

Consumer Focus response to Copyright in a digital world – What role for a Digital Rights Agency? Discussion paper

Introduction

Consumer Focus champions the needs of consumers across the UK. We operate across the whole of the economy, persuading businesses and public services to put consumers at the heart of what they do. Through our legacy organisation, the National Consumer Council (NCC), we have a long history of representing consumers when it comes to digital and copyright issues and we have committed to intensify our work in these areas. We take action where markets fail consumers and ensure a fair deal for all – especially vulnerable and disadvantaged people. We want to see consumers central to business and government decision making, and to this end we also work at EU level and internationally contributing to the formulation of strategy.

Consumer Focus would like to encourage the Government to remain open-minded about how copyright may be reconciled with the digital world. The discussion paper “[Copyright in a digital world – What role for a Digital Rights Agency?](#)” leaves readers with the impression that the decision to go ahead with establishing a Rights Agency has already been made, however we would like to underline that a Rights Agency as proposed is by no means the only solution, nor is it, in our view, appropriate.

If implemented, the Rights Agency as proposed would see an industry-run body enforcing copyright law outside normal judicial procedures, raising concerns about due process. Beyond that the Rights Agency as a self-regulating industry body is neither independent nor credible. The proposals also raise profound concerns about competition law given that the agency would establish a forum for competitors to agree how digital content is provided and sold to consumers.

Consumer Focus is alarmed about the evident lack of consideration that has been given to consumer rights in the **Copyright in a digital world** discussion paper, or the intended remit of the Rights Agency. Furthermore we are concerned that the full scale of the task is lost when the discussion paper refers to “the industry” as umbrella term. File sharing of copyrighted material currently affects mainly music, movies, TV shows, games and software, and digital copies of books are increasingly appearing. It is not clear from the discussion paper how the Rights Agency would be able to represent all these industries, and neither is it clear if the individual actors within these industries would be willing to join or fund the proposed Rights Agency.

WHAT HAPPENS NEXT?

Although we are pleased to be part of this discussion, Consumer Focus has serious concerns over what appears to be a lack of due process. This discussion paper was issued on the 13 March¹, one working day after the deadline for submitting comment on the Digital Britain Interim Report (12 March)². We are concerned that this did not allow the respective Departments (DIUS, BERR and DCMS) adequate time to take into consideration the responses to the Digital Britain Interim Report, which first proposed the establishment of a Rights Agency. Furthermore interested stakeholders have only been given 10 working days to respond to the **Copyright in a digital world** discussion paper.³

The **Copyright in a digital world** discussion paper states that:

¹ See <http://nds.coi.gov.uk/imagelibrary/detail.asp?MediaDetailsID=268097>

² See [Digital Britain Interim Report](#), pg.72

³ See [Copyright in a digital world - What role for a Digital Rights Agency?](#), “What happens next?”

“(we understand this is a very short response period, but stakeholders will appreciate the need to make rapid progress on this issue). While we will ensure that we take views from a wide range of interests, we may focus initially at first on those parties who show interest at this stage.”⁴

Consumer Focus takes the position that all stakeholders should be given the opportunity to contribute at this stage and it is not clear on what basis the decision was made to not make this discussion paper a consultation proper. **Copyright in a digital world** proposes a solution that will have a significant impact on the UK economy and society for generations to come. The UK currently has a once in a lifetime opportunity to set the scene for a vibrant UK digital content industry and we believe that this is of such significance that all interests need to be considered. Hence Consumer Focus would like to see the issue of copyright in a digital world move beyond “a straw man”⁵ discussion paper.

Recommendations

RECOMMENDATION 1

The Government should not go ahead with the Rights Agency.

RECOMMENDATION 2

The issue of how to deal with copyright in the digital world needs to be opened to consultation, allowing all stakeholders to contribute.

⁴ [Copyright in a digital world - What role for a Digital Rights Agency?](#), “How do we move forwards with this work?”

⁵ [Copyright in a digital world - What role for a Digital Rights Agency?](#), “The rationale for a digital rights agency - Introduction”

Legitimate models

Consumer Focus does not condone the sharing of content in violation of copyright, but we see the rise of sites such as The Pirate Bay as an inevitable consequence of the digital market failing to meet consumer demands and needs. The demand and supply cycle has already driven some digital content industry actors to take first steps towards filling the supply vacuum currently taken advantage of by the informal market. No company or industry can expect to maintain profitability by maintaining the same business model for 30 years, and the Government should refrain from criminalising entire technologies or indeed large numbers of consumers.

Legitimate MP3 online stores and EMI's innovative digital release of the latest Coldplay album demonstrate that the digital content industry is seeking to re-engage with the consumer and technology, and we see such steps as the principle weapon against copyright violation in the digital world.

As the Communications Consumer Panel has highlighted in its response to the Digital Britain Interim Report, "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".⁶ The Government intends for "the industry" to fund the Rights Agency, but this really means that consumers will fund it, as the cost will be passed on. In our opinion it would be more helpful if the industry was allowed to invest the capital needed to fund the Rights Agency in developing new business models.

Copyright in the digital world

In the digital world copyright violation takes place in a multiplicity of ways, ranging from teenagers mashing-up a 30 second sample of a Lily Allen song with their own digital home video and posting it on YouTube to share with friends, through to organised criminals using high quality digital rips of DVDs to burn thousands of DVDs which are then sold by foot soldiers in pubs and bars. The concept of proportionality dictates that the Government takes an appropriate approach to different kinds of copyright violations. It would be wrong to conflate teenagers in bedroom with organised crime and the Government needs to consider copyright violations in the digital world in a holistic and proportionate manner.

