

Response by Consumer Focus to the BERR consultation on legislative options to address illicit peer-to-peer file-sharing

Introduction

Consumer Focus campaigns for a fair deal for consumers. We do this through research, policy analysis and lobbying and by working with policy makers, providers and others who can make a difference to consumers' lives. We have a special remit to represent the interests of disadvantaged and vulnerable consumers.

Consumer Focus wants to see a digital economy that is characterised by competitive, dynamic and innovative markets in which consumers are empowered to make informed choices. We want to see an intellectual property regime which supports this by providing a fair balance between creators and consumers.

The issue

Developments in digital technology have revolutionised how we conduct our lives at home and at work. These developments have been hugely beneficial to consumers and society. P2P file-sharing is one such beneficial technology enabling individuals to make the most effective use of computer networks and to share material. Much of this sharing is entirely legitimate; however, much of it infringes content producers rights under copyright law. P2P file-sharing is very popular and widespread. Estimates of the scale of the file-sharing of copyrighted material vary but it could involve a tenth of the population – six million people.

However, instead of seeing this huge consumer demand as a business opportunity the content industry has seen it as a threat. Rather than innovating with new business models to profit from this demand, it has sought to stop consumption through technical or legal means. Unfortunately the same attitude pervades government policy and this consultation document. Consumer Focus does not condone illicit P2P file-sharing but we see it as an inevitable consequence of failing to meet consumers' needs. The market has filled the vacuum but in ways that do not involve or remunerate the content industry.

Consumers are not going to return to the consumption patterns of the past any more than they would have returned to horses to meet their transport needs after the internal combustion engine had entered the scene. No one can make money out of stopping consumption even if it was technically, legally or socially feasible to do so. The only solution is new business models that meet consumers' clearly expressed demand for digital services.

The proposals

The Memorandum of Understanding (MOU) agreed by key stakeholders from the ISP industry, the content industries, OFCOM and the Government and published in July forms the basis for the implementation options considered in the consultation document. However, it is our view that it starts in the wrong place. The objective of the MOU is to “achieve within 2 or 3 years a significant reduction in the incidence of copyright infringement as a result of peer to peer file-sharing and a change in popular attitudes towards infringement.” No mention is made of what the real objective should be which is to increase legitimate consumption through the development of new business models.

While the text includes a paragraph on new business models, the only parts of the text that have clear targets and deadlines are the paragraphs relating to notifications to consumers about alleged illicit file-sharing activity and mechanisms to deal with repeat infringers. We comment on the proposals below.

Consumer education

The MOU commits signatories to work together “to ensure that consumers are educated to respect the value of the creative process, and the importance of supporting creators to invest time and resource in developing new work, and understand that unlicensed sharing of others’ work is wrong.” Clearly no one would be opposed to good quality consumer education initiatives but it is a crowded field and its effectiveness as a policy tool can be over estimated.

Also there is an issue of sequencing. For consumers to respect copyright it is not sufficient that they know about it and understand it - the law on copyright also needs to be worthy of respect. Currently it is imbalanced and outdated. It needs to be made fit for the digital age. In particular, absurdities such as the fact that copying music from a legally purchased CD to play in the car or on an MP3 player is an infringement of copyright, need to be resolved. Without reform more education may not lead to more respect.

New business models

It is good that the need to develop attractive offerings to consumers is included in the MOU and the consultation document even if its importance is under-emphasised. However, there seems to be an implied assumption that ISPs bear a large share of the responsibility for developing these new offerings rather than the producers of content. This is odd – we would not normally expect one business sector to be responsible for marketing the products of another. We would not expect a haulage company to come up with marketing ideas for the products transported in its trucks. Services which bundle content with broadband provision would be welcome, provided the bundles and pricing are transparent so that consumers can make informed choices; but other models should also be developed.

Notifications of alleged file-sharing

The MOU commits ISPs to send 1000 notifications a week to customers, whom music rights holders allege are file-sharing illicitly, for a three month trial period. After the trial period the number and scope of the notifications will be escalated. The trial has already started and anecdotal evidence suggests that notifications are going to some consumers who are not file-sharing raising concerns about the quality of the evidence base.

