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CONSULTATION ON LEGISLATIVE OPTIONS TO ADDRESS ILLICIT PEER-TO-PEER (P2P) FILE-SHARING

JULY 2008

Consultation document on legislative options to address illicit P2P file-sharing

Explanation of the wider context for the consultation and what it seeks to achieve

This consultation is intended to set out and gather views on a proposal for a co-regulatory approach that could be adopted in order to facilitate and ensure co-operation between Internet Service Providers (ISPs) and rights holders to address the problem of illicit use of Peer-to-Peer (P2P) file-sharing technology to exchange unlawful copies of copyright material. This takes forward Recommendation 39 of the Gowers Review of Intellectual Property which addressed the issue of illicit use of P2P. The consultation also identifies and seeks views on other potential options and calls for evidence on issues related to illicit use of P2P.

The Government continues to consider that an industry solution in this area, as envisaged by Andrew Gowers, would be best, provided it is not anti-competitive, is effective and is fair to all parties, particularly citizens. We have made good progress on formulating the high level principles of such an approach which we believe could form the kernel of a self-regulatory code or codes of practice, overseen by Ofcom and backed up by a duty on ISPs to take action in relation to the use of their networks that is shown to be infringing copyright. While the co-regulatory approach is the government's preferred approach at this stage, we have also identified a number of other possible regulatory solutions and are seeking views on all of these options (and on any other options that people might identify).

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Respond by 30 October 2008

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This consultation is relevant to: industry, in particular ISPs and copyright holders such as music, film, publishing, software and games sectors. Consumers and consumer organisations will also have a close interest.

Contents

1. Executive Summary

1.1 Copyright owners (rights holders) have struggled to develop effective business models in the digital world against a backdrop of pervasive and illicit P2P copying of copyright material. Existing remedies are slow, expensive and have proved largely ineffective. That being the case they have sought to engage with ISPs to agree ways in which they can co-operate to reduce illicit P2P traffic. Increasingly this is in the interests of ISPs as well, since high users of illicit P2P are not the most profitable customers, and are taking up bandwidth that could be utilised for more commercial uses to the benefit of ISPs and potential partners.

1.2 Because there would appear to be common interest between ISPs and rights holders to come to a voluntary solution the Government has been keen to give the different parties the time and opportunity to develop such an agreement, though we would wish to be assured that it was legal, effective and fair. More recently we have worked closely with ISPs and rights holders to arrive at a set of principles encapsulated in a memorandum of understanding (MOU) that would provide an agreed industry framework for action. This approach has garnered a good deal of support from industry but it has not been possible to arrive quickly at an agreement that covers the whole industry. As such we need to consider what regulatory action might be appropriate.

1.3 No regulatory option is straight forward. There is a complex legislative environment already in place here including privacy, eCommerce and copyright laws. We are therefore keen to hear from all stakeholders their views on the pros and cons of the options put forward, bearing in mind the existing legal framework within which such solutions need to work, and would welcome responses that are able to put a value on both the benefits and the costs.

1.4 The regulatory options identified in the consultation are:

Government's preferred option:

A co-regulatory approach consisting of:

- A self-regulatory industry approach, designing codes of practice under principles such as those set out in **Annex D**, covering both rights holders and ISPs and dealing with education and awareness; making content available to consumers in a choice of formats at a range of prices; and notifications to alleged infringers. The self-regulatory approach would be overseen by a regulator who would have the responsibility for approving codes of practice;

- The regulator will invite stakeholders, including ISPs and rights holders to join a group to explore effective mechanisms to deal with repeat infringers. Members of the group will look at solutions including technical measures such as traffic management or filtering and marking of legitimate content to facilitate identification, as well as ways in which rights holders can take action against the most serious infringers.

The group will report within 4 months and the Government and Ofcom will consider the findings of the group, leading to a Code of Practice on mechanisms to deal with repeat infringers; and

- An obligation on ISPs to take action against subscribers to their network who are identified (by the rights holder) as infringing copyright through P2P. This obligation could be fulfilled by compliance with the codes of practice mentioned above, including on mechanisms to deal with repeat infringers.

1.5 Alternative regulatory options considered:

- Option A1: Streamlining the existing process by requiring ISPs to provide personal data relating to a given IP address to rights holders on request without them needing to go to Court

- Option A2: Requiring ISPs to take direct action against users who are identified (by the rights holder) as infringing copyright through P2P (this is essentially the same legal obligation as in the preferred option in section 8, but without any self-regulatory element).

- Option A3: Allocating a third party body to consider evidence provided by rights holders and to direct ISPs to take action against individual users as required, or to take action directly against individual users

- Option A4: Requiring that ISPs allow the installation of filtering equipment that will block infringing content (to reduce the level of copyright infringement taking place over the internet) or requiring ISPs themselves to install filtering equipment that will block infringing content

How to respond

1.6 When responding please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

1.7 **The closing date for all responses is 30 October 2008**

A response can be submitted by letter, fax or email to:

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1.8 **A list of consultation questions can be found at Annex A**

A list of those organisations and individuals consulted is at **Annex C**. We would welcome suggestions of others who may wish to be involved in this consultation process.

1.9 **Help with queries**

Questions about the policy issues raised in the document can be addressed to:

Michael Klym/Adrian Brazier
Department for Business, Enterprise & Regulatory Reform

(Contact details as above)

1.10 **Additional copies**

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1.11 **Confidentiality & Data Protection**

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is

a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

1.12 **Issues relating to the consultation process**

If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

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More information on the Code of Practice on Consultation is in **Annex F**.

2. Scope

2.1 This consultation is concerned with examining the options for a statutory solution to the problem of "peer-to-peer" (P2P) file-sharing of copyright protected works without permission as identified by Andrew Gowers in his report to HM Treasury in December 2006[1].

"*Recommendation 39: Observe the industry agreement of protocols for sharing data between ISPs and rights holders to remove and disbar users engaged in 'piracy'. If this has not proved operationally successful by the end of 2007, Government should consider whether to legislate.*"

2.2 In its *Creative Britain* strategy document, published on 22 February 2008, the Government stated:

The Government recognises the value of the current discussions between internet service providers (ISPs) and rights holders; we would encourage the adoption of voluntary or commercial agreements between the ISPs and all relevant sectors. While a voluntary industry agreement remains our preferred option, we have made clear that we will not hesitate to legislate in this area if required. To that end, we will consult on the form and content of regulatory arrangements in 2008 with a view to implementing legislation by April 2009. [2]

2.3 This consultation is designed to take that commitment and Recommendation 39 from the Gowers Review, forward. It seeks to identify the issues raised by P2P file-sharing and the unlawful copying of content in breach of copyright, sets out a proposed way forward and identifies other options and seeks evidence relating to these issues.

2.4 The Government has made it very clear that it would prefer to see rights holders and ISPs reach a voluntary agreement on how to co-operate to tackle the problem of illicit P2P file-sharing. As of when this consultation is published the prospect of this happening appears uncertain. However, we continue to believe that a largely industry-led solution presents the best outcome. To that end this document outlines a co-regulatory approach based on the draft MOU that Government has been discussing with industry. The document also identifies other solutions that have been suggested and seeks views on them.

2.5 This document only deals with illicit use of P2P technology. It does not examine the issue of commercial piracy, websites dedicated to unlawful copying (or the encouragement of) or the hosting of such websites. Neither will it examine the issue of format-shifting. All these issues fall outside the scope of Gowers's Recommendation 39

[1] The report and all papers associated with it can be found at: http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm

[2] Creative Britain: New Talents for the New Economy: www.culture.gov.uk

and are issues for the Department of Innovation, Universities and Skills and the UK Intellectual Property Office.

3. The Current Position

What is P2P file-sharing?

3.1 P2P technology has many legitimate uses – providing opportunities and benefits to Internet users. It is not the intention of government to interfere with this or to create barriers to the legitimate use of this technology. However such technology does enable users to share information that they are not entitled to share – for example by sharing music or audiovisual materials without permission in breach of copyright law. It is this activity that is the subject of this consultation.

