



**Consumer  
Focus**  
Campaigning for a fair deal

# **Consumer Focus response to the Liberal Democrat consultation on information technology and intellectual property**

**November 2010**

# Contents

About Consumer Focus	3
Introduction	3
Summary of our recommendations	4
Open source and open data	7
The ultimate goal in providing public services online	7
Ensuring voters and constituents have ready access to information relevant to them	8
Education and IT skills training	9
Online marketing to children	9
Digital infrastructure – minimum speeds, promoting broadband access and public investment	10
Digital infrastructure – telecommunications technology infrastructure and broadband in rural areas	12
Net neutrality, traffic management and competition	13
Guiding principles for regulating material online and the right to freedom of expression	16
Internet service provider liability for content	19
Legal and technical support and monitoring for the purpose of law enforcement agencies pursuing criminal activities	20
Aspects of the digital economy not addressed in copyright law – copyright licensing	21
Consumer rights to use works they have paid for and other fair use	24
Balancing consumer rights to access with creators rights to fair remuneration	25
Appropriate international forums to develop copyright systems	26

## About Consumer Focus

Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and (for postal consumers) Northern Ireland. Our role is to represent the interests of consumers, particularly those who are 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.

## Introduction

Consumer Focus welcomes the opportunity to contribute to the development of the Liberal Democrat's new policy on information technology and intellectual property. Consumer Focus has sought to provide input on areas in which we have expertise and experience. Our response to the **Information Technology and Intellectual Property Consultation Paper 100** focuses on open data, public service online, information technology skills training, online marketing to children, minimum broadband speeds and access to broadband, net neutrality, freedom of expression and regulation of the internet, data retention laws and the copyright system in the context of the digital economy.

Consumer Focus would like 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. The internet has been unprecedented in allowing citizens and consumers access to knowledge and to participate in society and the digital economy. The internet also has the potential to promote and drive democratic participation, social and commercial innovation, as well as economic growth.

Government is increasingly migrating public services online, unfortunately the primary motivation for this shift has tended to be a desire for cost savings rather than increased convenience and choice for users. If this shift is to be successful consumers should be put at the heart of online public service provision and design. Simply moving services online should not be regarded as an end in itself. This migration should be built upon the principle of improving consumer access to and interactions with these services. To realise the potential of the internet to support social and commercial innovation we would also like to see ongoing support for open data initiatives by central and local Government. Government and relevant public bodies should seek to learn from, work with and encourage civic online initiatives when they are demonstrably working for the public good.

To ensure that UK citizens and consumers benefit from the internet all UK citizens should be provided with basic internet access and special care must be taken to ensure that consumers in rural and remote areas are not left behind. Training in the use of information technology should be provided in schools and made available to adults throughout life. Children should be encouraged to go online, as this can enhance learning and allow them access to information which is educational and useful to their studies. With this increasing online exposure comes the need to protect children from inappropriate and irresponsible marketing. Consumer Focus wants to see greater consistency across both the self regulatory and statutory practices to better protect children from needless commercial messages.

It is right and appropriate for law enforcement agencies to undertake lawful surveillance for the purpose of combating terrorism and serious or organised crime. But it is the responsibility of the Government to protect citizens and consumers from unlawful interception and surveillance of their communication by private companies for behavioural advertisement or other purposes. Attempt to regulate the internet and online content should respect citizens and consumers right to privacy and freedom of expression and appropriately balance these rights against other rights. In order to maintain the internet as

a network that allows for competition and equal access to private and public services any regulation of the internet should preserve competition among network, application, service and content providers. The internet connection consumers receive should be free from discrimination with regard to type of application, services, or content or based on sender or receiver address. We believe that all consumers should be entitled to an internet connection of the speed and reliability advertised to them, that enables them to: send and receive content of their choice, use services and run applications of their choice, and connect hardware and use software of their choice that does not harm the network.

To support innovation in the digital economy Consumer Focus wants to see a copyright system that strikes a fair balance between creators, investors and consumers. If consumer demand is not met by legal sources, consumers will turn to unlicensed sources. We are hopeful that the creative industries have learned the lessons of the music industry and that the transition into the digital economy will be faster and less painful for them. To achieve this we need the copyright licensing system to be reformed so that it allows online and mobile content providers to meet consumer demand in a timely manner. Copyright law should give consumers fair access to copyrighted works, particularly those they have paid for. Copyright law should tell consumers what they can and cannot do with copyrighted content, but current copyright law is confusing and makes many every day activities, such as format-shifting a CD onto an iPod or backing up digital music and e-book collections, illegal. We would therefore like to see the introduction of a non-commercial-use exception, allowing individuals to copy copyrighted works they have legally acquired for non-commercial purposes, but which does not allow the communication of such copies to the public. In order to support the innovative mash-up culture that has developed on the internet we would also like to see the introduction of a fair dealing defence, allowing the communication to the public of caricature, parody or pastiche.

For copyright to be balanced it should also achieve a fair remuneration to creators. To this end we would like to see fair contract terms for artists and creators, and a stronger protection of moral rights, such as the right to be credited. UK copyright law is increasingly subject to principles in international and regional copyright law. To ensure that copyright law balances the interest of all relevant stakeholders, international and regional copyright law should only be negotiated in democratic and transparent forums.

## Summary of our recommendations

### Consumer Focus recommends:

- continuous support for open data initiatives by central and local Government
- that the needs and preferences of consumers should be put at the heart of online public service provision and design
- that the primary goal of providing public services online should be to use the internet to improve interactions for users of these services, simply moving services online is not an end in of itself
- that Government and relevant public bodies should seek to learn from, work with and encourage civic online initiatives when they are demonstrably working for the public good
- that information technology tuition should form a central part of the national curriculums
- that information technology training is made available to adults throughout life
- that the 20+ self regulatory and statutory codes on marketing to children and advertisement are consolidated and a single definition of 'child' is provided

- that relevant regulatory and self-regulatory codes establish greater transparency in the process used to implement existing codes and in establishing new ones in relation to online marketing to children
- a universal service in broadband service of at least two megabits per second (Mbps) should be guaranteed to 100 per cent of households in the UK
- that any exceptions to this level of provision must be treated as delivery exception and follow clear criteria
- that the Government invests in the development of telecommunications technology infrastructure in rural and remote areas where there is not an economic case for the market to deliver
- that the potential role of mobile broadband in delivery of a universal service in broadband to rural and remote areas should be realised through effective spectrum management
- that all consumers should be entitled to an internet connection of the speed and reliability advertised to them, that enables them to:
  - send and receive content of their choice
  - use services and run applications of their choice
  - connect hardware and use software of their choice that does not harm the network
- that the internet connection consumers receive should be free from discrimination with regard to type of application, services, or content or based on sender or receiver address
- that the regulation of the internet should preserve competition among network, application, service and content providers
- that internet service providers must undertake network management practices in a transparent manner
- that the same principles that apply off-line are applied to the regulation of material on the internet, namely:
  - all fundamental rights and freedoms need to be protected and the appropriate balance needs to be sought
- the right to freedom of expression, including the right to express, disseminate, seek and receive information and ideas, should be recognised as especially relevant to the internet
- recognition that the internet has enhanced citizens' and consumers' ability to exercise their right to freedom of expression, and increasingly becomes a necessity for full participation in cultural, social and economic life
- that the blocking of material that infringes existing rights and laws should not lead to the indiscriminate and large scale blocking of websites and internet services
- that ISPs continue to be treated as mere conduits and that no general obligation may be placed on them to monitor the information which they transmit or store
- that in relation to serious crime only law enforcement agencies should be given the appropriate powers under EU and UK law to undertake lawful interception of communication and to obtain communications data retained by internet service providers
- that under no circumstances should internet service providers be allowed or forced to retain data and release such data to private agents or companies

