinion, the health of the broadband and content markets needs to be assessed by Ofcom as part of its assessment on whether imposing technical measures would be 'efficacious and proportionate'.⁷⁹

⁷⁵ BIS & DIUS, [Digital Britain Final Report](#), June 2009, pg.112

⁷⁶ BIS, [Government statement on the proposed p2p file-sharing legislation](#), 25 August 2009

⁷⁷ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.23

⁷⁸ BIS, [Government statement on the proposed p2p file-sharing legislation](#), 25 August 2009

⁷⁹ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.23

Consumer Focus has particular concerns about the details of the second proposed power to direct, which states ‘... 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.’⁸⁰

We are alarmed that Ofcom’s advice will not be binding on the Secretary of State, who will be able to make decisions based on undefined ‘wider factors and other sources of information’.⁸¹

The process and information based on which the Secretary of State makes a decision needs to be open and transparent. If the Secretary of State chooses to exercise their power to direct, the reasoning behind the decision must be disclosed. The Secretary of State should base their decision on evidence established by Ofcom.

The process by which technical measures may be implemented could become subject to a judicial review. The Government must ensure that the process through which technical measures could be implemented is evidence based, open and accountable.

We ask the Government:

- to ensure that the process triggering ‘technical measures’ is evidence based, transparent, open and accountable

⁸⁰ BIS, [Government statement on the proposed p2p file-sharing legislation](#), 25 August 2009

⁸¹ BIS, [Government statement on the proposed p2p file-sharing legislation](#), 25 August 2009

Costs

Who should bear the cost?

The question of cost has been a thorny issue throughout the consultation process in advance of the *Digital Britain* Report. The Communications Consumer Panel has highlighted in its response to the *Digital Britain Interim Report* that ‘if the funding by distributors and rights’ holders of a new approach to copyright enforcement fed through to higher prices for consumers that might, in turn, deter broadband take-up’.⁸² Any cost imposed on ISPs is likely to be passed on to consumers and will increase the cost of broadband for all consumers.

In its latest thinking the Government proposes ‘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’.⁸³

The *Government statement on the proposed p2p file-sharing legislation* estimates the operating cost for the notification process that is proposed to be at least £80,000 per Internet Service Provider, which overall is estimated to impose a £35 million cost on the UK Internet Service Provider industry.⁸⁴ If these costs are passed on to the customers the Department for Business, Innovation and Skills (BIS) has estimated that broadband retail prices will increase between 0.2 per cent and 0.6 per cent and has estimated the reduction in demand for broadband connection to result in a £2 to £9 million per annum loss to the ISP industry.⁸⁵

The majority of consumers do not violate copyright via file-sharing and Consumer Focus does not believe that UK broadband consumers should be paying a de facto ‘copyright enforcement tax’ on what the Government recognises to be an essential service. The cost to Internet Service Providers arising out of the notification process, especially any technical measures that may be introduced, would have a negative impact on the achievement of universal access, and on Internet Service Providers’ ability to implement the roll out of the next generation of broadband as outlined by Government in *Digital Britain*.

The approach to splitting the cost set out in the Government’s latest thinking raises the possibility that Internet Service Providers may have to meet the cost of technical measures. Again, this cost is likely to be passed on to consumers, which will raise the cost of broadband in the UK. We take the position that Internet Service Providers should not bear the cost of technical measures which the Government may decide to introduce at a later date.