3.2 The software typically used in file-sharing was developed in order to allow people to make the most effective use of computer networks. Rather than relying on a central file server, a P2P computer network uses a series of ad hoc connections between participants in a network and the cumulative bandwidth of network participants. Such networks are used for many purposes - sharing content files (i.e. file-sharing) containing audio, video, data or anything in digital format is very common, and real-time data, such as telephony traffic, is also passed using P2P technology.

3.3 The advantage of a P2P network is that all users provide resources, including bandwidth, storage space, and computing power. As additional users arrive and demand on the system increases, the total capacity of the system also increases. This is not true of a client-server architecture with a fixed set of servers, in which adding more clients could mean slower data transfer for all users. As there is no one central server to fail, P2P networks are more robust with data replicated over a number of users. Furthermore, as individuals use a number of different connections to download the (same) information, this avoids bottlenecks.

3.4 Perhaps the best known example of legitimate P2P use is the BBC's iPlayer which uses Kontiki (a P2PTV protocol also used by Joost). Since its launch on 25 December 2007, iPlayer achieved over 3.5m downloads in the first three weeks and 1 million visits in the first week, compared with the target of 500,000 users in the first six months.[3] Apart from the popularity of the content this demonstrates the robust nature of P2P technology. Other well-known protocols include BitTorrent and Napster.

3.5 A key feature of P2P file-sharing software commonly used in illicit file-sharing is that in order to participate and download files, the user is expected to make available the files on their computer. In other words, if you want to copy files from someone, the deal is that your own files are equally available for others to copy. It is such reciprocal arrangements that enable P2P in illicit copyright to happen on the scale it does.

3.6 It is also this feature which allows the rights holders to identify who is copying material. The act of joining a P2P network and actively accessing material for

[3] http://news.bbc.co.uk/1/hi/technology/7187967.stm

download provides them with the IP address of the up-loader. In order to take legal action against the person uploading these files the rights holder needs to relate this IP address to an actual person and a physical UK address – the computer records held by the ISP can provide this information.

How big a problem is P2P copying of copyright protected works?

3.7 The scale of file-sharing and its impact varies between different industry sectors. The music industry has so far been the most affected sector, with millions of individuals engaging in unlawful file-sharing. The film industry is also becoming increasingly affected by unlawful downloading, and as broadband speeds increase, the games industry too is looking at the impact this will have in the future. The publishing industry is in the same position as the nascent e-book market develops. The software industry also suffers from P2P but here the problem is unlawful use by business, with far higher costs associated with individual instances. As e-business is a rapidly growing and changing area, it is possible other sectors could be adversely affected in the future by unlawful P2P file-sharing.

3.8 Most comment and the limited amount of available research tends to focus on the music industry, not least because it was the first to see the effect of on-line behaviours and also because, in terms of overall numbers, it currently represents the biggest area of P2P activity. Consequently most examples used in this consultation relate or refer to the music industry; although it should be stressed we recognise that the nature of the problem (and therefore possible solutions) may vary across different industry sectors.

3.9 According to studies conducted by Jupiter Research, commissioned by the BPI, 6.5 million people in the UK engaged in online music "piracy" in 2007 (this equates to 25% of UK internet users, although this was not restricted to P2P activity). Jupiter Research has also estimated that the cumulative cost to the music industry over the next five years of this activity will exceed £1bn.

3.10 A separate survey by Entertainment Media Research[4] showed that in 2007 some 43% of respondents had downloaded unauthorised music from file-sharing sites, although a different survey by Olswang into convergence reported lower figures, whereby only 14% of respondents admitted unlawfully copying music, along with 6% who admitted unlawfully copying films (a further 9% preferred not to say, while 27% said "not that they were aware of").[5] The most recent research commissioned by the British Music Rights into music use by young people found that 63% of respondents used unlicensed P2P networks, downloading an average of 53 tracks per month (although some individuals admitted copying 5,000 tracks per month).[6]

[4] The 2007 Digital Music Survey www.entertainmentmediaresearch.com
[5] Olswang Convergence Consumer Survey 2007 www.olswang.com/convergence07
[6] BMR/University of Hertfordshire ""Music experience and behaviour in young people" Spring 2008 www.bmr.org

3.11 A report by LEK Consulting, commissioned by the Motion Picture Association, estimated that Internet piracy (not just P2P) cost the worldwide film industry US$2.3 billion in 2005 (defined as obtaining movies by either downloading them from the Internet without paying or acquiring hard copies of unlawfully downloaded movies from friends or family).[7]

3.12 The most recent figures released for the UK music industry show that in 2007, (music) industry revenues fell by 13% to £1.02 billion. Although digital sales rose by 28% to £132.2m (a rise of £28.8m) this was more than off-set by a 16% fall in revenue from CD sales to £871 million – a loss of £166m. The net decline in revenue was some £152.4m[8]. There are a number of factors contributing to this decline including increased discounted sales via supermarkets, activity substitution as well as piracy and unlawful P2P activity – indeed one report attributes only 18% of revenue decline since 2004 to piracy[9]. **However given the amount of research which documents the levels of unlawful P2P activity, particularly in some age groups, it is reasonable to conclude that unlawful P2P copying represents a significant loss of the creative industries in the UK.**

3.13 The impact of P2P lies in the large numbers of users who regularly download copyright work without the rights holder's permission and share with other users, rather than the activity of a few individuals undertaking downloading for commercial profit. Although there is a range of estimates from different surveys, it is clear that a significant number of users regularly engage in downloading.

3.14 The attraction for music file-sharing appears straightforward. 18% of respondents to the EMR survey indicated they thought themselves more likely to download in 2008. Of these, 91% said this was because "it was free" with a further 42% claiming "they could find everything they looked for".[10]

3.15 The combination of a large population of down-loaders each making a few copies, allied with the evidence on the attitudes to downloading, has significant implications for possible remedies.

3.16 ***In considering the costs and benefits of the regulatory solutions set out in this document (and any other options that may emerge) it is important that we have a full picture of the impact of illicit file-sharing. As such we would welcome further information from respondents on this – in particular on what impact such activity has had on various sectors (for example computer software and film as well as music) and on ISPs. Views on likely future impact if such activity continues would also be welcomed. The detailed list of questions set out in Annex A and the Impact Assessment (IA) identify further the areas where additional information would be particularly helpful***.

[7] http://www.mpaa.org/leksummaryMPA%20revised.pdf
[8] 18th June 2008 http://www.ifpi.org
[9] http://www.theregister.co.uk/2007/10/19/vrs_value_gap_report/
[10] The 2007 Digital Music Survey www.entertainmentmediaresearch.com

The legal position

UK Copyright law

3.17 Copyright law seeks to strike an appropriate balance between the interests of the creators of protected works and consumers – ensuring that creators are suitably rewarded to encourage them to create while also allowing for legitimate use by users – through exceptions and by providing that after an appropriate period works fall into the public domain and may be used freely. This protection is commonly provided by giving rights holders the exclusive right to authorise certain activities in relation to their work – for example the right to authorise its broadcast or to make copies of the work. Copyright in the UK is primarily a private (i.e. civil) law with rights holders being able to sue people who infringe their rights. In some instances copyright infringement can also be a criminal offence, although this tends to require that actions are taken for commercial gain or that they are on such a scale that the interests of rights holders will be commercially prejudiced.

3.18 The acts restricted by copyright in a work are set out in section 16 of the Copyright, Designs and Patents Act 1988 (CDPA). The owner of copyright in a work has the exclusive right to do, or authorise others to do, the following:

- copy the work - the act of copying (including making transient copies) of a protected work is an infringement under the CDPA and subject to civil remedies. Therefore both the act of uploading material and downloading material are capable of being infringements under the CDPA
- issue copies of the work to the public
- rent or lend the work to the public
- perform, show or play the work in public
- communicate the work to the public - it is an infringement to make available to the public a protected work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them
- make an adaptation of the work or to do any of the other restricted acts in relation to the adaptation.

3.19 There are some exceptions that allow limited use of copyright works without the permission of the copyright owner. However, usually it is an infringement to do any of the above acts without the authorisation of the owner of the copyright. In such circumstances it is for the rights holder to undertake civil action against the alleged copyright infringer.