- that the right of citizens and consumers not to have their communication intercepted by private agents or companies without their consent should be safeguarded
- that the UK reforms the UK copyright licensing system so that it supports a dynamic market in digital copyrighted content
- that the UK implements extended collective licensing for some types of copyrighted content so that consumers are given access to copyrighted works and creators are remunerated
- that copyright law is simplified so that it tells consumers what they can and cannot do with copyrighted content
- the introduction of a technology neutral non-commercial use exception, allowing individuals to copy copyrighted works they have legally acquired for non-commercial purposes, but does not allow the communication of such copies to the public
- the introduction of a fair dealing defence for caricature, parody or pastiche, allowing the communication to the public of the caricature, parody or pastiche
- that creators need to be give fair contract terms and their moral right to attribution should be strengthened
- that international and regional copyright law should only be negotiated in democratic and transparent forums

## Open source and open data

### Question 31

The principles of open source and open data should be welcomed by Government. Making this data readily available in easy to access, machine-readable formats has the potential to generate a wide range of benefits. Initiatives such as data.gov.uk are a step in the right direction with regard to Government data transparency initiatives. Making Government data available for both commercial and non-commercial re-use stimulates innovation by third parties who are able to build tools of benefit to consumers. These tools provide citizens and consumers with the ability to more easily access and use the data. Open data initiatives are in their infancy and their full potential for social and commercial innovation has yet to be fully realised.

#### Consumer Focus recommends:

- Continuous support for open data initiatives by central and local Government

Public data is defined by the Public Data Principles as ‘the objective, factual, non-personal data on which public services run and are assessed, and on which policy decisions are based, or which is collected or generated in the course of public service delivery.’<sup>1</sup> Making public data openly available represents a low cost, low risk catalyst for innovation that can lead to considerably more than could be attempted within the organisation and as such should be encouraged. This openness not only allows for greater Government transparency, it also allows non-commercial and commercial entities to create tools that allow users new and more effective ways of engaging with their public services.

## The ultimate goal in providing public services online

### Question 31

A combination of technological development and cost pressures will continue to drive a change in the way citizens and consumers interact with Government. There is increasing evidence that providing public services online will shift from being one of a range of channels to the primary channel of interaction. Consumer Focus is concerned that as Government pushes ahead to move services online it risks ignoring a vital element: capturing what people actually want from online public services, the extent to which the public expect the opportunities presented by the internet to be exploited and which approaches there is particular demand for. The best services are designed around and are responsive to, the needs of their users.

#### Consumer Focus recommends:

- that the needs and preferences of consumers should be put at the heart of online public service provision and design
- that the primary goal of providing public services online should be to use the internet to improve interactions for users of these services, simply moving services online is not an end in of itself

Consumers are the best experts on the services they use. As such their opinions and needs should be at the heart of any decisions regarding what services are provided online and how.

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<sup>1</sup> **Public Data Principles**, data.gov.uk

Martha Lane Fox recently led an independent review into the role of Directgov, the UK Government's primary online engagement portal. While the consultation was technically open to anyone with internet access, by its nature the vast majority of respondents are likely to be public servants or experts who are particularly engaged with the issues surrounding online public service provision. Clearly the opinions of these groups are valuable and insightful but it is debatable whether this consultation will have succeeded in adequately capturing the views of the wider public. It is certainly not an optimal outcome if the public are effectively excluded from the debate into what the services they are expected to use will be like. These services should be built and designed for the convenience of service users, not providers.

Consumer Focus are about to begin a piece of research to establish consumer priorities for online public services provision. Previous Consumer Focus work examining Directgov<sup>2</sup> has indicated that while there is no problem with the principle of putting a large amount of information and services online, it is imperative that these resources be easily navigable and user-friendly. Achieving this should be approached in an intelligent way built upon what is shown to be practical. Moving Government services online is not an end in itself; the goal should be to make best use of the opportunities afforded by the internet to improve interactions with Government services for users.

## Ensuring voters and constituents have ready access to information relevant to them

### Question 44

Civic online initiatives such as PatientOpinion and FixMyStreet have recently garnered attention and user numbers, demonstrating a demand for the services they offer. Such websites better enable users to provide feedback to public services or report issues to the relevant departments of their local authority. These websites have become increasingly significant elements of public interaction with public services and servants; offering an innovative and easy route to engaging with public structures that can appear unresponsive because the routes of 'official' engagement are unclear to first time users.

### Consumer Focus recommends:

- that Government and relevant public bodies should seek to learn from, work with and encourage civic online initiatives when they are demonstrably working for the public good

Whether the public use these websites because the official mechanisms to do so are inferior, hard to find (or indeed non-existent) or because consumers prefer the independence of a third party when engaging with public services in this way is currently unknown. This is a question we intend to investigate further in our forthcoming research.

Considering the current state of online Government services the continuing emergence of these innovative third party websites seems inevitable. Regrettably public bodies have not always adopted a collaborative or constructive approach towards such third party websites, with MyPolice, FixMyStreet and WhatDoTheyKnow notably receiving negative responses from some parts of Government. We believe that Government and relevant public bodies should seek to learn from, work with and encourage such third party initiatives when they are demonstrably working for the public good.

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<sup>2</sup> For further details see the Consumer Focus report **Does Directgov deliver?** November 2009

## Education and IT skills training

### Questions 19-21

It is important that there is a strong component of information technology (IT) tuition within the school's national curriculum. Since the abolition of BECTA, the body charged with ensuring that innovative IT was integrated into learning in schools, it is unclear how this vital function will be taken forward. It would be useful to know from the Department for Education how these functions will be taken forward and which departments will oversee this work.

### Consumer Focus recommends:

- that information technology tuition should form a central part of the national curriculums
- that information technology training is made available to adults throughout life

To empower citizens and consumers as the digital technologies develop it is equally important that there is the opportunity for IT training throughout life. Such training is especially important to consumers who do not have internet access at home and who have not had the opportunity to previously become proficient in IT skills. UK online centres and community-based projects, including those which are part of Race Online 2012, currently offer training for all age groups. Consumer Focus wants Ofcom to continue with its duty to promote media literacy and for all these bodies to be linked in on their various activities. We also support the good work done by Age UK in encouraging older people to be enthusiastic and confident when using computers. Regrettably the Home Access scheme, where low income families were offered one year's free internet access and free laptops, has been abolished. It is currently unclear whether Government will offer help to some of the poorest families who are unable to afford a computer and the necessary start-up costs in getting online.