⁸² Communications Consumer Panel, [The Communications Consumer Panel Response to Digital Britain Interim Report](#), March 2009

⁸³ BIS, [Government statement on the proposed p2p file-sharing legislation](#), 25 August 2009

⁸⁴ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.50

⁸⁵ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.50

'Better Regulation Principles do not cover the apportionment of costs. The aim should be to keep the costs of regulation on business as a whole to a minimum (and ensure they are proportionate to the desired outcome). As a general principle we believe that the cost should be borne by the party that will benefit, though there may be circumstances where it is appropriate to diverge from that.'⁸⁶

The Government strategy to reduce copyright violation via file-sharing has been introduced primarily to benefit the rights' holders, who have lobbied aggressively for the Government to intervene. The British Phonographic Industry, for example, has consistently argued that copyright violation via file-sharing imposes a heavy economic loss on their industry, establishing figures in the millions and billions.⁸⁷

The rights' holders who have asked the Government to introduce file-sharing legislation, and these are by no means all rights' holders who see their content shared on file-sharing services, believe that a reduction in copyright violation via file-sharing will bring significant financial benefits to their industry. It seems reasonable that those who benefit from the legislation should meet the costs.

The cost distribution of proposed legislation must support the objectives of Government strategy and, therefore, the development of a legitimate market by rights' holders. The cost of the notification process, and any technical measures that may be introduced, must be imposed on the rights' holders. Otherwise there is no incentive for the development of new services to support the online market. In short, rights' holders will find it cheaper to enforce copyright measures than to invest in the growth of the legal market online.

The *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* acknowledges that 'there will also be costs incurred by Ofcom in meeting its obligations to approve the code, including the necessary costs for setting up an appropriate appeal mechanism'.⁸⁸ Ofcom needs to invest time and resources into running the notification process and evaluating the progress of the Government strategy. The cost arising to Ofcom has not been quantified but is likely to be substantial, as is the cost of imposing technical measures.

Ofcom is predominantly funded by the companies it regulates and receives payments from broadcasting licensees and communications providers, as well as payments for the management of the UK radio spectrum.⁸⁹ If Ofcom absorbs the cost arising from its new duty, the UK broadcasting, radio and telecoms industries would effectively pay, and if Ofcom's cost is passed on to the Internet Service Providers, the 'copyright enforcement tax' imposed on an essential service would further increase. We take the position that the rights' holders utilising the notification process should meet the full cost arising to Ofcom from the proposed new duty.

We ask the Government to:

- ensure that UK broadband consumers do not pay a de facto 'copyright enforcement tax' on an essential service
- ensure that those rights holders that utilise the notification process bear the full cost arising to ISPs and Ofcom from this process

⁸⁶ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.17

⁸⁷ [File-sharing FAQs](#), BPI

⁸⁸ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.16 & 17

⁸⁹ Ofcom, [Annual Report 2007/08](#), pg.7

Ofcom's duties

The *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* proposes for the Digital Economy Bill to establish a new Ofcom duty.

'... whereby a duty will be placed on Ofcom to take steps aimed at reducing online copyright infringement. Specifically they will be required to impose the two obligations on Internet Service Providers set out in the *Digital Britain Interim Report*. Ofcom will also have the power to impose by Statutory Instrument the additional obligations listed in the legislation if they think it necessary. In addition they will be required to put in place a code to support any obligations that are in place.'⁹⁰

The Government is implementing the notification process and considering the possible introduction of technical measures as part of its overall strategy to reduce copyright violation via file-sharing. As we have highlighted, however, there has been little or no progress on how the legal market and education element of the Government's strategy will be taken forward. Enforcement action alone is unlikely to achieve a substantial and sustained reduction in copyright violation via file-sharing. There is a danger that the desired reduction in copyright violation via file-sharing will not be achieved because Ofcom's work under the new duty will be entirely detached from the strategy set out in *Digital Britain*.

Consumer Focus is concerned that Ofcom's new duty is too broad in scope and will be interpreted as a general duty to reduce online copyright violation. Consumer Focus does not support such a broad duty. The duty placed on Ofcom should be to reduce copyright violation via file-sharing as set out in the Government's strategy.