3.20 There are also a number of secondary infringements under the Act relating to possessing or dealing with an article which is, and which the individual concerned knows or has reason to believe is, an infringing copy of a copyright work, or to providing the means and apparatus etc., for making infringing copies (see sections 23 – 26 of the Act).

3.21 Although the vast majority of infringements under the Act are civil offences, Section 107(1)(e) of the Act provides that, a person commits a criminal offence who, without the licence of the copyright owner and who knows or has reason to believe that the copy he is dealing with is an infringing copy:

"…distributes otherwise than in the course of business to such an extent as to affect prejudicially the owner of the copyright."

3.22 In practice the vast majority of single instances of illicit file sharing fall into the civil heading primarily because they are not carried out for financial gain nor would the distribution in question generally be considered to affect prejudicially the owner of the copyright.

3.23 Whilst the e-Commerce Directive is clear about the boundaries of liability for parties engaged in various Internet-related activities it should be noted that Article 8 (sanctions and remedies) of Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society also specifies that Member States shall ensure that rights holders are in a position to apply for an injunction against intermediaries (who might be an ISP) whose services are used by a third party to infringe copyright or related rights.

The Directive on the enforcement of intellectual property rights

3.24 The Directive on the enforcement of intellectual property rights (2004/48/EC) was implemented in the UK by means of the 41st update to the Civil Procedure Rules, and the Intellectual Property (Enforcement, etc) Regulations 2006. This Directive aims to provide a sound and harmonised approach to the enforcement of civil intellectual property rights across the European Community. Amongst other things the Directive provides that in certain circumstances (e.g. via a court order) personal information can be released to a rights holder to enable them to take action against individuals or companies who may be infringing its copyright.

Directive 2000/31/EC: The E-Commerce Directive

3.25 The purpose of the E-Commerce Directive is to contribute to the proper functioning of the internal market by ensuring the free movement of "information society services". Broadly speaking, "information society services" are commercial services provided on the internet. The Directive contains a mixture of requirements which affect the regulation of information society services by Member States.

- Member States are required to regulate information society services in accordance with the country of origin rules set out in Article 3 of the Directive (which provide that a Member State must not, subject to specified exceptions, restrict the freedom of a person established in another Member State to provide information society services from another Member State).

- Member States are prohibited from establishing schemes specifically targeted at information society services that require prior authorisation to provide information society services (Article 4).
- Member States are required to ensure that providers of information society services provide general information about themselves and how to contact them (Article 5).
- Member States are required to ensure compliance with requirements, including information requirements, in relation to commercial communications (such as advertising and promotional material) (Articles 6 to 8).
- Member States are (subject to exceptions) required to ensure that their legal systems allow contracts to be concluded by electronic means; where contracts are concluded by electronic means, the Directive sets out requirements, including information requirements, that Member states must ensure that information society services providers comply with (Articles 9 to 11).
- Member States must ensure that the liability of intermediary providers is limited in the circumstances specified in Articles 12 to 14; Member states must not impose on intermediary providers a general obligation to monitor information (Article 15).
- There are various other provisions in relation to codes of conduct, out-of-court settlement, court action and cooperation between Member States and the Commission (Articles 16 to 19).

When does the E-Commerce Directive apply?

3.26 The E-Commerce Directive is concerned with "information society services". Essentially, these are commercial services provided over the Internet. The definition of information society services is explained in Recital (17) of the E-Commerce Directive as covering "any service normally provided for remuneration, at a distance, by means of electronic equipment for processing (including for digital compression) and storage of data, and at the individual request of a recipient of a service". Information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services that are not remunerated by those who receive them, such as those offering on-line information or promotional communications. Services provided in connection with the operation of the Internet such as transmission services and the storage of information also fall within the scope of information society services.

3.27 Given the broad definition of "information society services", the E-Commerce Directive has the potential to apply to a broad range of legislation. Examples of cases where the E-Commerce Directive has been thought to apply include legislation regulating the sale of tickets on-line, the publication of books on-line and the publication of specified content on-line (for example, statements encouraging acts of terrorism, videos of animal fights and tobacco advertising). The Directive must be taken into account even where legislation is not specifically aimed at activities undertaken on the Internet, but where such activities are covered by more general provision. For example, legislation might provide that it is a criminal offence to

publish, by any means, specified information. "Publication" would include, but not be limited to, publication on the Internet. In so far as the offence relates to publication on the Internet, the legislation would need to comply with the E-Commerce Directive.

Country of origin rules

3.28 The E-Commerce Directive is an internal market measure designed to ensure the free movement of information society services in the EEA. One way in which it seeks to achieve this objective is through the country of origin rules in Article 3. These rules have been interpreted in the UK to mean that, within the "coordinated field", information society services must be regulated by the law of the EEA State in which the provider of the services is established (rather than the law of the EEA State in which the services are received or the law of the EEA State from which the services physically originate) (Article 3(1)). The other side of the coin is that an EEA State must not, for reasons falling within the "coordinated field", restrict the freedom of a person established in another EEA State to provide information society services (Article 3(2)).

3.29 The "coordinated field" is defined in Article 2(h) of the E-Commerce Directive. It has been given a broad interpretation in the UK covering all requirements in national law affecting the provision of information society services, rather than requirements specifically applicable to services provided by electronic means.

3.30 The concept of "establishment" is addressed in Article 2(c) and Recital (19). The definition is based on the case law of the ECJ. In essence, the place where a provider is established is meant to signal the place where services are provided on a permanent, as opposed to temporary, basis. Further, it is the place where the economic activity is pursued rather than the place where the physical supply of the service takes place or where the technology is located that is relevant.

3.31 It is permissible to derogate from Article 3(2) and restrict the provision of information society services by a non-UK established provider if the conditions and procedures laid down in Article 3(4) are satisfied. However, Article 3(4) permits derogation on a case-by-case basis only.

Immunity from liability

3.32 Articles 12 to 14 of the E-Commerce Directive require EEA States to limit the liability of Internet service providers who carry out certain activities essential for the operation of the Internet, namely those who act as "mere conduits" and those who "cache" or "host" information. The protection required to be given is in respect of <u>all</u> types of liability, including tortuous and criminal liability. In the case of mere conduits and caches, the immunity of the service provider does <u>not</u> depend on whether he knows the information or activity in question is unlawful.

3.33 "Mere conduits" are the operators of computer systems through which communications pass on their route from one computer to another. It is thought that

they include those who provide the infrastructure for the Internet, in particular the routers and "pipes" (for example, telephone lines or other cables), as well as those ISPs who provide access to the Internet. "Caching" is the copying and temporary storage of information to enhance the speed and efficiency of transmission on the Internet. "Hosts" provide storage space on their computer systems (servers) for Internet content such as that contained on web pages or bulletin board postings. It is worth noting that a particular information society service provider may carry out more than one of these roles – for example by providing an internet access and hosting web pages the subscriber chooses to set up.

3.34 Articles 12 to 14 do not, however, prevent a court or administrative authority from requiring a mere conduit, cache or host to terminate or prevent an infringement (Articles 12(3), 13(2) and (14(3)). In the circumstances, it appears that the imposition of injunctions or certain "notice and take down" regimes on these service providers may be permitted, although the detail of any proposal would need to be assessed against the requirements of the E-Commerce Directive.

3.35 Finally, if it is proposed to impose on mere conduits, caches or hosts obligations to monitor or "police" the internet, or to provide information about their customers, care must be taken to ensure that such proposals comply with Article 15 of the E-Commerce Directive. This provision prohibits the imposition of general monitoring obligations on mere conduits, caches and hosts, but permits the imposition of certain other, more limited and specific, obligations. Generally, it is thought that Article 15 permits the imposition of more onerous obligations on hosts than it does on mere conduits and caches.

Directive 2002/58/EC: the E-Privacy Directive

3.36 The E-Privacy Directive forms part of the so-called "New Regulatory Framework" for electronic communications, comprising a series of directives and other measures that were adopted as a single package in 2002. The Directive complements Directive 95/46 (the Framework Data Protection Directive) and essentially applies the general EU regulatory framework on data protection to the electronic communications sector.

3.37 The E-Privacy Directive applies to the processing of data relating to private individuals or legal entities wholly or partly by automatic means and, if by non-automatic means, where the data will be maintained as part of a filing system, in connection with the provision of publicly available communications services and networks in the EU.