## Online marketing to children

### Question 4

The coalition Government has indicated it will take action to protect children from excessive commercialisation and crack down on irresponsible marketing. The Children and Families Taskforce chaired by David Cameron was set up in July 2010 to look at issues concerned with the commercialisation of children. The recent extension of the digital remit of the non-broadcast advertising code – the Committee of Advertising practice (CAP code) has gone some way to improve irresponsible advertising on brands' own websites but still does not cover sponsorships, competitions and marketing communications from a foreign media.

### Consumer Focus recommends:

- that the 20+ self regulatory and statutory codes on marketing to children and advertisement are consolidated and a single definition of 'child' is provided
- that relevant regulatory and self-regulatory codes establish greater transparency in the process used to implement existing codes and in establishing new ones in relation to online marketing to children

Consumer Focus recognises that there have been recent developments by industry to further protect children but certain gaps do still remain – these considerations are highlighted in our recent report, *A Tangled Web* which researches current regulation and highlights where children are not adequately protected by either the law or industry self-

regulation.<sup>3</sup> The aim of the report was to try and disentangle the complexity of the regulatory landscape for parents on how they can best protect their children from unwanted advertising and for businesses to comply with statutory codes when trying to best protect children.

Consumer Focus is particularly concerned that codes of practice are dispersed across a wide range of bodies. Currently at least 20 different self-regulatory and statutory codes of practice relate to marketing and advertising practices, data protection, research, privacy and parental involvement. These are supplemented with ad-hoc trade association codes of practice and initiatives related to, for example, the marketing of food and drink products high in fat, salt and sugar. We are also concerned about the lack of transparency in how the various regulatory and self-regulatory bodies relate to each other. The lack of an overall monitoring mechanism for integrated marketing campaigns targeted at children further compounds the issue. Going forward Consumer Focus would like to see greater transparency in the process used to implement existing codes and developing new ones.

## Digital infrastructure – minimum speeds, promoting broadband access and public investment

### Questions 23 & 25

Having access to fast, reliable and high quality telecommunications services is rapidly becoming essential for consumers, particularly those who are living in rural and remote areas. People increasingly rely upon the internet to engage with public and private services in a wide range of different markets. The internet underpins many of the activities that consumers might undertake when dealing with businesses and especially public services. For example, consumers need the internet in order to find the best deal for a particular service or product; to access vital public services; to pay suppliers for using a service; to find out new information about a particular product; or to provide feedback or make a complaint about a service that they have used. Therefore lack of access to effective telecommunications services can lead to consumers suffering detriment in many areas of their lives.

### Consumer Focus recommends:

- a universal service in broadband service of at least 2Mbps should be guaranteed to 100 per cent of households in the UK
- that any exceptions to this level of provision must be treated as delivery exception and follow clear criteria
- that a universal service obligation in communication is considered, covering all sectors of communications, including postal services and telecoms (both fixed line and mobile)

Currently 10 million people, often the most vulnerable living in remote and rural areas, do not use or have access to home internet. The Government has announced as part of the Comprehensive Spending Review funding that £530 million (from BBC licence fees and under-spend from digital switchover funds) will be provided to facilitate the roll-out of superfast broadband to cover the areas known as 'not spots' where it is not commercially viable for service providers to install carbon fibre needed for superfast broadband.

Consumer Focus and Consumer Focus Scotland believe that if the market does not deliver universal access to a fast, effective broadband service then public policy

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<sup>3</sup> For further details see the Consumer Focus report **A tangled web – Marketing to children** October 2010

intervention is essential. We welcome the extra funding announced by the Government but would want assurances that bids are encouraged from those communities who are without superfast broadband connections, likely to be households who would suffer detriment to be left out of the digital race. We also encourage cross-departmental working for the Government to be plugged into groundbreaking projects as part of Race Online 2012's drive to encourage everyone to get online.

We support the UK Government's commitment to delivering a universal broadband service to all consumers in the UK by 2015, although we would urge the Government to strive to achieve this target before that date if possible. We believe that this universal service must deliver a broadband service of at least 2Mbps to 100 per cent of households in the UK. If there are to be any exceptions to this level of provision then these must be determined by clear criteria, similar to those, for example, used by Royal Mail for delivery exceptions to their universal service obligation.

In order to deliver a universal service of 2Mbps we believe that the UK Government must take a proactive role in identifying the parts of the UK's telephone network which cannot deliver a 2Mbps service at present, including potential backhaul issues. An accurate, comprehensive and up to date mapping of the telecoms infrastructure is essential. The spread of basic broadband and mobile phone technology to date has clearly highlighted the areas in the UK that are unlikely to be served by a market-driven approach to the provision of telecommunications services. We would urge the Government to consider a universal service obligation which brings all sectors of communications, including postal, fixed and mobile broadband together.

The speed of broadband service that consumers need now may be very different from what they need in one, five or 10 years time. In Scotland it is anticipated that domestic broadband speeds will follow 'Nielsen's Law' and will double every 20 months.

'Broadband speeds currently experienced in Scotland range from 0.3Mbps to 50Mbps. Already we find 0.5Mbps is inadequate to support a family's use of many of today's applications, such as streaming video and video chat. If we accept 2Mbps as a benchmark minimum recommended speed for connection to today's internet [and many would set it higher than that] then we should require 16Mbps in 2015 and 128Mbps in 2020 just to maintain our relative position.'<sup>4</sup>

As technology develops it is likely that more services and products will be accessible online and the potential benefits to consumers – particularly those in rural areas – from having access to the most up to date technology will only increase. Therefore it is vital the broadband infrastructure is developed with a 'future proof' mindset, using next generation technologies wherever possible. The launch of *Youview* in 2011 will revolutionise how broadband content will be accessible via TV screens. It is unclear at present what range of speeds this will need. We therefore believe that the Government's commitment of delivering a minimum speed of at least 2Mbps needs to be reviewed annually and matched against actual needs.

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<sup>4</sup> **Digital Scotland: an interim report for consultation**, The Royal Society of Edinburgh, 2010

## Digital infrastructure – telecommunications technology infrastructure and broadband in rural areas

### Question 24

Consumer Focus believes that Government must play a role in ending the digital divide and breaking the cycle of rural consumers continually having to play catch up in the telecommunications market. The geography and topography of rural areas can make it expensive to put telecoms technologies in place. At the same time lower population density in these areas means that the customer base for taking up this technology is relatively small. The market therefore often fails to deliver an adequate infrastructure or service in many rural communities.

#### Consumer Focus recommends:

- that the Government invests in the development of telecommunications technology infrastructure in rural and remote areas where there is not an economic case for the market to deliver
- that the potential role of mobile broadband in delivery of a universal service in broadband to rural and remote areas should be realised through effective spectrum management

The UK Government should take action now to ensure that rural and remote consumers are not left behind again as next generation access and superfast broadband is rolled out across the UK. Incentives and investments must be provided now to help deliver telecom services in remote and rural areas, rather than waiting for the market to fail rural consumers again before taking action.

The existing disparity in provision of telecoms services is extremely problematic. People who live in remote and rural areas often live the furthest from face-to-face services and therefore arguably have the most to gain from having access to fast, reliable telecoms services and the benefits that these can bring.