Any new duty given to Ofcom must be well defined and carefully considered in terms of its wider implications. This is particularly apparent when looking at recent developments in South Korea, where the National Assembly recently passed an anti-file sharing provision into its copyright law. The new provision is so broad in scope that it is now interpreted to cover practically all copyright violation online, such as message boards, articles of media organisations and individual blog postings.⁹¹

We ask the Government to:

- introduce a tightly defined duty for Ofcom to reduce copyright violation via file-sharing as set out in the Government's strategy

⁹⁰ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.4

⁹¹ Jim Burger, [Filtering & graduated responses against online video infringers](#), DVD Intelligence, 6 June 2009 & Kim Tong-Hyung, [Upload a Song, Lose Your Internet Connection](#), Korea Times, 4 May 2009
[Memorandum to IMPALA Members ISP cooperation on online piracy around the world](#), Independent Music Companies Association

Establishment of baseline data

The debate around the scale and damage caused by file-sharing has suffered from a lack of reliable figures. A number of rights' holder groups have established their own estimates, but the credibility of the figures has been repeatedly contested.⁹² In order for Ofcom to assess whether the Government's strategy to reduce copyright violation via file-sharing is effective, it will need to establish reliable baseline figures and continue to monitor developments. It is important that this data does not measure purely the volume of file-sharing, but also the copyright violation occurring via file-sharing. Not all file-sharing activity breaches copyright, as file-sharing networks are used to distribute open source software as well as films and music which are licensed for non-commercial distribution, for example under a Creative Commons license.

It is important that Ofcom also establishes reliable data on the economic impact of file-sharing, specifically in regard to economic damage and lost sales. Claims around possible economic damage from file-sharing have been central to the debate leading up to the publication of the Digital Britain report but the Government has failed to establish reliable and independent figures. Furthermore, Ofcom should quantify and track the growth of the legal market in online content affected by file-sharing with a view to monitoring the progress of the first element of the Government's strategy as set out in *Digital Britain*.

Ofcom should publish this data so that stakeholders in the debate have access to reliable figures. Furthermore baseline figures on file-sharing should be published on a quarterly basis. In our view it is imperative that the debate is based on reliable figures and that small industry stakeholders, which may not have the resources to conduct surveys of their own, can benefit from this market data. Such data is invaluable in gaining a full understanding of ongoing developments and to identify opportunities to develop the legal market in copyrighted content.

We ask the Government:

- to ensure that Ofcom, as part of its new duty, establishes reliable baseline figures on copyright violation via file-sharing and that these are updated and published on a quarterly basis

Criteria for the evaluation of the Government's strategy:

According to the *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing*, considerations on whether technical measures may need to be introduced would rely on Ofcom conducting a full assessment of the effectiveness of the Government's strategy.

⁹² Dave Legg, [How 136 file sharers became 7 million](#), Neowin, 5 September 2009

'Ofcom first reviews evidence of the effectiveness of notifications and rights holder legal action against serious repeat infringers. We would expect that the start of a notifications program, under the agreed industry code, would form a baseline with Ofcom conducting its first review of effectiveness of notifications within a year. Similarly, Ofcom would review the effectiveness of targeted rights holder legal action within a year of the start of an orchestrated campaign of targeted legal action against serious repeat infringers. We would also expect Ofcom to consider the impact on infringer behaviour of education initiatives and the availability of legitimate services in assessing the overall effectiveness of the notification and collaboration obligations in reducing copyright infringement.'⁹³

Consumer Focus takes the position that even if the Secretary of State is given the final power to direct Ofcom to look at the feasibility of introducing possible measures, the assessment by Ofcom as proposed in the consultation is essential. Technical measures should only be considered if the Government's strategy has failed and the assessment needs to consider, as proposed, the effectiveness of the notifications, the targeted legal action by rights holders against repeat infringers, the education initiatives that have been undertaken, and whether rights' holders have done enough to offer legal services designed to attract users of illicit services to the legal market.

We are concerned that without such an assessment some rights' holders will continue to call for the introduction of technical measures even though they have not fully committed to the Government's strategy. The growth of the legal market is central to the Government's strategy as set out in *Digital Britain*, and Ofcom needs to be able to consider whether the rights' holders have done enough to facilitate the migration of users to legal services.