3.38 Under the Directive, Member States must ensure that personal data is:

- Processed fairly and lawfully;
- Collected and processed only for specified, legitimate purposes;

- Collected only if it is adequate, relevant and not excessive in relation to the purposes for which it is collected;
- Accurate and kept up-to-date where necessary; and
- Kept in a form that permits the identification of individuals for no longer than necessary in view of the purposes of processing.

3.39 In addition, the communication of personal data to third parties is also limited under the Directive. The processing of traffic and billing data must be restricted to persons acting under the authority of the communications operator, handling billing or traffic management, customer inquiries, fraud detection and marketing of the provider's own communications services. In addition, under the Framework Data Protection Directive (which the E-Privacy complements), personal data may be disclosed to third parties, provided the persons to whom this data relates have been informed of their right to object to the disclosure of such information and have not objected to the disclosure.

What action can be taken by rights holders at the moment?

3.40 Rights holders can and do take action against those they believe are unlawfully copying original material. They are able to identify where material is being offered for download and downloaded by joining file-sharing sites. Once they have identified an IP address that they believe is infringing their copyright they can take action against the ISP via the civil courts in order to obtain the personal details of offenders. Once they have this information they can pursue a civil action against the individual who has been uploading the content. Between 2004 and 2005 the BPI undertook concerted action against unlawful file-sharers in the UK. Most cases ended in an out of court settlement but a number were taken to court and judgement was found against them. This action has not been confined to the UK. In the same period, the US recording industry brought civil copyright infringement lawsuits against over 15,597 alleged illegal file sharers with 3,590 settlements by the end of 2005, averaging several thousand US dollars each.[11] To follow on from earlier legal action, the IFPI launched a further 2,000 cases in 2006 against individuals in 10 countries.[12] Although it is rarer, action has also been taken in the UK where illicit file-sharing has been on an organised, large-scale commercial basis, for example Cleveland Police's Operation "Ark Royal" in 2007.[13] In the UK ISPs have traditionally not defended actions brought by the rights holder to have the name and address of an IP address released.

3.41 There are however a number of factors which make enforcing these rights a long and costly process for rights holders. It is important to understand these factors because the difficulty rights holders encounter in enforcing those rights lies at the heart of the P2P file-sharing issue.

3.42 The information linking the IP address with an individual is held by the ISP. However, ISPs work on the assumption that they cannot, under the provisions of the

[11] http://www.ifpi.org/content/section_news/20051115h.html
[12] http://www.ifpi.org/content/section_news/20060404.html
[13] http://www.cleveland.police.uk/news_resources/press_releases/071023_OperationArkRoyal.htm

Data Protection Act, simply pass on such personal details to an unauthorised 3rd party. Technically, an ISP could pass on such information to the Police but, as breach of copyright is (in most instances) likely to be a civil rather than a criminal offence, the Police are not then involved.

3.43 Instead, the rights holder has needed to get a specific court order relating to a specified alleged instance of file-sharing. Once obtained, this requires the ISP to pass the personal details to the rights holder who can then take civil action.

3.44 This is a time-consuming process and costly for an individual action, despite ISPs not traditionally defending the actions to obtain personal information (it is not possible to give an authoritative figure but sources indicate that such legal action can cost in excess of £10,000). Such actions can do little more than scratch the surface of the problem given the discrepancy between the number of cases that can be pursued in this way and the sheer number of cases involved.

4. What Gowers said

4.1 In December 2005, the Chancellor of the Exchequer asked Andrew Gowers to conduct an independent review into the UK's Intellectual Property framework. The Review was published on 6th December 2006. It became known as the "Gowers Report".

4.2 The Review set out a number of targeted, practical recommendations to deliver a robust IP framework fit for the digital age. Its principle recommendations were aimed at:

- tackling IP crime and ensuring that rights are well enforced;
- reducing the costs and complexity of the system; and
- reforming copyright law to allow individuals and institutions to use content in ways consistent with the digital age.

4.3 One area identified by rights holders as being of increasing concern was the practice of P2P file-sharing by which individuals make available copyright material, typically music or films, for copying by others, in breach of copyright. Gowers identified this practice was on the increase but noted the efforts of industry (rights holders and ISPs) to reach a voluntary agreement to address the problem. His recommendation was therefore that Government should:

Recommendation 39: Observe the industry agreement of protocols for sharing data between ISPs and rights holders to remove and disbar users engaged in 'piracy'. If this has not proved operationally successful by the end of 2007, Government should consider whether to legislate.

4.4 At the December 2006 Pre-Budget Report, the Government agreed to implement all the recommendations in the Gowers Report that fell to it.

5. What's happening elsewhere?

5.1 This problem is obviously not limited to the UK. International comparisons might therefore be useful. The two countries which are most often cited in the P2P debate are France and the USA. Descriptions of the regimes operating in France and the US are provided at Annex C. The French approach is yet to be implemented and throws up a number of questions – including the how such a solution would be financed. The US approach is not immediately compatible with EU law. Respondents may wish to comment on the applicability to the UK of international models; if you do so it would be helpful if you would address the compatibility of those models with the EU/UK legal framework.

6. Voluntary solution

6.1 The Government's preferred solution to the problem of unlawful P2P remains a voluntary industry agreement that is effective in dealing with the issue while being fair to consumers. Valuable discussions have been facilitated with both ISPs and rights holders, and the draft MOU at Annex D is the result. It is possible that with further help and support from Ofcom and Government a solution based on the MOU can be agreed that delivers the objective of reducing significantly the amount of unlawful P2P. In those circumstances we remain prepared to halt the regulatory process.

6.2 However, despite a great deal of effort from all stakeholders a voluntary agreement at this time appears highly unlikely. A voluntary agreement would require the voluntary participation of all ISPs and it has become clear that we do not yet have this. Rather, it appears that further progress is more likely to happen if the MOU forms the core of a co-regulatory approach, which would have the advantage of ensuring that its provisions were applied to all stakeholders. This is described in section 8 of this document

Questions

1. Do you agree that a voluntary solution based on the principles set out in the draft MOU at Annex D, if effective and fair to consumers, would be the best approach to this problem? How likely is it to be achieved?

7. Developing regulatory options: issues to consider/constraints

7.1 Any regulatory action needs to be drawn up in the context of Government's stated better regulation principles and any relevant specific constraints. There are a number of such constraints in this case, which are set out in this section. We believe that the approach outlined above is compatible with all of the requirements listed below and is capable of accommodating any specific constraints.

Better Regulation

7.2 It is important that any proposals for Government intervention:

- are evidenced-based;
- address a demonstrated market failure;
- show a positive NPV in the Impact Assessment - i.e. their benefits justify their costs over time;
- are rooted in the 'Principles of Good Regulation' set out by the Better Regulation Task Force (BRTF), namely: proportionate, accountable, consistent, transparent and targeted only where needed;
- use risk-based enforcement; and
- start from a presumption that small business will be exempt or subject to a lighter touch approach.

7.3 It is necessary to consider all the issues that regulation could affect, not least so that the regulation is as effective as possible and unintended consequences are avoided. Such issues should be considered in the light of Better Regulation principles[14], and the following list represents the major factors any regulation might need to consider; it should be noted however that not all will be an issue for all the options. Neither is it suggested that all should carry equal weight – or that the weighting of an issue should remain the same for each option.

Copyright protection

7.4 Copyright is a time-limited monopoly that operates to make sure that those who develop new ideas or new creative designs are granted protection in order to be able to exploit their own work. Without copyright, which enables creative works to be commercialised and distributed, it would not be possible for artists of any description to be able to develop and profit from their own work, and for consumers to enjoy the results. Copyright also allows organisations such as film studios, video games developers or record labels to invest time and resource in identifying and developing new talent. In the UK IP laws help creative industries create economic value, resulting

[14] More information about these principles and the Government's commitment to better regulation can be found at: http://www.berr.gov.uk/bre/index.html

in a creative sector worth some £61 billion[15]. In addition to the economic value of these industries to the UK economy, consumers of music, film, theatre, books etc gain considerable cultural value and enjoyment from these creative works.

