



**DIGITAL ECONOMY BILL -
online infringement of
copyright (initial obligations)
cost-sharing**

UKCTA response to BIS consultation

Submitted 25th May 2010

Introduction

UKCTA is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.com.

Summary

UKCTA welcomes the opportunity to respond to this consultation since the measures proposed are of significant importance to UKCTA members. There has been widespread concern that the final form of the Digital Economy Act was heavily weighted in favour of rights holders and we are keen to ensure that a similar bias does not unduly shape the development of the Code of Practice.

Given the haste with which the Act was passed by Parliament UKCTA is concerned at the adoption of a reduced eight-week consultation period, particularly given the potentially far reaching consequences of the legislation which may impact on many stake holders.

UKCTA does not agree with the basic proposition in the consultation that communications providers (and therefore their customers) should meet some of the cost of the initial obligations such as sending notification letters and maintaining a database of allegations. There is no justifiable basis for this approach.

CPs and ISPs are intermediaries that pass data over their networks. They do not benefit from or encourage customers to engage in unlawful file sharing activity. It is therefore inappropriate to require them to be financially liable for the cost of enforcing the rights of third parties against these users.

UKCTA believes that copyright holders are the sole beneficiaries of these proposed measures and that they, rather than CPs and ISPs, ought to meet the cost. To do otherwise would amount to the imposition of a copyright tax on all users of the internet in the UK. UKCTA is concerned that this would reduce incentives to exploit the opportunities to develop new business models for the distribution of content which the internet provides and which would do so much more to deal with the problem of illegal file sharing.

The Government's decision to depart from the conventional principle of "beneficiary pays" does not stand up to detailed scrutiny.

The idea that Communications Providers and their broadband customers pay for policing and protecting the rights of rights holders is unfair and unjustified.

We believe that there is no precedent for imposing the costs associated with protecting the copyrights of one group on another group.

There is however established precedent which would support UKCTA's preference that rights holders should meet all of the costs of policing their own copyright. At present, law enforcement agencies pay all of the costs of the obligations placed on ISPs under the RIPA legislation¹.

IMPOSING THE COST BURDEN ON COMMUNICATIONS PROVIDERS AND THEIR CUSTOMERS IS UNFAIR

The initial obligations laid out in the Digital Economy Act ('DEA') require ISPs to send notification letters to any customers whose connections are alleged to have been used for illegal file sharing. ISPs are also required to establish and maintain a database of such allegations made against their customers. These obligations will cause ISPs to incur significant cost. Costs will also fall on Ofcom in preparing the code and in establishing and running the appeals process. Since Ofcom is funded by the electronic communications industry, these costs too are likely to be borne ultimately by ISPs and their customers.

ISPs will derive no benefit from these measures and we do not therefore believe it is logical for ISPs to bear any of these costs. The Government has acknowledged that the normal principle is that the costs of measures are borne by those who benefit from them. - for example it has said:

"As a general principle we believe that the cost should be borne by the party that will benefit, though there may be circumstances where it is appropriate to diverge from that." (June 2009 Consultation at paragraph 4.17)

"As the main beneficiaries from the policy there was a strong argument that copyright owners should therefore bear all of the costs incurred" (March 2010 Consultation at paragraph 5.8)

While the latest proposal that ISPs should pay only 25% of the costs of these measures is an improvement on the initial proposal, UKCTA believes that since the sole beneficiaries of these proposed obligations are the rights holders, they ought to

¹ This includes audit of costs incurred
UK Competitive Telecommunications Association

bear the total cost. The Government supports the principle that ISPs ought to bear some of the costs on the following grounds:- (Consultation §§5.8, 5.9):

- gives ISPs an incentive to operate efficiently and minimise the cost of sending notifications
- provides incentives for ISPs to take voluntary measures and/or participate in commercial offers to reduce on-line copyright infringement (and thereby reduce the number of notifications an CP might have to process)
- adds an extra incentive for smaller ISPs to tackle infringement so that the CP does not fall into scope of the notification obligations.

UKCTA disagrees with this reasoning for the reasons set out below.