The consultation asks within what time frame Ofcom should consider the success of the scheme. We believe it requires at least a year before the long-term effects of the Government's strategy can be properly assessed. It takes time to bring legitimate services online and the notification process will also need time to demonstrate impact. Within 12 months we would expect the first instances of rights' holders bringing repeat infringers to court, which should provide a deterrent if convictions are obtained.

The 12-month period will also allow for a valid assessment of any increase or reduction in copyright violation. While we believe that Ofcom should produce quarterly public reports on the progress of the approach, we think they should also conduct a full impact assessment 12 months after the notification process has started. This impact assessment should then be carried out on a regular basis.

Ofcom must take all five industries affected by file-sharing into account when assessing the success of the strategy. File-sharing affects the music, film, broadcast, software, gaming and publishing industry. It may be that over the course of a year one industry sees a significant drop in copyright violation via file-sharing while another industry sees no change.

It is also likely that different industries will engage differently with the process, in that they may decide not to send out notification letters or take legal action. Similarly it could be that some industries develop the legal market considerably while others make no progress in implementing the first element of the Government's strategy. If this is the case Ofcom needs to be able to take this into account and not interpret a lack of progress in one industry as a failure of the Government strategy overall.

⁹³ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.14

We ask the Government to:

- ensure that Ofcom, when evaluating the performance of the Government's strategy, evaluates all aspects of the strategy, including the notification letters, targeted legal action by rights' holders against repeat infringers, education initiatives, and whether rights' holders have done enough to offer legal services designed to attract users of illicit services to the legal market.

Evidence base for the introduction of technical measures

While the Consultation stated that technical measures would need to be 'efficacious and proportionate'⁹⁴ the *Government statement on the proposed p2p file-sharing legislation* explains the reasons for adding suspension to the list of possible technical measures primarily in terms of the need to create a strong deterrent. This would detract from any evidence based considerations on whether or not a particular technical measure would be effective in achieving the desired effect.

Consumer Focus is concerned that the thinking behind adding suspension to the list of possible technical measures runs contrary to the Better Regulation Principles, which state that any regulation should be: transparent, accountable, proportionate, consistent and targeted only at cases where action is needed.⁹⁵

Consumer Focus remains concerned that technical measures, and particularly suspension, are still be seen as a silver bullet. Ofcom will need to assess whether any possible technical measure would be effective in achieving a reduction in copyright violation via file-sharing. It may well be that the technical measures are considered in order to reduce the copyright violation relating to a specific sector.

Ofcom needs to remain open-minded about how a reduction of copyright violation via file-sharing may be achieved in any particular sector, which may mean that a problem can be addressed through other non-technical measures that have not been implemented as part of the Government's strategy.

If the technical measure under consideration restricts consumers' access to online services, as for example bandwidth throttling would, Ofcom needs to establish a full impact assessment on proportionality, as well as compliance in law.

We ask the Government to:

- follow the Better Regulation Principles and establish the evidence base for the assertion that technical measures are effective in reducing copyright violation via file-sharing
- ensure that Ofcom conducts a full assessment of whether technical measures are efficacious and proportionate before they are introduced

The Code of Practice

The notification process that is to be established will be underpinned by a Code of Practice. Provisions in this code must:

- a) 'provide for a fair and transparent appeals' process for consumers, providing remedies and redress in appropriate circumstances
- b) establish the standards of evidence required to trigger a notification

⁹⁴ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.23

⁹⁵ [About the Better Regulation Executive](#), BIS

- c) set out what has to be covered in the notification and other relevant details about the process of notification, including the handling of repeat notifications and, if necessary, the number of notifications that any rights' holder can request
- d) apportion costs of any action, including notification, covered by the code between the relevant parties and left open to refinement by legislation
- e) provide for a dispute resolution mechanism between rights' holders, consumers and Internet Service Providers
- f) set out the process for the identification of 'egregious' infringers (ie, how data is to be kept and in what form and when rights' holders should have access to it in an anonymous form before a court order is obtained). [NB, the data referred to here is not personal data – it is an aggregation of the data provided by the rights holders]⁹⁶