Enforcement

7.5 For regulation to be effective it requires effective enforcement. In the case of alleged breaches of copyright through P2P networks (which in most instances are likely to be civil not criminal offences), enforcement is carried out by the rights holder through the civil court system. However, such a route is costly in both time and money. Given the numbers engaged in unlawful copying, action against all those involved appears impracticable. As such, the scale of any type of enforcement activity would be a key issue - sufficient to act as a deterrent but not at a level where the cost would be prohibitive.

Costs

7.6 Any effective action is likely to carry a significant cost to one or more of the parties involved (and/or to the State). Other costs would include those incurred by individual consumers if action is taken against them; and, at the other extreme, the macro-economic and social costs that could result from a change in the regulatory environment.

Data protection

7.7 Data protection legislation exists to protect personal data from misuse. The Data Protection Act laws lay out clear boundaries (the Data Protection Principles) about the processing (including sharing) of personal data. These principles, in particular, set out the conditions that must be present for personal data to be processed. It is a breach of the legislation to process the data where none of the relevant conditions apply. The Data Protection Act also contains some exemptions from the Principles that allow disclosure, for example, to the police for the prevention and detection of crime. [16] In this particular context it has been the practice for ISPs to only pass personal data to a rights holder with a specific court order.

Liability of ISPs [17]

7.8 The "Internet intermediary" status of ISPs means that conduits, catches and hosts who facilitate the transmission of information through the Internet, are not liable for the information carried across their networks provided they do not initiate the

[15] DCMS Creative Industries Economic Estimates http://www.culture.gov.uk/4848.aspx
[16] This is also the case under European law.
[17] S.I. 2002/2013, The Electronic Commerce (EC Directive) Regulations 2002, in particular, regulations 17 to 19, which give effect to articles 12 to 14 of the E-Commerce Directive (2000/31/EC) http://www.opsi.gov.uk/si/si2002/20022013.htm

transmission, exercise any control over the content of that information, and in the case of caches and hosts, they remove or disable access to the information upon obtaining knowledge of illegal activity. (This is in effect exactly the same as for any postal service which is not liable for what is contained in a letter insofar as they do not modify its contents.).

7.9 Although in certain circumstances, Internet intermediaries can be requested to take action to terminate or prevent specific infringements (e.g. monitoring specific accounts for a specified time), the E-Commerce Directive prohibits the imposition of general monitoring requirements on them or the imposition of a general obligation to actively seek the facts or circumstances indicating illegal activity (e.g. to generally identify which subscribers might be involved in file-sharing).

Technology: filtering

7.10 There are technologies available which can filter Internet traffic. These can identify particular types of file (eg music files), check whether the file is subject to copyright protection and then check whether the person offering the file for download has the right to do so. If no such permission is found, the filter can block the download. These technologies vary in their effectiveness and cannot guarantee 100% accuracy given the lack of conformity between different computer and software technologies.

Technology: identifying the infringer

7.11 The use of wireless technology means that a broadband subscriber can offer others (including complete strangers) access to the Internet via their connection. This could be deliberate (i.e.) wi-fi access provided in coffee bars, wireless access provided free in an educational or civic environment, or inadvertent (individuals not securing their home wireless hub). Again this raises issues where someone other than the actual subscriber is carrying out the unlawful downloads.

7.12 Technologies such as a proxy server, encryption or anonymous proxies can be used to disguise Internet traffic. A proxy server is a server (a computer system or an application program) which channels (information) requests to other servers. A client connects to the proxy server, requesting some service, such as a file, connection, web page, or other resource, available from a different server. The proxy server provides the resource by connecting to the specified server and requesting the service on behalf of the client. Often the proxy server "caches" material for access later and in a format to allow faster downloading.

7.13 An anonymous proxy attempts to make any activity on the Internet untraceable. This allows users to speak out without fear of reprisal (e.g.) expose human rights abuses, or to receive information within a repressive regime, but it can also be abused.

7.14 The use of proxy servers, anonymous proxies (if misused) and encryption could all have implications for the effectiveness of filters.

Consumer protection and level of proof

7.15 A consumer subscribing to an Internet provider enters into a contract with that ISP. The breaking of the contract terms by either party could lead to legal action and/or termination of the contract. Although the ISP contract is with a named individual to provide internet access, in most cases they are not the only person who will use that service (eg other family members in the same household, employees or staff in the workplace etc). This raises issues when someone other than the actual subscriber is responsible for unlawful file-sharing activity.

7.16 If action is taken without the individual case being tested in Court, there must be a sufficiently robust level of proof. It is also important to consider who will be responsible for examining the evidence and determining whether or not there has indeed been an infringement.

7.17 It is clear that any action taken to tackle infringers who continue unlawful P2P file-sharing needs to be proportionate, and must allow the consumer the right of appeal and a clear channel through which they can seek redress if necessary.

7.18 It is important that consumers are able to object/appeal to any action being taken in relation to an alleged infringement where they do not consider that their actions have infringed copyright. For example the consumer may be entitled to make use of statutory exceptions to copyright law or may believe that they have been given the appropriate permissions by the rights holder.

Scale

7.19 The estimated number of (music) unlawful downloads is in the millions (although for films, games and business software the number appears to be significantly lower). Any damage to the industry comes from the aggregate impact of unlawful activity. For action to work as a deterrent and as a means of addressing the problem, it is likely any solution would have to be able to handle a significant number of cases in the short term at least.

Responsibility

7.20 The concept of responsibility has implications for the individual, industry, society and Government, but in this context it is a difficult one to define. There is a case for calling this issue "media literacy" or "education".

7.21 The advent of the Internet and the increasingly converged broadcasting/media/ communications sector has shifted choice into the hands of the consumer. No longer is the consumer tied to the TV schedule of a traditional broadcaster, the film showing in the local cinema or on the music stocked in a local store. Instead, an individual has easy access to a whole range of options for entertainment where and when they wish.

7.22 The other side of this is that responsibility for those choices and possible consequences now falls more and more on the individual consumer. For example, with video on-demand and iPlayer, the traditional 9.00pm watershed as a means to protect children from adult content has increasingly limited application. Instead there is a growing onus on industry to provide tools for parents/carers to use and for those parents/carers to take an informed choice on how to use them. The same applies to how technologies - and access to technologies – like computers and P2P software are used.

7.23 Similarly, individuals need to be aware of the responsibility they accept when agreeing a contract for an Internet service connection.

This section has identified a number of important issues that must be addressed.

Questions

2 Do you consider this list is complete? Are there any other important factors that should be added?

3 Are any of these criteria (or any omitted criteria) more important (or less important) than the others and therefore should attract a weighting?

4 Do you agree that the preferred approach set out in section 8 is capable of dealing effectively with all of these constraints? If not, which are problematic and how?

Please give reasons.

8. Preferred Regulatory Solution

8.1 The Government's preferred regulatory solution is to adopt a co-regulatory approach which takes the basic approach and principles that have been developed during discussions on a voluntary agreement and combines these with high level regulatory oversight and an underlying obligation obliging ISPs to engage with rights holders to tackle the issue of repeated infringement through P2P.

8.2 The solution should ensure an appropriate balance is struck between the interests of rights holders, ISPs and consumers. The intention is to create a framework within which the detailed practical and commercial issues can be resolved, including issues of costs, action to tackle persistent infringement and appeals routes and proportionality. In terms of regulatory oversight it is proposed that Ofcom will have an oversight role and will approve codes of practice agreed between the two industries.

The Memorandum of Understanding

8.3 As discussed at Section 6, both the rights holders and the ISPs have been in discussion over a voluntary agreement for some time. These discussions have been multi-layered with bilateral talks between individual rights holder organisations and individual ISPs, as well as between industry-wide representative bodies of both sides. The trial by Virgin Media and the BPI to see the effect of letters of caution is an example of where these are beginning to be seriously examined.[18] The Government has been observing these, and has recently become directly involved in facilitating discussions and seeking the grounds for a brokered agreement. Some significant progress has been made. Indeed, as indicated in Section 6 above, a draft Memorandum of Understanding (MOU) has been produced which has a good degree of support among both rights holders and ISPs. This MOU is attached as Annex D. The MOU sets out the objective of significantly reducing the volume of copyright infringing file-sharing and identifies three areas where action both by rights holders and ISPs is needed and would form the basic framework for this option.