For example:

- 64 per cent of postcode districts in Scotland have 2G mobile coverage from one or more operators, compared to 91 per cent of districts across the UK as a whole. This disparity is primarily due to the fact that large swathes of the Highlands and Islands have no 2G mobile coverage
- 41 per cent of Scottish postcode districts have 3G mobile coverage from one or more operators, compared to 76 per cent of districts across the UK as a whole. 3G services in Scotland are largely concentrated around the central belt and are more or less non-existent in rural areas<sup>5</sup>
- 28 per cent of phone lines in the Highlands and Islands are unable to deliver broadband services at 2Mbps or faster, compared to only 11 per cent of all telephone lines across the UK as a whole<sup>6</sup>
- 37 per cent of Scottish households have access to cable broadband, compared to 48 per cent of all households across the UK as a whole. Further, only 14 per cent of Scottish rural households can access cable broadband, compared to 21 per cent of all rural households across the UK<sup>7</sup>

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<sup>5</sup> **The Communications Market Report – Scotland 2010**, Ofcom, August 2010

<sup>6</sup> **Telecoms Connectivity in the Highlands and Islands**, Analysys Mason, September 2009

<sup>7</sup> **The Communications Market Report – Scotland 2010**, Ofcom, August 2010

Mobile broadband has the potential to cost-effectively bring rural and remote areas online. In July a Statutory Instrument was laid containing a number of proposals to reform existing rules on spectrum management and initiate the release of two new spectrum bands: 800MHz (the 'digital dividend' spectrum) and 2.6GHz.<sup>8</sup> While this is welcome, Consumer Focus is concerned that the Statutory Instrument does not impose a guaranteed minimum level of coverage on the auctions, as has been required in previous auctions. Previous auctions also limited mobile operators' ability to bid for new spectrum depending on their existing holdings. Instead the Statutory Instrument only required Ofcom to design and carry out the auction process, after conducting an assessment of likely future competition in the mobile market.

We are concerned that the removal of coverage obligations on new spectrum bands will set back efforts to tackle rural not-spots, and that this decision may have been taken with a view to increasing the likely return on the spectrum bands at auction. We urge a holistic view about the benefits of coverage in increasing availability of broadband and boosting the economy. It would be short sighted for the Government to focus only on the short term economic gain of the spectrum auction, and not on its potential value in connecting more UK households to the internet.

## Net neutrality, traffic management and competition

### Question 4

Consumer Focus regards net neutrality as a key principle of the internet. It safeguards the enhanced participation by citizens and consumers in society, secures access to knowledge and diversity, and promotes innovation, economic growth and democratic participation.<sup>9</sup>

#### Consumer Focus recommends:

- that all consumers should be entitled to an internet connection of the speed and reliability advertised to them, that enables them to:
  - send and receive content of their choice
  - use services and run applications of their choice
  - connect hardware and use software of their choice that does not harm the network
- that the internet connection consumers receive should be free from discrimination with regard to type of application, services, or content or based on sender or receiver address
- that the regulation of the internet should preserve competition among network, application, service and content providers
- that internet service providers must undertake network management practices in a transparent manner

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<sup>8</sup> **Draft Statutory Instrument - The Wireless Telegraphy Act 2006**, Directions to OFCOM, Order 2010

<sup>9</sup>For more information see the **Consumer Focus consultation response to Ofcom's discussion paper on Net neutrality and traffic management**, September 2010, For more information see the **Consumer Focus response to the European Commission's consultation on the Open Internet and Net Neutrality in Europe** and **Transatlantic Consumer Dialogue (TACD) Resolution on net neutrality**, April 2010

We recognise that reasonable traffic management practices must be permitted under net neutrality principles to allow the proper functioning of the network. However these need to be distinguished from discriminatory practices arising from anti-competitive behaviour and access restrictions to the public internet. Currently some of the traffic management practices applied by network and internet service providers raise concerns over their discriminatory character. These include traffic blocking or throttling, such as the blocking of Skype by mobile networks or the downgrading of peer-to-peer filesharing traffic by internet service providers, and preferential treatment of one application provider over others, applied for example in mobile telephony.

The potential for unfair discrimination is increasing due to deployment of managed services with priority access, as well as the convergence of network providers with providers of television, radio and telephony services. Providers of integrated communications and multi-media platforms are likely to have financial incentives to prioritise transmission of affiliated content and services at the expense of competing products. An internet service provider that provides video distribution services will have an interest in allocating greater bandwidth to its own services at the potential expense of competing internet applications. Similarly, an internet service provider that also supplies telephony might degrade or block a voice over IP (VoIP) provider. Such practices can lead to market foreclosure of new entry content and service providers who do not secure integration or exclusive agreement with network operators. This could lead to price maintenance and could be to the detriment of consumers by limiting choice.

Consumer Focus is particularly concerned about the impact of such practices on consumers living in rural and disadvantaged urban areas with limited competition for network providers. Some UK consumers are still restricted in their content and service choice to the products and services offered by a single network operator which holds a dominant position in the area. Residents of Hull for example are limited in their choice of telecommunications provider to K-Com and its subsidiaries, which are the only retail and wholesale internet service providers in the area.<sup>10</sup> We are also concerned that discrimination may impact on the growth of the internet infrastructure as it will be against the financial interests of network providers to invest in expansion of the infrastructure's capacity to support content and services of competing players.

Net neutrality helps to maintain network, application, service and content providers competition and complements existing competition law. We are concerned that existing competition law is ill-equipped to deal with cases of anti-competitive behaviour by internet service providers that do not hold Significant Market Power (SMP) in the overall market, but have a dominant position in a particular geographical location where consumers have limited choice of providers.<sup>11</sup> Competition law takes effect only in cases where a company is proven to have abused its SMP and relies on a narrow definition and interpretation of the relevant market in which such power arises. The UK telecoms regulator Ofcom has noted that it is difficult to define the appropriate market in the complex and changing information and communications technology market.<sup>12</sup> Even where competition law applies it can only be used after the anti-competitive behaviour has occurred, ie ex-post, can take a long time to resolve, and can be circumvented, depending on whether services are blocked or slowed down.

Overall competition law can only deal with some aspects of traffic management such as blocking internet access as a whole, or intentionally degrading competing content and

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<sup>10</sup> **Ofcom review of the wholesale broadband access markets, Final explanatory statement and notification**, Ofcom, May 2008, pg.47

<sup>11</sup> Christopher Marsden, **Net Neutrality and Consumer Access to Content**, Scripted, volume 4, issue 4, September 2007.

<sup>12</sup> Ofcom's discussion paper on Net Neutrality and Traffic Management, 24 June 2010, p.26

services of unaffiliated providers.<sup>13</sup> Competition law can not address situations where internet service providers degrade all non-prioritised traffic in order to launch and promote prioritisation services. Neither is competition law able to address instances where internet service providers place unreasonable restrictions on end-users running certain applications. Competition law would also not apply where internet service providers refuse unaffiliated internet content providers access to prioritisation services.<sup>14</sup> Even if competition law applies, because it is enforced ex-post, consumers may be tied into a low value deal for a considerable period of time. Consumers' ability to switch internet service provider is typically limited by contract early termination charges, or software and equipment costs in the case of bundled services.