Notifications have their place in any scheme to assist and encourage consumers to move to legitimate services. The trial needs to be carefully and openly assessed and the results shared with all stakeholders, including consumer representatives. It is unfortunate that the text implies that, whatever the evidence from the trial, there will be an escalation of the scheme. And again there is a problem of sequencing. Notifications are being sent to consumers before the much promised new business models are on the market - another lost marketing opportunity.

Mechanisms to deal with repeat infringers

The MOU commits signatories to identify effective mechanisms to deal with repeat infringers and report in four months. The preparation of the report is happening in parallel with the notification exercise so without the benefit of the evidence on the outcome of the trial. In addition to rights holders existing rights to take civil actions, the MOU mentions technical measures such as traffic management, filtering and marking of content. The consultation document also mentions suspension or termination of internet accounts – the infamous “3 strikes and you are out” approach favoured by the French government but rejected by the European Parliament. We consider these options below.

Technical measures

Much has been made of the potential for technical measures to control illicit use of content but to date they have failed to live up to the hype. We have serious doubts about their ability to deliver fair and effective solutions in the future. Technologies to filter and block internet traffic are not accurate and there is a serious risk that legitimate material will be wrongly blocked denying consumers access to beneficial services. There is also the risk that once the principle of filtering of consumers’ use of the internet is established it will be extended and will seriously prejudice privacy and civil liberties. In any case technical measures are unlikely to be effective at preventing repeat infringers who can (and indeed do) use encryption and anonymous proxies to mask illicit material.

Suspension or termination of internet accounts

We consider disconnecting consumers from the internet for alleged illicit file-sharing activity to be a disproportionate sanction. It would deny consumers access to communications services and a range of services provided by internet businesses, public services and the Government. This would have an adverse impact on all these providers as well as on consumers.

Disconnection excludes the entire household not just the alleged file sharer and runs counter to government policy of increasing home internet access.

Implementation options

We repeat our view that the government is approaching the problem from the wrong end and that the approach that has been adopted is being implemented in the wrong sequence. The only effective way to reduce illicit consumption is to increase legitimate consumption through the development of new business models that meet consumers' needs. At the same time reform of copyright law is needed so that it provides, and is seen to provide, a fair and sensible balance between consumers and rights holders.

Any scheme to take action against alleged infringers needs to be:

- Evidence based
- Transparent
- Proportionate
- Provide a full range of consumer protection safeguards including routes of appeal and redress
- Respect consumers data protection and privacy rights

Voluntary or self-regulation

We are very concerned about this approach. Despite the involvement of Government and OFCOM, discussions have taken place behind closed doors without the involvement or consultation of other affected stakeholders including consumers. We are not confident that a self-regulatory approach will deliver sufficient safeguards for consumers particularly around standards of evidence, routes of appeal and redress.

Co-regulation

A co-regulatory approach should provide for transparency, participation of all affected parties, publication of papers and wide consultation and scrutiny of proposals. Provided this is the case it is a preferable option to self-regulation. However, it will require a significant change in the way the parties to the MOU have operated to date to be an acceptable way of proceeding.

Legislation requiring ISPs to provide personal data to rights holders without Court action

This option is not acceptable. The judicial oversight currently required provides an important consumer safeguard against unjustifiable requests.

Legislation requiring ISPs to take direct action against alleged illicit P2P file-sharing

This option is also unacceptable. We do not think that this is an appropriate role for ISPs. In addition it is not clear how consumers' safeguards on standards of evidence and routes to appeal and redress would be delivered.

Allocating a third party body to direct ISPs to take action

We doubt that this option would meet the positive Net Present Value requirement of the Government's better regulation principles. A full impact assessment would need to include the costs to consumers, taxpayers, rights holders, ISPs, and internet businesses.

Legislation requiring ISPs to allow the installation of filtering equipment or to install it themselves

This option is objectionable given its potential adverse affects on access to legitimate material and its implications for privacy and civil liberties. In addition it is very unlikely to be effective.

Conclusion

It is two years since the Gowers review was published. The report was an important step forward in the debate about intellectual property which has, until recently, been an evidence free zone dominated by rights holders. However, Gowers was not right about everything, including an appropriate policy response to illicit P2P file-sharing. Also digital technology has developed rapidly in the last two years and so, to an extent, has the policy debate. The only effective response to illicit P2P file sharing is to increase legitimate consumption through the development of new business models that meet consumers' needs. And the only solution to the so called problem of lack of respect for copyright law is reform of the law so that it is fit for the digital age.

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