Consumer Focus would like to underline that Ofcom, when approving, monitoring and enforcing the Code of Practice, needs to ensure that it complies with its other statutory duties. Sections 3, 4 and 10 of the Communications Act 2003 establish Ofcom's principle duty in carrying out its function 'to further the interests of citizens in relation to communications matters; and to further the interests of consumers in relevant markets, where appropriate by promoting competition'.⁹⁷

The proposed Code of Practice and the notification process it establishes needs to respect consumer rights. It is imperative that Ofcom complies with its general duties. Consumer groups, such as ourselves, the Communications Consumer Panel and Which?, need to be fully involved in the process of establishing the Code of Practice, particularly when it comes to standard of evidence, the suggested appeal process and the way in which personal information of consumers is handled by both the Internet Service Providers and the rights' holders.

The *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* envisages that Internet Service Providers and rights' holders who want to use the notification process should negotiate a Code of Practice which is approved by Ofcom. The Consultation also proposes that, should no Code be negotiated, Ofcom would be obliged to put such a Code in place within a specified date.⁹⁸

Consumer Focus agrees that a deadline should be set for the negotiation of the Code and that if Internet Service Providers and rights' holders are unable to negotiate a Code that can be approved, Ofcom should draw up its own. The Consultation asks if it is realistic to expect such a Code to be developed in less than 12 months. While we hope that the negotiations will finish sooner, we recognise that there will be considerable need for discussion to establish common ground. We would also recommend that Ofcom facilitates this process.

⁹⁶ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.20

⁹⁷ [Communications Act 2003](#), Section 3(1)

⁹⁸ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.20

We ask the government to:

- ensure that Ofcom, in approving the Code of Practice as well as monitoring and enforcing the Code, has due regard to its statutory duties under the Communications Act 2003, particularly with regards to furthering ‘the interests of citizens in relation to communications matters’

Approval of the Code of Practice

With reference to the Communications Act 2003, Ofcom shall only approve such a Code if it is satisfied:

- ‘that adequate arrangements are in force for funding the activities of that person in relation to the code
- that the provisions of the code are objectively justifiable in relation to the activities to which it relates
- that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons
- that those provisions are proportionate to what they are intended to achieve
- that, in relation to what those provisions are intended to achieve, they are transparent.’⁹⁹

The Consultation also states that ‘Ofcom would of course not approve any part of a code that imposes an obligation on an ISP that would contravene the e-Commerce Directive or any other relevant statute – eg, data protection, privacy etc.’¹⁰⁰

Consumer Focus stresses that compliance with consumer protection law and the Human Rights Act 1998 needs to be added to the criteria Ofcom considers when approving the code. We would also like to see Ofcom publish an assessment of the Code’s compliance with relevant consumer rights. This would increase public confidence on the notification process that is to be set up by the Code.

We ask the Government to:

- ensure that Ofcom does not approve a Code of Practice that violates relevant EU directives, consumer protection law, data protection law or human rights law

Compliance with the Code

The *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* suggests that compliance with the Code by Internet Service Providers and rights holders will be mandated, in stating that ‘legislation shall provide that ISPs (and rights’ holders who want to trigger action under this proposal) shall comply with the Code.’¹⁰¹

It is proposed that Ofcom will have the duty to monitor compliance with the Code of Practice.