Consumer decisions to switch providers are complex, and depend on many factors, including tariffs, bundles of products, network coverage, licensing and contract lock-ins. Yet information on these is not always presented to the consumer in a transparent and clear way. Our research on consumer experiences of the mobile market suggests that only one in five consumers found it easy to navigate through the available information, with close to 70 per cent feeling that there are too many mobile tariffs available.<sup>15</sup> Similarly, our cross-country research on consumers' experiences of buying goods and services with the use of a mobile handset found insufficient information disclosure on products, on subscriptions, costs and customer services.<sup>16</sup>

Even where information about traffic management is provided to consumers it is difficult for them to assess impact on their internet access. According to Ofcom's research on broadband speeds only a minority of consumers were at ease with making practical use of information provided, for example to compare connection speeds or reliability of connection.<sup>17</sup> Consumers may also find it difficult to assess what part of a service's chain is at fault. Synnovate research indicates that consumers who experienced problems with internet connection attributed them to different causes, such as ISPs, internet connection speed, computer hardware, computer memory, websites, download limits of their internet plan and others.<sup>18</sup>

Consumer Focus is therefore concerned that adopting the new EU legislation<sup>19</sup> without clear guidelines on traffic management will legitimise traffic management practices as long as consumers are informed about such practices. In reality this would leave consumers with little choice to reject such practices and network providers. In addition we fear that lack of guidelines on traffic management will facilitate development of premium managed services, at the expense of maintaining 'best effort' public internet. We are concerned that this in turn will have long term implications for both consumers and citizens in accessing not only commercial but also public services online (eg NHS, DirectGov, Inland Revenue).

It may also have an adverse effect on the Government's plan for digital inclusion. In our view minimum quality of service should be adopted if developments in the market

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<sup>13</sup> Peggy Valcke, Liyang Hou, David Stevens, Eleni Kosta, [Legal analysis of network neutrality under EU competition rules and the Regulatory Framework for Electronic Communications](#), August 2008

<sup>14</sup> Peggy Valcke, Liyang Hou, David Stevens, Eleni Kosta, [Legal analysis of network neutrality under EU competition rules and the Regulatory Framework for Electronic Communications](#), August 2008

<sup>15</sup> For further details see the Consumer Focus position paper [Priorities in the mobile phone sector](#), November 2009

<sup>16</sup> For further details see the Consumer Focus report [Pocket shopping, International consumer experiences of buying goods and services on their mobile phones](#), December 2009

<sup>17</sup> [Ofcom's discussion paper on Net Neutrality and Traffic Management](#), 24 June 2010, p.37

<sup>18</sup> [Consumer Expectations of the Internet](#), Synnovate 2009.

<sup>19</sup> See the new revised [EU Framework Directive](#) (formally part of the Telecoms Package)

threaten maintaining 'best effort' public internet and compromise consumers' access to public and private services.

Net neutrality requires a joined-up approach in policy making that adequately considers short and long term implications of traffic management for consumers' and citizens' interest, including impact on access to public services. Countries such as Canada and Norway have been at the forefront of net neutrality regulation and have placed an obligation on operators to justify traffic intervention on their networks. They have also set neutrality and traffic management guidelines to serve as a benchmark to prevent anti-competitive behaviour.<sup>20</sup> The policy debate on net neutrality should not only focus on traffic management, but also take account of other factors that are likely to reduce competition, such as switching barriers, mobile termination rates, complaint and redress mechanisms, as well as infrastructure investments.

## Guiding principles for regulating material online and the right to freedom of expression

### Question 1

The right to freedom of expression includes the right to express and disseminate information and ideas, as well as the right to seek and receive information and ideas. Freedom of expression is one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every citizen.<sup>21</sup> It is a fundamentally British human right which was developed over the course of a century by three successive British thinkers: starting with John Milton, then John Locke and finally John Stuart Mill. Subsequently the right to freedom of expression was recognised as a core human right in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights, which takes effect in the UK through the Human Rights Act 1988. Freedom of expression is one of the core constitutional principle, which embodies the tolerant and vibrant society that is Britain.

As such freedom of expression should be the guiding principle when regulating the internet, or any other communication technology. Material or speech, such as content that infringes copyright, indecent images of children and hate speech, are regulated online and offline through relevant laws, such as the Copyright, Designs and Patents Act 1988, the Protection of Children Act 1978 and the Racial and Religious Hatred Act 2006.

### Consumer Focus recommends:

- that the same principles that apply off-line are applied to the regulation of material on the internet, namely:
  - all fundamental rights and freedoms need to be protected and the appropriate balance needs to be sought
- the right to freedom of expression, including the right to express, disseminate, seek and receive information and ideas, should be recognised as especially relevant to the internet
- recognition that the internet has enhanced citizens' and consumers' ability to exercise their right to freedom of expression, and increasingly becomes a necessity for full participation in cultural, social and economic life

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<sup>20</sup> **Ofcom's discussion paper on Net Neutrality and Traffic Management**, 24 June 2010, pg.20-21, footnote 18 &

**Network neutrality. Guidelines for Internet neutrality**, Post-og teletilsynet, 24 February 2009

<sup>21</sup> **Handyside v. United Kingdom** (5493/72) European Court of Human Rights, 1976

- that the blocking of material that infringes existing rights and laws should not lead to the indiscriminate and large scale blocking of websites and internet services

In the past two decades the internet has become an important medium to exercise freedom of expression for the media and individuals alike; it allows individuals to communicate, as well as to publish and access information and ideas. Unlike traditional media, the internet allows ordinary citizens and consumers to publish ideas and information without the approval of gatekeepers. As such the internet has had an historically unprecedented empowering and democratising effect, which should continue to be encouraged. The internet is different from any other medium in that anybody can download (receive) information, as well as upload (distribute) information. Unlike TV or radio broadcast, citizens do not need a licence to upload information and ideas on the internet. It is this absence of gatekeepers that gives the internet its raw and unprecedented potential. As such the Government should seek to safeguard and preserve this essential quality of the internet by, among others, upholding the key principles of net neutrality.

Plurality and tolerance are the basis for a democratic society and the Government should seek to safeguard these values in its policies and practices. The right to freedom of expression, while a core human right, always needs to be balanced against other rights, such as the right to privacy and the right to not be libelled. Courts of law have traditionally played a strong and important role in ensuring an appropriate balance between the right to freedom of expression and other rights. Going forward guidance should continue to be sought from relevant UK and EU case law. The UK High Court and the European Court of Justice will continue to have an important role in determining the balance between freedom of expression and other rights with regards to the internet and technologies yet to be developed.

Attempts to balance competing rights should not lead to the suppression of large amounts of information and ideas that citizens have a right to express, access and receive. The indiscriminate and large scale blocking of websites and internet services, on the basis that these are used to access or host some material that infringes existing rights and laws, should be rejected. Specifically, the fact that some copyright infringing material is hosted or accessed via a website or internet service should not be used as an excuse to block access to the entire website or internet service for all citizens. Attempt of pre-emptive censorship on the basis that a website or internet services may in future be used to access or host material that infringes existing rights and laws should also be rejected. Similarly attempts of retrospective censorship on the basis that a website or internet service has in the past been used to access or host material that infringes existing rights and laws should also be rejected.