8.4 The three areas are:

Education and awareness – a key necessity if this problem is to be solved is to change the minds of the vast number of, predominantly young, people who think that downloading content without paying for it is OK. This is no easy task and rights holders and Government already engage in a variety of activities to develop a proper understanding among consumers of the value of creativity and the creative process and the importance of remunerating the creative act in order to secure future streams of creative content. The MOU envisages a high profile campaign, building on current activities and using the creativity available to rights holders to deliver a message designed to appeal to the target audiences.

[18] http://www.bpi.co.uk/

Commercial models – one of the reasons often cited for consumers choosing to access illicit content is that they cannot legally access the content in the way in which they want it – it may not be available in download form, on a timescale that they want to experience it, or in a format or package that meets their needs, and at a reasonable cost. If we are to convince consumers that they need to respect copyright laws, then it is vital that industry competes to make available suitable products and offers which allow them to enjoy this content legitimately. The MOU recognises this. Action on education and awareness without the development of legal offers will do little to reduce infringement through P2P. It is also in the interests of ISPs to be able to offer value added content services to their subscribers. This is not to say however that the development of new models should be solely limited to ISP linked offerings – rights holders must consider much more broadly how they will enable consumers to access content more flexibly – including through more traditional online retailing.

Sanctions – in order to persuade people to stop using illicit P2P services some kind of appropriate sanction must be found. The MOU envisages ISPs committing to a trial of writing to infringing users pointing out that the infringement has occurred, has been detected and is unlawful. However, we recognise that there is likely to be a hard core that will not respond positively to this approach. Some form of effective sanction is needed to ensure that the more serious infringers can be stopped. To that end Ofcom will invite stakeholders, including ISPs and rights holders to join a group to explore effective mechanisms to deal with repeat infringers. Members of the group will look at solutions including technical measures such as traffic management or filtering and marking of legitimate content to facilitate identification, as well as ways in which rights holders can take action against the most serious infringers. The group will report within 4 months and the Government and Ofcom will consider the findings of the group, leading to a Code of Practice on mechanisms to deal with repeat infringers.

A co-regulatory approach

8.5 A voluntary solution remains the Government's preferred outcome. This would be in line with the regulatory reform agenda, offering the lightest touch regime possible. Such a voluntary solution would be much quicker to implement, be more flexible and adaptable as conditions change, is likely to be less expensive and should incorporate a proper level of consumer safeguards. However, it has become increasingly clear to Government that there are a number of reasons why this may not be achievable.

8.6 A key potential issue is the concern among ISPs that a voluntary solution that did not have the full support of all ISPs might not be effective and might put those that adhered to such a solution at a competitive disadvantage, since those who were not party to the agreement might seek to gain market share by appealing to those consumers still wishing to infringe. Consequently, whilst we are still keen to see evidence of a full industry solution, and the MOU at annex D which has been signed by the main ISPs and some significant players in the content industries is an encouraging sign, we are

proposing in this consultation document a co-regulatory solution to ensure that all ISPs are required to undertake an appropriate level of action to achieve the desired result.

8.7 Another factor that suggests that a co-regulatory approach may be more appropriate is the importance of ensuring that the arrangements that are put in place deal properly and appropriately with consumer issues.

8.8 Co-regulation is a term used to describe a self-regulatory approach that is backed up in some way by a regulatory requirement. Annex E sets out what Ofcom means by co-regulation and the factors that need to be considered before adopting a co-regulatory approach. In this case what we are proposing is the establishment by industry of a self regulatory approach to design appropriate Codes of Practice. While the industry would be responsible for preparing and agreeing these Codes they would be subject to approval by Ofcom. It is likely that Codes will address a number of key issues, for example:

- standards of evidence;
- actions against alleged infringers;
- actions against persistent or criminal infringers;
- indemnity and compensation resulting from incorrect allegations of file sharing; and
- routes of appeal for consumers.

Ofcom's role will be to approve these Codes so as to ensure that they will deliver fair and proportionate treatment for consumers, and strike an appropriate balance between competing industry interests. In examining the Codes, Ofcom will have regard, among other issues, to ensuring that the actions required by the Codes are necessary, proportionate and consistent – for example, are only directed at cases in which such action is justified.

Ofcom may also periodically review the operation of the codes in relation to these considerations.

8.9 At the same time an obligation would be placed upon ISPs to take action against subscribers using their networks to infringe copyright over P2P networks when notified, with adequate evidence, that such infringement is taking place. We anticipate this would take the form of a requirement to have an effective policy in place for dealing with cases of alleged unlawful P2P file-sharing. That obligation could be fulfilled by compliance with the approved codes of practice of the self-regulatory body. This regulatory requirement will be phrased to limit the ISPs obligation to take action to those circumstances where it can be demonstrated that an individual subscriber or account is being used to infringe copyright. It would be designed to apply only to unlawful file-sharing over P2P networks. This will not affect the ISPs' limitation of liability under articles 12 to 14 of the E-Commerce Directive, insofar as ISPs will not be made liable for the illicit content of what they transmit, cache or host. Furthermore, ISPs will not be required to perform any general monitoring of their networks.

8.10 ISPs who choose not to engage in the self-regulatory arrangement would remain bound by the underlying requirement to have an effective policy on unlawful P2P file-sharing.

8.11 From time to time the Codes may require amendment and updating, and this will be done in line with the agreement of the original Codes, including requiring approval by Ofcom. Ofcom would review the relevance of the Codes periodically.

8.12 While the arrangements described above refer largely to arrangements concerning the identification of infringers and the issuing of notifications, the other elements of the MOU remain vital. Action must be taken on improving education and awareness and on the delivery of new products which meet consumer demands and preferences for content - action on notifications without this will do little to tackle the problem in the longer term.

Questions

5. Do you agree that a self-regulatory only approach may not be sufficient to resolve this problem? Please give reasons.

6. Do you support the described co-regulatory approach? Please set out clearly what aspects of this approach you support and which you do not support. Please provide reasons and, where appropriate, evidence.

7. Do you agree that Ofcom is the right regulator to oversee the self-regulatory body?

8. Do you agree that the regulatory oversight should include approval of Codes of Practice?

9. What do you think the coverage of the self-regulatory approach should be? The proposal above suggests rights holders and ISPs. Is this right? Should any other stakeholders such as consumer organisations have a place in the self-regulatory approach? If so, which?

10. What do you think the scope of the legal obligation should be? Do you agree that as described its effect would be limited to P2P networks? If not, how could such a limitation be achieved?

11. The costs of the self-regulatory approach would have to be met by industry. How do you think this should be split between the stakeholders, including between the different content industries?

12. The costs of the activities envisaged under the codes of practice could be met either by those responsible for carrying them out, or by some form of cost sharing between parties. It is envisaged that this should be agreed by industry as a part of relevant codes of practice. Do you agree with this process?

13. The draft MOU at Annex D provides the principles within which the self-regulatory approach could work. Do you think these are the right principles?

9. Other Options to be considered

9.1 Although we have set out the Government's preferred option in Section 8 above, a number of other approaches have been suggested. These are set out here, with a brief analysis. We would welcome your views on whether any of these solutions, or one that is not described here, would be a more effective and efficient way of dealing with the issue of substantial infringement of copyright by a very large number of consumers over P2P networks.

9.2 It is recognised that some options may be considered to be more viable than others, and also that some may be difficult to deliver within the existing boundaries of EU law regulating information society service providers. However all of these options have been included to demonstrate the range of possible actions that have been suggested and to allow a consideration of the potential costs, benefits, merits and constraints of these options.

9.3 The arguments presented both for and against the various alternative options are not meant to be conclusive, and nor do they indicate a Government position. They are included as an illustration of what might conceivably be said for or against the options, and as a starting point for respondents' own views. **In line with the principles of better regulation, all legislative options should be judged against the consequences of taking no action, with the costs and benefits examined through that lens.**

9.4 The four potential alternative regulatory options identified to date are:

- Option A1: Streamlining the existing process by requiring ISPs to provide personal data relating to a given IP address to rights holders on request without them needing to go to Court

- Option A2: Requiring ISPs to take direct action against users who are identified (by the rights holder) as infringing copyright through P2P (this is essentially the same legal obligation as in the preferred option in section 8, but without any self-regulatory element).