UKCTA believes that requiring rights holders to meet the costs of the obligations would maximise efficiency and also provide them with an incentive to deal with the underlying problem rather than merely its symptoms. If rights holders bear the costs of the measures then they will make the most efficient decisions as to how they are used. For example if ISPs were to bear the cost of sending out letters to those alleged to be infringing copyright then there is nothing to dissuade rights holders from over use of letters to internet users, ie using them even where there is no demonstrable benefit. They would also have no incentive to pursue other options such as developing new business models or pursuing education initiatives.

Furthermore UKCTA believe there is a problem with the proposals from a fairness perspective since all ISPs and customers will pay to protect the rights of content providers regardless of whether they are engaged with illegal file sharing. Where ISPs and their end users are innocent of any wrong doing it seems inappropriate that they should be subjected to financial penalties.

The current proposals for cost sharing will impact only the biggest ISPs and will therefore put smaller providers at a competitive advantage. Conversely this might encourage those actively seeking to engage in illegal activity to move to smaller ISPs, this would impact disproportionately on such ISPs. UKCTA believes that Government should seek to avoid doing anything which distorts competition in the market.

GOVERNMENT'S PURPORTED BENEFITS

The Government's assertion that cost-sharing will be beneficial are incorrect and do not stand up to scrutiny.

Cost sharing will not promote cost minimisation. The proposed approach sets a fixed fee per letter sent for an efficient operator with the cost determined using an audit / assessment of estimated future costs. Given this fixed fee structure ISPs will have a strong incentive to reduce costs irrespective of whether there is cost-sharing or not. Cost-sharing will not affect this incentive since the fee paid will have no relation to the actual costs incurred. These reduced costs will be passed onto rights holders when the fee is reset in future since any audit will be able to identify the actual (and reduced) cost. This mechanism is the standard one used for 'charge controls' set by Ofcom. There is no need for the regulated entity to share some of the cost in order to create a cost minimisation incentive.

Cost sharing will not encourage ISPs to take voluntary measures to reduce on-line copyright infringement (and thereby reduce the number of notifications). This argument pre-supposes that there are some voluntary arrangements that ISPs could reasonably take to reduce on-line copyright infringement - the fact is that there are not voluntary actions that ISPs could take and therefore this claimed benefit is unreal.

UKCTA believes that the Government ought to bear in mind that ISPs have not and do not benefit from illegal file sharing. They do not gain a meaningful number of new customers as a result of illegal file sharing since file sharing is not typically one of the primary drivers behind a customer choosing to take broadband.

ISPs do not encourage, induce or condone illegal file sharing, ISPs do not direct consumers to illegal sites and there is no 'silver bullet' measure that ISPs can reasonably take to eliminate illegal file sharing. Contrary to some of the lobbying which took place prior to the enactment of the DEA, ISPs are not the 'polluters' and so the doctrine of "polluter pays" is not relevant here. The individuals that infringe copyright are the polluters but none of these measures are aimed at ensuring that they pay.

These facts further reinforce the logic that the ISPs should not be required to pay for the initiatives which are sought by and stand to benefit only rights holders.

We are also concerned regarding the inconsistency between the proposals being consulted on and the widely made comment that the proposals only relate to those service providers with more than 400,000 customers. The supply chain for providing broadband to SME's can involve several levels, with one or more intermediaries

between the ISP which has the IP address data and the final reseller which has a contract with an end-user business. If these measures are to apply to all service providers then we foresee very real difficulties implementing the proposals up and down such a chain. This would be far from trivial and could involve a very large number of parties.

ANSWERS TO BIS QUESTIONS

1. Is the list of included cost items correct? What items should be added or removed? Please give reasons.

UKCTA believes that the main costs have been outlined in section 5 of the document. UKCTA does not believe that opportunity costs incurred by ISPs should not be recoverable. Article 5.4 references the admission in the Mott Macdonald report that ISPs are likely to incur significant opportunity costs. UKCTA can see no reason why these should not be fully recoverable.

2. Do you think this is the right approach to the sharing of notification costs? If not, what should be? Please give reasons and any supporting evidence.