The appropriate way to deal with instances where a website or internet service host is being used to access material infringing existing rights and laws is through targeted notice and takedown procedures, in accordance with existing laws and in recognition of the right and proper role of courts of laws. Pre-emptive or retrospective censorship should be rejected on principle in policies and practices.

In relation to copyright infringement online, Consumer Focus is particularly concerned about Sections 17 and 18 of the Digital Economy Act 2010, which would allow copyright owners to apply for blocking injunctions against websites or internet services:

- 'from which a substantial amount of material has been, is being or is likely to be obtained in infringement of copyright'
- 'at which a substantial amount of material has been, is being or is likely to be made available in infringement of copyright'

- ‘which has been, is being or is likely to be used to facilitate access to a location within’ [the two previous grounds]<sup>22</sup>

If implemented through secondary legislation Section 17 and 18 could lead to the indiscriminate and large scale blocking of website and internet services on the basis that they are being, have been, or may in the future be used to host or access copyright infringing material. As such it could be used to deny large numbers of citizens and consumers access to information and ideas which are legal and which they have a right to access. It could also deny a large number of citizens and consumers the use of internet services they have a right to use, and through which they exercise their right to freedom of expression, such as Facebook, MySpace, YouTube and Flickr. In our view Section 17 and 18 fail to strike the appropriate balance and could have a chilling effect on commercial and social innovation online.

To date a number of courts in the UK and abroad have considered the boundaries of freedom of expression and the internet. One of the earliest legislative attempts to regulate content on the internet was overturned as unconstitutional in 1996. Part of the US Communications Decency Act 1996 (CDA) sought to outlaw the seeking, distribution or receiving of indecent images of children online, and to protect children from sexually explicit material online. The law was overturned because its indiscriminate provisions were held to violate US citizen’s right under the first amendment, ie the right to freedom of expression. US Judge Dalzell’s summary of the interplay between freedom of expression and the internet is worth quoting at length:

‘The Internet is a far more speech-enhancing medium than print, the village green, or the mails. Because it would necessarily affect the Internet itself, the CDA would necessarily reduce the speech available for adults on the medium. This is a constitutionally intolerable result.

Some of the dialogue on the Internet surely tests the limits of conventional discourse. Speech on the Internet can be unfiltered, unpolished, and unconventional, even emotionally charged, sexually explicit, and vulgar – in a word, “indecent” in many communities. But we should expect such speech to occur in a medium in which citizens from all walks of life have a voice. We should also protect the autonomy that such a medium confers to ordinary people as well as media magnates.

My analysis does not deprive the Government of all means of protecting children from the dangers of Internet communication. The Government can continue to protect children from pornography on the Internet through vigorous enforcement of existing laws criminalizing obscenity and child pornography... As we learned at the hearing, there is also a compelling need for public educations about the benefits and dangers of this new medium, and the Government can fill that role as well. In my view, our action today should only mean that Government’s permissible supervision of Internet contents stops at the traditional line of unprotected speech.

The absence of Governmental regulation of Internet content has unquestionably produced a kind of chaos, but as one of the plaintiff’s experts put it with such resonance at the hearing: “What achieved success was the very chaos that the Internet is. The strength of the Internet is chaos.” Just as the strength of the Internet is chaos, so that strength of our liberty depends

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<sup>22</sup> **Digital Economy Act**, Section 17(4)(a)-(c)

upon the chaos and cacophony of the unfettered speech the First Amendment protects.<sup>23</sup>

## Internet service provider liability for content

### Question 6

Internet service providers are mere conduits of information, not publishers. They operate akin to the postal service, not a broadcaster, who has actual editorial control over what they broadcast. Internet service providers do not have editorial control over content posted on their servers by consumers and businesses. As such Consumer Focus believes that internet service providers should not be held responsible for content they carry unknowingly. We do not believe that internet service providers should be made responsible for proactively regulating or monitoring content they carry. It is wholly inappropriate, and neither is it desirable, to make internet service providers judge and jury over the legality, suitability or appropriateness of the content they carry or is contained on their servers.

#### Consumer Focus recommends:

- that ISPs continue to be treated as mere conduits and that no general obligation may be placed on them to monitor the information which they transmit or store

Consumer Focus believes that the mere conduit principle, as enshrined in Article 12 of the E-Commerce Directive (Directive 2000/31/EC), is still appropriate and should be maintained. The principle has effect under UK law, and makes specific provisions for ISP liability. It states that:

‘Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.<sup>24</sup>

The acts of transmission and of provision of access include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.<sup>25</sup> Article 15 of the E-Commerce Directive furthermore provides that ‘Member States shall not impose a general obligation on providers, when providing the services..., to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.’<sup>26</sup>

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<sup>23</sup> Fred H Cate, **The Internet and the First Amendment: schools and sexually explicit expression**, Phi Delta Kappa International, 1998, pg.51 & **Exercise for Integrating Sources – Communications Decency Act**, Stanford University

<sup>24</sup> **E-commerce directive**, Article 12(1)(a)-(c)

<sup>25</sup> **E-commerce directive**, Article 12(2)

<sup>26</sup> **E-commerce directive**, Article 15(1)

## Legal and technical support and monitoring for the purpose of law enforcement agencies pursuing criminal activities

### Question 7

The ability to lawfully intercept communication and obtain communications data is critical to combating terrorism and serious and organised crime such as child sex abuse, kidnap and murder.<sup>27</sup> Such activities are subject to, amongst others, the following laws: The Data Protection Act 1998, the Regulation of Investigatory Powers Act 2000, the Anti-Terrorism, Crime & Security Act 2001, the Human Rights Act 1998, the Electronic Communications (Universal Service) Order 2003, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, the Privacy and Electronic Communications (EC Directive) Regulations 2003 and the European Union's Data Retention Directive.

#### Consumer Focus recommends:

- that in relation to serious crime only law enforcement agencies should be given the appropriate powers under EU and UK law to undertake lawful interception of communication and to obtain communications data retained by internet service providers
- that under no circumstances should internet service providers be allowed or forced to retain data and release such data to private agents or companies
- that the right of citizens and consumers not to have their communication intercepted by private agents or companies without their consent should be safeguarded

According to the European Data Retention Directive (Directive 2006/24/EC):

'Public authorities may interfere with the exercise of that right only in accordance with the law and where necessary in a democratic society, inter alia, in the interests of national security or public safety, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others. Because retention of data has proved to be such a necessary and effective investigative tool for law enforcement in several Member States, and in particular concerning serious matters such as organised crime and terrorism, it is necessary to ensure that retained data are made available to law enforcement authorities for a certain period, subject to the conditions provided for in this Directive. The adoption of an instrument on data retention that complies with the requirements of Article 8 of the European Convention on Human Right is therefore a necessary measure.'<sup>28</sup>

Article 8 of the European Convention secures citizens' and consumers' right to privacy. The objective of the Directive is to 'harmonise the obligations on providers to retain certain data and to ensure that those data are made available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law'.<sup>29</sup>

According to the Privacy and Electronic Communications Directive (Directive 2002/58/EC) and the Data Retention Directive internet service providers are not allowed to retain data, such as IP address logs, other than for the purpose of transmitting the communications, billing purposes, and where required to do so in relation to 'serious crimes' as defined by UK law and in compliance with the European Convention on

<sup>27</sup> **Telecommunications: Databases**, Written question James Brokenshire, Answer Mr. Coaker, 8 October 2008

<sup>28</sup> **Data Retention Directive**, Recital 9

<sup>29</sup> **Data Retention Directive**, Recital 21

Human Rights.<sup>30</sup> But the UK has thus far failed to specify “serious crime” and Consumer Focus is concerned that obligations are placed on internet service providers to retain data for matters not relating to serious crime. For example, section 3 to 16 of the Digital Economy Act 2010 place a duty on ISPs to retain and release IP address logs to copyright owners and their agents for the purpose of the pursuit of civil copyright infringement by consumers without a court order.