Consumer Focus takes the position that the Government should focus on criminals and the digital content industries should re-engage the public with innovative business models. Consumers are already responding to new digital business models that satisfy their demand, and it is our view that a free and fair digital market place is more likely to come up with innovative models than an industry committee. Consumers can not be educated into accepting old business models, but they will take up legitimate services that meet their needs and expectations.

Consumer Focus would therefore like to encourage the Government to assess what impact the Rights Agency, as proposed, would have on copyright violation in the digital world. We are concerned that a single-issue approach will merely displace copyright violation within the digital world – i.e. if file-sharing is targeted those currently file-sharing content in violation of copyright will simply shift to a different medium or technology, making the Rights Agency obsolete. Hence we ask the Government to re-open the debate on copyright in the digital world and make this subject to a proper consultation exercise.

⁶ [The Communications Consumer Panel Response to Digital Britain Interim Report](#)

Consumer rights

Creating the Rights Agency would constitute a move towards what has been termed the “graduated response”, where consumers are disconnected from the internet after repeat warnings in an attempt to stop civil copyright violations. A number of European countries have by now seen the unilateral industry implementation of the graduated response and in both 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.⁷ Consumer Focus believes that such a response is unnecessary and disproportionate, and the Government needs to consider whether the proposed process (Annex B of the discussion paper) would comply with Article 6 of the European Convention on Human Rights which details the human rights to due process (implemented in the UK via the Human Rights Act 1998).

The Copyright in a digital world discussion paper acknowledges that:

“While the IPO already does some work in this vein for criminal copyright infringement, there are legal issues that would need to be taken into account before any agency took on such a role for civil issues.”⁸

The enforcement of intellectual property law is the responsibility of the judiciary. Rights owners have the right to bring proceedings for infringement and the EU IP Enforcement Directive requires Member States to provide fair and equitable remedies which must be “effective, proportionate and dissuasive”. In England and Wales civil proceedings for the enforcement of intellectual property have traditionally been brought in the Chancery Division of the High Court and in 1989 a Patents County Court was established to deal with civil patents and trademark issues. This court was specifically created to provide a less expensive and prompt remedy to violations of civil intellectual property law violations and it is not clear why the Patent County Court, or a similar judicial institution, is considered inappropriate to deal with civil copyright violations in the digital world. At the very least the evolution of the Patents County Court should yield lessons learned for the appropriate enforcement of civil copyright law.

Competition

In the **Copyright in a digital world** discussion paper the Government has acknowledged that the Rights Agency raises competition law concerns, stating that:

“The formation of an industry self-regulatory body may potentially raise competition law concerns since it is likely to involve cooperation between competitors in the industry. Such cooperation may spill over into areas which raise competition law concerns under Chapter I of the Competition Act 1988 and/or Article 81 EC... it may be possible to address these concerns by the way in which any agency is structured or operated...It is also necessary to consider the wider implication that the agency, and

⁷ Jacqueline Klosek and Tamar Gubins (2008) [United States: Combating Piracy And Protecting Privacy: A European Perspective](#), Goodwin Procter

⁸ [Copyright in a digital world - What role for a Digital Rights Agency?](#), “Guarantor of quality – a kite mark for digital content - Acting as an information hub”

any proposals made by it, will have on behaviour in the market, and the consequences for consumers.”⁹

Consumer Focus is alarmed that the “thinking” on the Rights Agency has been allowed to progress to an advanced stage, even though there are still fundamental concerns regarding the compliance of such an approach with competition law. The discussion paper even goes so far as to suggest that the Rights Agency may provide:

“a market place for developing collective licensing agreements or marriage brokering between organizations who want to develop consumer propositions and those who have the content.”¹⁰

Competition law is essential in maintaining a free and open market which allows access for all. In a free market companies ought to engage with their consumers to develop consumer propositions and a competitive market will do much to encourage the emergence of new and appropriate digital content business models.

Intellectual property law confers on the owner exclusive rights, so the owner can prevent competition in relation to the subject matter of the right. There is an inherent and constant tension between the granting of those exclusive rights and the application of competition law. Hence it is not surprising that the enforcement of civil copyright law raises profound competition issues and Consumer Focus is not convinced that an industry body could adequately deal with such tensions, while at the same time not falling foul of competition law itself. The Government should consult the competition authorities on its plans.

Governance

The Rights Agency would deal with important issues of public policy and have a remit to carry out regulatory functions, such as drafting rules and managing appeals. It is therefore deeply concerning that the governance arrangements allow for very little consumer input. The discussion paper states that:

“...fundamentally this has to be an industry owned, industry led and industry run body.”¹¹

If the Rights Agency is seen to be run by industry promoting industry interests the agency will lack credibility with consumers, and hence fail to achieve public buy-in. Self-regulation has a poor track record in consumer markets, but our experience suggests it can work if the right ingredients are in place. The most credible self-regulatory schemes - such as the Advertising Standards Authority and The Royal Institution of Chartered Surveyors – in particular enjoy robust governance structures, including a majority of lay members on their decision-making boards. The regulation of copyright in the digital world can only be entrusted to a credible and independent body, and in our view the Rights Agency as proposed is neither.

⁹ [Copyright in a digital world - What role for a Digital Rights Agency?](#), “Guarantor of quality – a kite mark for digital content - Formation of an industry self-regulatory body”

¹⁰ [Copyright in a digital world - What role for a Digital Rights Agency?](#), “Encouragement of commercial offerings”

¹¹ [Copyright in a digital world - What role for a Digital Rights Agency?](#), “Ministerial introduction”