- Option A3: Allocating a third party body to consider evidence provided by rights holders and to direct ISPs to take action against individual users as required, or to take action directly against individual users

- Option A4: Requiring that ISPs allow the installation of filtering equipment that will block infringing content (to reduce the level of copyright infringement taking place over the internet) or requiring ISPs themselves to install filtering equipment that will block infringing content

Option A1: Legislation to streamline the existing process by requiring ISPs to provide personal data relating to a given IP address to rights holders on request without them needing to go to Court.

9.5 At present rights holders follow a process whereby they have to apply to the court for an order to obtain the necessary personal data from the ISP as the first step in taking civil action against an alleged unlawful file-sharer.

9.6 This approach would remove some of the costs and delays of the current system. It would streamline the current process, with rights holders being able to move quickly towards warning letters for alleged infringers and/or court action. This option would require at the least clarification as to whether passing personal data to rights holders in this way would be compatible with data protection legislation.

Option A2: Legislation to require ISPs to take action against individuals identified (by the rights holder) as unlawfully file-sharing.

9.7 At present ISPs are under no (legal) obligation to take action against subscribers alleged to be unlawfully copying copyright material. Typically, under the terms of the contract between an ISP and an Internet service subscriber, the subscriber is not allowed to use the account for illegal purposes. Obliging ISPs to take action to enforce this contractual term in some way, for example to warn, suspend or terminate the Internet accounts of file-sharers, or to use other technical options would avoid lengthy, costly legal action.

9.8 This could be done without the co-regulatory element set out in the Government's preferred option, but that would give rise to some particular issues. There would need to be standards set for the assessment of evidence. Consumer protection would be an issue and consumers might need a route of appeal against whatever sanction the ISP chose to use. The specific proposals would need to be assessed for their compatibility with the protections given to ISPs by the E-Commerce Directive under which they cannot be made liable for the information transmitted or stored by their systems except in specified circumstances.

Option A3: Allocate a third party body to consider evidence provided by rights holders and to direct ISPs to take action against individual users as required, or to take action directly against individual users

9.9 This is effectively a wholly regulatory version of the Government's preferred option. Rights holders would identify infringing IP addresses and pass evidence and details to a 3rd party body, which would take responsibility for assessing the evidence that file-sharing of copyright material had taken place. If the evidence was judged sufficiently robust, the body would then direct the ISP to take appropriate action or do so itself. Such a body would also be able to hear appeals and complaints from consumers and may also be responsible for developing and administering or overseeing any required code of practice for ISPs and rights holders. It is therefore not envisaged

that ISPs would actively be monitoring traffic to consider whether there had been an infringement.

9.10 This option would deal with many of the issues raised by option A2 but the cost would be substantially higher. Establishing a new regulatory body from scratch would take time and could be costly (in France they estimate the annual cost of such a body as being several million euros). Utilising an existing body, assuming that one can be identified, would increase pressure on its resources and could be expensive, and it is not clear how such costs ought to be met and by whom – or indeed whether the scale and impact of the problem of P2P file-sharing would warrant such an approach.

9.11 Such a system may also be slow – in particular if it is required to handle a large number of requests each day. In addition, there may again be e-privacy issues and data protection issues to consider if the third party body was to keep a register of infringing activity.

Option A4: Requiring that ISPs allow the installation of filtering equipment that will block infringing content (to reduce the level of copyright infringement taking place over the Internet) or requiring ISPs themselves to install filtering equipment that will block infringing content

9.12 Legislation would require ISPs to allow filters to be installed or require them to install filters on their own networks to monitor and block attempts at file-sharing.

9.13 It is possible to install technological filters which can identify the type of files being copied (music, film etc), check whether the material contained in the file is subject to copyright and (if so) to check whether the parties offering the material for download are authorised to do so. If the download is in breach of copyright the filter can block the download before it has been completed. No breach therefore occurs.

9.14 The use of such filters might actually prevent the infringement taking place and could be seen as an attractive solution to this problem. It could potentially prevent the initial loss of revenue by the rights holder and may not require costly regulatory processes to be established or require issues of data protection to be addressed. However there would of course be costs associated with this option – in terms of the filtering technology itself which would need to be paid for (and maintained/upgraded).

9.15 Whilst it would be legally possible to require that internet intermediaries carry out a certain degree of filtering, any specific (filtering) proposals will need to be assessed for their compatibility with the prohibition in Article 15 of the E-Commerce Directive to impose general monitoring requirements on service providers.

9.16 Opinion seems to be divided between stakeholders on whether filters could be an effective, long-term, cost-effective way of tackling not only P2P piracy but also other forms of copyright infringement. It might be valuable, in addition to moving

forward on P2P, if rights holders and ISPs jointly investigated the technical, legal and cost issues around filters and assessed their utility in addressing unlawful online activity

Questions on Alternative Options

14. Do any of these alternative options seem more likely to achieve the objective of significantly reducing illicit P2P use? If so, which? Please give reasons.

15. In relation to any Alternative Option that you would prefer over the co-regulatory option outlined in section 6 please answer the following questions:

a) who should take action?
b) who should decide whether to take action and the nature of the action?
c) what costs would this Option entail?
d) who should bear these costs?
e) what safeguards would this Option require? In particular:
i) How would the rights of the consumer be protected?
ii) Should there be an appeal mechanism? If so, who would handle any appeals?

16. If you consider option A3 to be an appropriate model then:

a) Is there an existing official body which could take on this role? If not, should such a body be created?
b) What status should the body have?
c) How should the body (or the additional work an existing body would have to take on) be funded?
d) Who should the body be accountable to?
e) Who should carry the cost of carrying out action against the alleged file-sharer, given the lack of legal action means there is no prospect of costs being awarded?
f) Should the body have a legal enforcement role (ie) the power to take legal action:
i) to force ISPs to take action?
ii) against alleged unlawful file-sharers?
g) What level of cases (ie how many) would such a body need to consider in order to be effective and credible? Could this be automated without an unacceptable loss of control over quality of evidence and proportionality of action?

Please give reasons

17. <u>If you consider option A4 to be an appropriate model the:</u>

a) Do you consider that filters are able to offer a sufficiently high level of reliability in identifying correctly copyright material to justify an obligation to utilise them (or allow their use)?
b) Do you consider filters are able to check accurately the status of copyright material and to distinguish between legal and unlawful transactions?
c) Who should operate the filters and bear the cost of their installation and operation?
d) What redress should consumers have if legitimate material is mistakenly blocked?
e) Assuming no technological solution is 100% reliable, there will inevitably be a number of "false positives" generated (ie legal material is wrongly identified and blocked as unlawful). What level of false positives would you deem acceptable, bearing in mind the potential for damage to legitimate business and to the individual?

Please give reasons.

18. Do you agree that a joint rights holder/ISP industry working group to look at filtering options would be a useful initiative? Is there are role for Government in convening and/or facilitating such a group? Should any other stakeholders be involved? Would you be willing to participate in such a working group if it was established?

Please give reasons.

19. We are committed to producing an impact assessment in order to quantify as far as possible the implications for business, the consumer and the wider socio-economic environment of any regulatory proposal. This is an integral part of our decision-making process. Can you provide further information to better inform that process?

8.18 *The Impact Assessment for this consultation is at Annex G. This is not a static document; rather it is refined and developed as more robust data is provided as part of the regulatory process.*

8.19 *Although the information you provide in answer to the specific questions posed will be incorporated into the Impact Assessment, we would welcome any additional evidence you could provide in order to make this assessment as accurate as possible. Please note: all information and responses submitted will be placed in the public domain unless expressly indicated otherwise.*

Annex A: Summary of Questions

Questions

1. Do you agree that a voluntary solution based on the principles set out in the draft MOU at Annex D, if effective and fair to consumers, would be the best approach to this problem but is unlikely to be achieved?