⁹⁹ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.20

¹⁰⁰ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.21

¹⁰¹ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.20

‘Ofcom should have the power to fine ISPs for failure to comply with the code. Where a rights holder fails to comply with the code, the code would be void in respect of that rights holder’s requests to ISPs to take action to prevent or reduce online copyright infringement. Where ISPs have taken action as a result of a request from a rights holder who is in breach of the code, for example, on the basis of incorrect evidence or a flawed identification process, then Ofcom should have the power to fine the rights holder. In addition, the offending rights holder should indemnify fully affected ISPs against any subsequent remedies granted to affected consumers.’¹⁰²

Consumer Focus agrees with the provisions set out in the Consultation. However, Ofcom should have the power to fine rights’ holders for any non-compliance with the Code, not just if Internet Service Providers have taken action as a result of a request from a rights’ holder who is in breach of the Code. It is important that Internet Service Providers and rights holders’ comply with the agreed Code to the same extent and that no loopholes are created for rights’ holders. We also ask that Ofcom publishes any incidences of non-compliance so that a strong incentive for compliance is created.

We ask the Government to:

- ensure that Ofcom can fully enforce rights’ holder’s compliance with the Code of Practice
- ensure that Ofcom publishes any incidences of non-compliance with the Code of Practice

Reasonable standard of evidence

The *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* proposes that the Code will ‘establish the standards of evidence required to trigger a notification under this proposal’¹⁰³. Due to continued concerns over the standard of evidence used by some rights’ holders, Consumer Focus believes that this provision will be essential to the Code and the legitimacy of the process it establishes.

‘The standard of evidence required from rights holders should, as a minimum, establish an infringement on the balance of probabilities. The template used by the BPI in the MOU trial should serve as a model for this as it has proved satisfactory to all the ISPs in the trial and has not provoked any particular concerns by consumers affected. This will need to be defined by the code.’¹⁰⁴

Consumer Focus agrees that the standard of evidence should as a minimum aim at establishing an infringement on the balance of probability, which is the standard of evidence required in civil proceedings. It is important that consumer organisations are involved in the establishment of the Code in relation to standards of evidence and that Ofcom draws legally qualified parties to the negotiation for advice.

¹⁰² BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.21

¹⁰³ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.20

¹⁰⁴ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.16

If the standard is set too low there is a danger of wrongful notifications being sent to consumers, which would endanger the legitimacy of the notification process. However, we are unable to take a position on whether the British Phonographic Industry's template for the Memorandum of Understanding should serve as a model for this standard of evidence. The template has yet to be offered so this question will need to be resolved during the negotiation of the Code.

The limited information we have about the Memorandum of Understanding standard of evidence indicates that the IP address was the main or only evidence established. As documented in the Davenport Lyons case, the use of IP addresses as the only evidence has resulted in significant number of consumers complaining about being wrongly accused. Ofcom must review under which circumstances IP addresses meet the suggested minimum standard of 'balance of probabilities'. If the standard of evidence is too low there is a danger of notification letters being sent out in error and any case that may be taken to court being struck down due to inadequate evidence.

We ask the Government to:

- ensure that consumer groups and legal experts are involved in the negotiations to establish the standard of evidence that is to be specified in the Code of Practice
- ensure that Ofcom reviews under which circumstances an IP address would meet the 'balance of probability' standard of evidence

Notification letters

Wording of the letters

It is important that the notification letters help drive a reduction in copyright violation through file-sharing as part of the Government's overall strategy. The letters need to provide consumers with accurate information that will facilitate a migration of consumers towards the legal market, including full and accurate information on how rights' holders may pursue persistent file-sharers and information about available legal services. We ask for the inclusion of the letters in the Code of Best Practice.