The interception of communications should be limited to law enforcement agencies and undertaken in compliance with all relevant laws as a matter of principle. UK citizens and consumer are within their rights under EU law to not have their communication intercepted by private agents and companies without their consent. And it is the responsibility of the UK Government to safeguard this right. In this respect the European Commission has recently referred the UK to the European Court of Justice in relation to the improper implementation of EU data protection, retention and privacy laws. In doing so the UK has effectively allowed BT and Phorm to run two secret trials in 2006 and 2007 on its broadband customers using deep-packet inspection technology for the purpose of behavioural advertisement. Such interception of communication is not lawful under EU law, unless undertaken for legitimate law enforcement purposes, or with the consent of the consumers concerned. As the European Commission stated, when making the referral to the European Court of Justice, it is the responsibility of the UK Government to ensure the confidentiality of the communications and related traffic data by prohibiting unlawful interception and surveillance.<sup>31</sup>

## Aspects of the digital economy not addressed in copyright law – copyright licensing

### Question 9

Advances in digital technologies allow consumers to enjoy copyrighted content on a variety of platforms, which in turn stimulate increasing consumer demand for content. The commercial exploitation of copyrighted works occurs through copyright licensing, where the copyright owner licenses retailers and others to deliver the copyrighted works to the consumer in different formats and on different platforms. But current developments in the online and mobile delivery of copyrighted content, particularly in relation to recorded music, films in digital formats and e-books, show that the UK has not yet managed to establish a copyright licensing system that supports a dynamic market in copyrighted digital content.

Copyright owners and collecting societies need to be responsive to consumer demand and licence digital formats in a timely fashion. If demand is not met with supply, consumers will turn elsewhere and the UK-based film and book publishing industry need to learn from the mistakes made by the music industry.

### Consumer Focus recommends:

- that the UK reforms the UK copyright licensing system so that it supports a dynamic market in digital copyrighted content
- that the UK implements extended collective licensing for some types of copyrighted content so that consumers are given access to copyrighted works and creators are remunerated

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<sup>30</sup> **Privacy and Electronic Communications Directive**, Article 5, 6 and 9 and **Data Retention Directive**, Article 1(1) and recital 20

<sup>31</sup> **Digital Agenda: Commission refers UK to Court over privacy and personal data protection**, European Commission press release, 20 September 2010

Online and mobile content delivery allows for the mass usage of content, but copyright law requires that prior permission is obtained for every copyrighted work. A single copyrighted work frequently has a number of different copyright owners and several related rights attached, making prior rights clearance time consuming and expensive. In the digital economy, more than ever, copyright licensing needs to be responsive to evolving consumer demands and emerging technologies. Otherwise mobile and online content providers cannot harness consumer demand and technologies as they emerge. The creative industries clearly benefit from meeting consumer demand for digital content and the music industry is now starting to reap the rewards of licensing more of their content to legal content delivery services. According to recently published figures the music industry had licensed one million digital tracks globally in 2003, generating digital revenues of US\$20 million. By 2009 the industry had licensed more than 11 million digital tracks and generated revenues of US\$4.2 billion, constituting 27 per cent of the industry's total revenues.<sup>32</sup>

The time and resources spent by many online and mobile content providers, which are frequently small and medium sized enterprises, to obtain licences from copyright owners and collecting societies, imposes an unnecessary cost on the providers and stifles innovation. Such services should be able to obtain licences within months, not years, otherwise they will not be able to effectively take advantage of technological developments and consumer demand. However, the unnecessary fragmentation in copyright licensing, particularly music copyright licensing, means that online and mobile content providers have to obtain licences from various collecting societies, large organisational copyright owners, such as record companies, and individual creators who are not members of collecting societies. The complexities of the music licensing system are illustrated in simplified form in the diagram on the next page.

In the light of the overly complex copyright licensing system we were supportive of the extended collective licensing provision in the Digital Economy Bill. Extended collective licensing was designed to enable mass use of copyrighted content – it provides consumers with access to creative works, ensuring that creators and copyright owners receive remuneration and allows the content provider to respond quickly to consumer demand. Such licensing schemes have been in operation in Nordic countries since the 1960s and have been successful particularly with regards to broadcast. Pre-clearance of copyright for mass use of films produced for TV broadcast can be so prohibitively time consuming that many broadcasters such as the BBC and Channel 4 are unable to rebroadcast or reuse large parts of their vast film archives. We would therefore like to see the introduction of a general extended collective licensing provision for broadcast.

Such a provision would allow the broadcasters to negotiate extended collective licences for copyright and the related rights with collecting societies for specific uses. The collecting societies would ensure that all creators are equitably remunerated and broadcasters could rebroadcast and reuse their archives without having to pre-clear all associated rights. Extended collective licensing operates on an opt-out basis, and creators can ask for their work not to be included in the extended collective licence. In Scandinavia, broadcasters have seen very few instances of creators opting out of the licence and the schemes are regarded as working well by broadcasters, collecting societies and creators. Extended collective licensing could unlock vast quantities of archived broadcasts; allowing broadcasters to innovate based on old material, creating a new income stream for creators and producers of broadcasts, and giving consumers access to historically significant material and classic entertainment.

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<sup>32</sup> **IFPI Digital Music Report 2010, Music how, when, where you want it**, IFPI, 2010, p.6



## Consumer rights to use works they have paid for and other fair use

### Question 11 and 13

The purpose of copyright is to encourage learning and the production and distribution of creative works, ensuring that artists and investors are remunerated and consumers have access to information and culture. Copyright gives copyright owners the sole right to commercially exploit their copyrighted works by granting the exclusive right to copy, adapt and distribute a copyrighted work. At the same time copyright exceptions and fair dealing provisions allow consumers and others, such as educational institutions and news agencies, to use copyrighted works without permission or payment in certain circumstances. These provisions protect the public interest and allow for social and commercial innovation.

However, with the emergence of ever new platforms and formats for creative content existing exceptions and fair dealing provisions in UK law have become outdated. UK copyright law currently makes everyday consumer activities, such as back-up and format-shifting of music, films and e-books, illegal. Under current law parodies and pastiches, which have gained new cultural relevance in the digital mash-up culture, are also illegal. The law needs to be updated urgently if it is to remain relevant; copyright law also need to be future proofed so that primary legislation does not have to be updated in step with technological advances.