3. Do you think the 75:25 ratio is the correct one? If not, what should it be? Please give reasons and any supporting evidence.

UKCTA advocates full reimbursement of the actual costs incurred by ISPs based on the well established principle of beneficiary pays. There is no justification for imposing the costs that should be borne by rights holders on CPs and ISPs. None of the obligations in the Digital Economy Act are entirely for the benefit of rights holders and present no commercial advantage for CPs and ISPs. Any sensible analysis of the costs and benefits to communications providers and rights holders would determine that the rights holders ought to pay for the policing of their copyright.

UKCTA believes that the reasons offered to support the decision to propose a 75:25 split are unsatisfactory.

We do not accept the claim made in the consultation document that dividing the costs would encourage CPs and ISPs to enter into new commercial arrangements for content distribution. The success of lawful alternatives depends entirely on them being attractive to consumers. This suggestion is based on the mistaken assumption that all ISPs and CPs would be interested in becoming involved in the distribution of content. While some CPs undoubtedly might be so minded, for many more this is simply not of any interest. The absence of large numbers of lawful alternatives owes more to the failure of rights holders to adapt their business models than to any act or omission by network providers. The Government ought therefore to look at ways to

encourage rights holders to develop commercial offers. We would suggest that the proposed cost split will do more to preserve rather than resolve the problem.

UKCTA would suggest that the suggested cost split add nothing to the existing incentive which ISPs and CPs already have to minimise costs. Current arrangements with law enforcement agencies demonstrate that the industry can be relied on to minimise costs and can safely be reimbursed in full for all costs incurred in assisting with criminal investigations. There is no reason to believe that the experience in relation to illegal file sharing would be any different.

4. Do you think this is reasonable? Do you have an alternative formulation that addresses the issue in a more effective way? Please give reasons.

UKCTA does not have a view about the proposed formula for devising the costs that Ofcom will incur. UKCTA members would, however, like assurances that all costs for Ofcom's work in this area must be met independently of Ofcom's current financial provisions. Ofcom should not at any time contribute its existing funding to meet any of the requirements of it as identified in the Digital Economy Act.

5. Do you think the 75:25 cost split should be used to apportion the cost of the regulator functions and appeals? If not, why not and how should they be funded?

UKCTA believes that the costs that Ofcom incurs should be reimbursed by the rights holders that benefit from the process. Indeed, many of the functions of the regulator have been requested by the rights holders and, as such, it is only right and proper that they be responsible for reimbursing all of the costs incurred.

6. Should subscribers have to pay a fee to access the appeals system? If so, at what level, and how should economically vulnerable people be protected? Please give reasons and any supporting evidence.

Section 5 iv on appeals correctly identifies the issues around charging subscribers to appeal. UKCTA believes that the fee should be set in agreement with consumer groups and at a level that is fair to consumers.

UKCTA would also agree that the fee is refundable by the rights holder where an appeal is upheld. Given that mistakes leading to successful appeals are likely to be caused by a problem with the method of detection and evidence being used by the rights holder, it is reasonable to expect rights holders to reimburse the appeals fee, where the appeal is successful. It is important to note that ISPs will incur costs by processing consumer appeals. These costs should be recoverable in line with other

costs, especially given that errors that lead to appeals are likely to be the responsibility of rights holders' process for gathering evidence.

7. Does the Order achieve all of these objectives? If not, please specify which aim(s) you feel the Order fails to achieve and why.

8. If you answered 'no' to Question 6, please set out how you think the Order should be changed.

In addition to the concerns cited earlier in the response, it is imperative that a system is developed that allows for a different level of cost reimbursement for different ISPs since a flat fee is unlikely to be fit for purpose given the complexity and diversity of the sector. It is not reasonable to assume that the costs incurred by one ISP will be comparable with those incurred by others.

11. The impact assessment sets out the costs as we understand them at this stage. Does this represent a reasonable assessment of the position? Please provide any supporting evidence for your comments.

UKCTA does not have any estimate of the likely costs which our members would face.

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