As a matter of principle the letters need to respect the right of consumers to the presumption of innocence enshrined in the right to due process. All letters, as a matter of principle need to:

- make clear the claim of infringement is merely an allegation based on the standard of evidence established in the Code
- provide a clear explanation for the reasons why the allegation may be false (ie, the evidence, in terms of identifying the actual individual, is unreliable due to wifi hijacking, other users)
- highlight that the account holder is not legally responsible (in respect of copyright infringement) for the actions of other users of the account or for securing their wifi network
- outline steps which account holders can take to stop copyright violation via file-sharing on their account
- the letter must not 'scaremonger' or make unfounded and unreasonable threats, particularly with regards to possible technical measures and account suspension
- explain that the name and address relating to the internet account IP address are not passed on to rights' holders and that this can only be obtained through a 'Norwich Pharmacal' order
- explain that rights' holders can take court action, and which remedies a court can impose against an individual found guilty of copyright violation
- how consumers can contest the letter
- where consumers may find legal advice

In order for consumers to be able to assess and if necessary defend themselves against the evidence obtained by rights' holders the following information need to be provided in the letter:

- the name of the rights' holder alleging infringement in the UK jurisdiction (different rights' holders commonly own the copyright on the same works in different jurisdictions)
- the name of the company that has established the evidence based on which the rights holder is acting
- the name of the copyrighted work in question.
- whether the allegation of copyright infringement relates to the uploading or downloading of the copyrighted work in question

- the name of the file-sharing network through which the alleged copyright infringement has occurred
- the times and dates of the uploading or downloading activity (UK time)

To ensure that the notification supports the Government's strategy to reduce copyright violation via file-sharing as set out in the *Digital Britain* report, the notification letters should also provide the following information:

- An up-to-date list of legal services consumers are able to access and use. This list needs to be updated to reflect the emergence of new services and should be relevant to the copyrighted work in question, ie, if an account holder is alleged to have violated the copyright of music it makes most sense to list the available music services
- A summary of the Government's strategy, ie, to achieve a reduction in copyright violation through file-sharing by growing the legal market, provision of appropriate education to consumers on copyright, and the notification activity which will be the basis for rights holder to take persistent offenders to court
- Details under which circumstances the Government may consider to introduce technical measures against serious repeat infringers

We ask the Government:

- to ensure that the wording and content of the notification letters is established as part of the Code of Practice and respects consumer's right to presumption of innocence

Handling consumer enquiries

Consumer Focus believes that a mechanism should be established through which consumers can contest a warning letter they have received. When Davenport Lyons sent out hundreds of letters *Which?* and various consumer media programmes, such as BBC *Watchdog*, received a high number of enquiries. Internet Service Provider's customer service centres are also likely to be called.

Consumers who receive warning letters may not know what to do about the notice or feel that they have been wrongly accused. They need to be provided with a contact number, under which they may also obtain further information on how copyright violation via file-sharing can be avoided on their account. Consumers may also have a need to obtain more information about the Government's strategy to reduce copyright violation via file-sharing and how data privacy is handled.

Consumer Focus does not believe that Consumer Direct or the Citizens Advice Bureau should be asked to provide this service. The *Consultation on Legislation to address illicit peer-to-peer (p2p) file-sharing* suggests that Internet Service Providers should set up a mechanism through which consumer responses to notification letters are handled, such as a call centre.¹⁰⁵ However, we believe that Ofcom should provide such an independent and impartial service to consumers. Ofcom would then also be able to establish a process through which consumers can contest a warning letter they have received.

If an account holder receives repeated warning letters which they believe to be wrong they should be provided with reliable information on how they can secure their internet account. Potentially wrong notification letters may also point to problems with the standard of evidence and/or failure by a rights' holder to comply with the Code.

¹⁰⁵ BIS, [Consultation on Legislation to address illicit peer-to-peer \(p2p\) file-sharing](#), 16 June 2009, pg.17

It is important Ofcom provides an independent and reliable service, which may take the form of an advice line.

We ask the Government to:

- ensure that Ofcom establishes and runs an advice line for consumers who have received notification letters, and that consumers have the ability to officially contest the warning letters

Consumer Focus response to the consultation on legislation to address illicit peer-to-peer (p2p) file-sharing

If you have any questions or would like further information about our response please contact Saskia Walzel, Policy Advocate, via email: saskia.walzel@consumerfocus.org.uk

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