### Consumer Focus recommends:

- that copyright law is simplified so that it tells consumers what they can and cannot do with copyrighted content
- the introduction of a technology neutral non-commercial use exception, allowing individuals to copy copyrighted works they have legally acquired for non-commercial purposes, but does not allow the communication of such copies to the public
- the introduction of a fair dealing defence for caricature, parody or pastiche, allowing the communication to the public of the caricature, parody or pastiche

Copyright effectively regulates the creation, production and distribution of creative content, and as such it needs to support and enable innovation by protecting the commercial interest of copyright owners and allowing appropriate access to copyrighted works. Ultimately copyright law should be relevant to consumers, and provide certainty to the creative and the technology industry which innovates within the limits of the regulatory framework.

The use of copyrighted works by consumers and other institutions has been termed 'fair use', 'private copying' or 'non-commercial use'. These terms are loosely based on existing provisions, such as the fair use defence in US law, the private use provisions in civil law European countries and the Creative Commons licence terms. The boundaries of what may constitute fair use, private copying or non-commercial use are fluent, in popular use and law. The US fair use defence sits easier with UK law and traditions than the private use provisions and accompanying levies of civil law European countries. This is because both the UK and the US have developed their fair use and fair dealing defences on the basis of the common law principle of fair abridgement. But the open ended nature of the fair use defence has in practice led to great uncertainty about what is and what is not legal under US copyright law. Cases only make it to the courts if they have significant economic value and courts are therefore unable to set the boundaries of an open ended provision as new technologies emerge.

Copyright law ought to tell consumers what they can and cannot do with copyrighted content. Exceptions and fair dealing provisions need to be specific enough to only legalise uses that do not impact negatively on artists and investors in copyright, and broad enough to remain relevant as consumers enjoy copyrighted works in an ever increasing number of formats using newly emerging technologies. Therefore Consumer Focus would like to see the introduction of a non-commercial use exception in UK law. Such an exception would legalise all instances where consumers format-shift, back-up or otherwise copy music, films, e-books and other content they have legally acquired in order to enjoy it on different platform and devices. This exception should be technology neutral and apply to all types of copyrighted work to ensure that the exception remains relevant as new technologies and formats emerge over time. A fair balance between the interests of consumers, investors and artists would be maintained by allowing individuals to copy for non-commercial purposes, but not to distribute these copies or make them available to the public. This would ensure that the exception complies with existing EU law on private use and that consumers are given fair access to copyrighted works. It would also protect the commercial interest of artists and investors in content by not legalising activities such as the unauthorised large scale distribution of copyrighted works through peer-to-peer filesharing networks.

Consumer Focus would also like to see the introduction of a fair dealing defence for caricature, parody or pastiche in UK law. This provision should allow the use of copyrighted works for the purpose of a caricature, parody or pastiche, as well as the communication to the public of the new work. This provision should be technology neutral, cover all types of work, and courts would apply the usual fair dealing criteria, i.e. whether the use was substantial, in the public interest, and whether the use had a significant negative economic impact on the copyright owner. Such a provision would cover user generated content, such as the 'ACS:Law Downfall' caricature,<sup>33</sup> where users use (copy) parts of a copyrighted work to create a caricature, parody or pastiche and communicate their work to the public. EU law does not limit an exception for caricature, parody or pastiche to non-commercial use by consumers, therefore the exception can also cover works by artists, such as the 'Newport State of Mind' parody<sup>34</sup> and works by commercial and non-commercial organisations, such as the Conservative Party's 'Fire up the Quattro. It's time to change' poster.<sup>35</sup>

## Balancing consumer rights to access with creators rights to fair remuneration

### Question 2

According to our research 82 per cent of British consumers agree that 'copyright law should achieve a fair balance between the interests of artists and consumers'.<sup>36</sup> Copyright should function as a mechanism that ensures that artists receive a fair remuneration for their work. As such artists should receive a fair part of what consumers pay for copyrighted content. However, copyright law and licensing currently does not achieve this in all cases. Ideally copyright should balance the interests of consumers, investors and creators, and as such it should help creators to financially and reputationally benefit from their work.

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<sup>33</sup> **ACS:Law's Anti-Piracy Downfall Sends Hitler Crazy**, Torrentfreak, 4 October 2010

<sup>34</sup> **Newport parody of Empire State of Mind becomes online hit**, Telegraph.co.uk, 23 July 2010

<sup>35</sup> **Gene Hunt poster sparks propaganda battle**, BBC News, 3 April 2010

<sup>36</sup> Consumer Focus commissioned research, undertaken online by BMRB/Kantar Media between 17 and 23 September 2009 among 2,026 British consumers

### Consumer Focus recommends:

- that creators need to be given fair contract terms and their moral right to attribution should be strengthened

Consumers purchase substantial amounts of copyrighted content, such as music, films, books, video games and software. Under UK copyright law the copyright owner, who is not necessarily the original creator, has the exclusive right to commercially exploit a copyrighted work, be it through copying, distribution, adaptation, translation, broadcast or making it available to the public online. Copyright does not have an inherent link to the original creator(s). It is traded like a commodity, ie creators assign or transfer their copyright through contract, and the copyright owner may in turn sell the copyright on. This means that the copyright owner is frequently several steps removed from the original creator, ie the copyright owner may not even be the investor that has originally contracted with the creator. This means that a creator may not be the copyright owner, and hence does not financially benefit from the continuous commercial exploitation of her work.

Furthermore the UK, unlike civil law countries whose copyright is based on the authors' rights tradition, only offers a weak protection of creators' moral rights, such as the right to be attributed. Hence creators frequently do not have the right to be credited, and hence do not obtain reputational benefit from the continuous use of their work.

## Appropriate international forums to develop copyright systems

### Question 10

The World Intellectual Property Organisation (WIPO) is the multilateral organisation for intellectual property, including copyright and patents. It has a wide membership of countries, procedures for accrediting non-governmental organisations and open meetings. Similarly, at regional level, European Union laws and policies, are made with full involvement of the European Parliament and engagement of all stakeholders.

### Consumer Focus recommends:

- that international and regional copyright law should only be negotiated in democratic and transparent forums

Initiatives, such as the Anti-counterfeiting Trade Agreement (ACTA) to negotiate agreements among a small number of countries behind closed doors lack transparency and legitimacy. ACTA will establish a new body where Parliamentary scrutiny is absent and where stakeholders are not represented. This is a retrograde step with regards to democratic process and multi-stakeholder involvement.



## **Consumer Focus response to the Liberal Democrat consultation on information technology and intellectual property**

If you have any questions or would like further information about our research, please contact Saskia Walzel, by telephone on 020 7799 7977 or via email [saskia.walzel@consumerfocus.org.uk](mailto:saskia.walzel@consumerfocus.org.uk)

[www.consumerfocus.org.uk](http://www.consumerfocus.org.uk)

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## **Consumer Focus**

4th Floor  
Artillery House  
Artillery Row  
London SW1P 1RT

Tel: 020 7799 7900

Fax: 020 7799 7901

Media Team: 020 7799 8004 / 8005 / 8006