2 Do you consider this list (of issues) is complete? Are there any other important factors that should be added?

3 Are any of these criteria (or any omitted criteria) more important (or less important) than the others and therefore should attract a weighting?

4 Do you agree that the preferred approach set out in section 8 is capable of dealing effectively with all of these constraints? If not, which are problematic and how?

Please give reasons.

5. Do you agree that a self-regulatory only approach may not be sufficient to resolve this problem? Please give reasons.

6. Do you support the described co-regulatory approach? Please set out clearly what aspects of this approach you support and which you do not support. Please provide reasons and, where appropriate, evidence.

7. Do you agree that Ofcom is the right regulator to oversee the self-regulatory body?

8. Do you agree that the regulatory oversight should include approval of Codes of Practice?

9. What do you think the coverage of the self-regulatory approach should be? The proposal above suggests rights holders and ISPs. Is this right? Should any other stakeholders such as consumer organisations have a place in the self-regulatory approach? If so, which?

10. What do you think the scope of the legal obligation should be? Do you agree that as described its effect would be limited to P2P networks? If not, how could such a limitation be achieved?

11. The costs of the self-regulatory approach would have to be met by industry. How do you think this should be split between the stakeholders, including between the different content industries?

12. The costs of the activities envisaged under the codes of practice could be met either by those responsible for carrying them out, or by some form of cost sharing between parties. It is envisaged that this should be agreed by industry as a part of relevant codes of practice. Do you agree with this process?

13. The [draft] MOU at Annex D provides the principles within which the self-regulatory approach could work. Do you think these are the right principles?

Questions on Alternative Options

14. Do any of these alternative options seem more likely to achieve the objective of significantly reducing illicit P2P use? If so, which? Please give reasons.

15. In relation to any Alternative Option that you would prefer over the co-regulatory option outlined in section 6 please answer the following questions:

a) who should take action?
b) who should decide whether to take action and the nature of the action?
c) what costs would this Option entail?
d) who should bear these costs?
e) what safeguards would this Option require? In particular
i) How would the rights of the consumer be protected?
ii) Should there be an appeal mechanism? If so, who would handle any appeals?

16. If you consider option A3 to be an appropriate model then:–

a) Is there an existing official body which could take on this role? If not, should such a body be created?
b) What status should the body have ?
c) How should the body (or the additional work an existing body would have to take on) be funded?
d) Who should the body be accountable to?
e) Who should carry the cost of carrying out action against the alleged file-sharer, given the lack of legal action means there is no prospect of costs being awarded?
f) Should the body have a legal enforcement role (ie) the power to take legal action:
i) to force ISPs to take action?
ii) against alleged unlawful file-sharers?
g) What level of cases (ie how many) would such a body need to consider in order to be effective and credible? Could this be automated without an unacceptable loss of control over quality of evidence and proportionality of action?

Please give reasons

17. <u>If you consider option A4 to be an appropriate model then:</u>

a) Do you consider that filters are able to offer a sufficiently high level of reliability in identifying correctly copyright material to justify an obligation to utilise them (or allow their use)?
b) Do you consider filters are able to check accurately the status of copyright material and to distinguish between legal and unlawful transactions?
c) Who should operate the filters and bear the cost of their installation and operation?
d) What redress should consumers have if legitimate material is mistakenly blocked?
e) Assuming no technological solution is 100% reliable, there will inevitably be a number of "false positives" generated (ie legal material is wrongly identified and blocked as unlawful). What level of false positives would you deem acceptable, bearing in mind the potential for damage to legitimate business and to the individual?

Please give reasons.

18. Do you agree that a joint rights holder/ISP industry working group to look at filtering options would be a useful initiative? Is there are role for Government in convening and/or facilitating such a group? Should any other stakeholders be involved? Would you be willing to participate in such a working group if it was established?

Please give reasons.

19. We are committed to producing an impact assessment in order to quantify as far as possible the implications for business, the consumer and the wider socio-economic environment of any regulatory proposal. This is an integral part of our decision-making process. Can you provide further information to better inform that process?

Annex B: Acknowledgements

We would like to thank the following organisations for their time and efforts in helping us produce this consultation:

- British Music Rights (BMR)
- British Phonographic Industry (BPI)
- BSkyB
- BT
- EMI
- Federation against software theft (FAST)
- Fédération nationale d'achats des cadres **(**FNAC)
- Internet Service Providers' Association (ISPA)
- Motion Picture Association (MPA)
- NBC Universal
- National Consumer Council (NCC)
- O2
- Orange
- Reputation Inc
- Sony BMG
- Thus
- Tiscali
- Warner Bros
- Virgin Media

Annex C: What's happening elsewhere:

France, USA and the European Parliament

France

The ***Olivenness Agreement*** on ISP cooperation was signed in November 2007. Although agreed between the French authorities, the ISPs and the rights holders, it is subject to and dependent on the necessary legislation being passed. The Bill was introduced on 18 June 2008 and is expected before the French Parliament in the autumn.

As such the detail is subject to change and the following represents our current understanding only. It should not be taken therefore as an authoritative representation of the French position, but used only as a guide for comparative purposes.

The agreement contains the following provisions:

Government

- Legislation to set up a (government funded) warning and sanction mechanism aimed at deterring infringements of IPR on digital networks
- To consider establishing and maintaining a black list of those who broadband contract was terminated due to IPR infringement
- Production of monthly statistics on levels of illicit file-sharing

Rights holders

- To take effective action to use exiting mechanisms (eg watermarks, fingerprinting, filters etc) to make IPR infringement harder
- To bring on-demand and physical video release dates in line
- To make audio visual material available on-line earlier
- To make French musical productions available online

(the last three provisions are subject to the effective functioning of the warning/sanction mechanism).

ISPs

- To send warnings and implement sanctions as required by this framework, acting on the direction of the government funded body
- To test and implement (if effective) filters
- Work with the rights holders to use and improve existing technologies (eg watermarks, fingerprinting, filters etc).

New Administrative Authority

The "warning and sanction mechanism" would establish a new administrative authority to receive and pass on infringement notifications. It would require ISPs to act on these and would have the authority to direct ISPs to suspend or terminate accounts of repeat offenders. The obligations would apply to those ISPs established in France. It would be able to apply sanctions to ISPs who did not act as directed and be able to require ISPs to "take any measures to prevent" copyright infringement (in effect filters). The authority would be headed by a judge and would be centrally funded by the state.

Costs

It is anticipated that the body would send around 3 million messages a year and cost around £15 million pa with about 30 staff. Each member of staff would be expected to deal with 5-7 cases per day (this implies a strong element of sampling within an automated system as the manual element equates to around 50k a year).

Criminal offence

The penalty for downloading material (which falls under counterfeiting) is heavy in France – a fine of €300,000 and/or 5 years imprisonment. This to date has been ineffective, with cases either not being brought or Courts refusing to convict with the prospect of such a severe sentence for a relatively minor a crime.

Rights of appeal

This would be an integral part of the system. In order to address privacy concerns the body would be headed by a judge who could be appealed to as a final resort if previous routes were unsatisfactory. The concept of a blacklist of subscribers still requires the approval of the French equivalent of the Information Commissioner.

Process

The body would issue 2 warnings to alleged offenders, the first by email, followed about a week later (if there was no response to the first warning and offences continued) by a recorded delivery letter. If there is no response and offences continue the account will be suspended for 15 days. If there is still no reaction, and offences continue after resumption of service, the account will be suspended for (up to) one year.

The law would be generic – i.e. it would not be specific to music and film, so in theory any rights holder will be able to present evidence and ask the body to take action. However, in practice there would be limited resources and it was expected that music and film (who have offered to move their own business models as part of the process) would be prioritised.

As yet there is no decision on how public access networks (eg local authority provision of wi-fi etc) would be addressed. There would be a legal responsibility to require that subscriptions were properly used and monitored, but in practice it is likely that a pragmatic approach will be followed in such cases.

USA

Digital Millennium Copyright Act (DCMA)

The On-Line Copyright Infringement Liability Limitation Act – commonly known as Section 512 of the DCMA – was a compromise between rights holders and ISPs in the USA.

Section 512 offers internet service companies (which include ISPs) several categories of protection. The broadest is Section 512(a) which gives "safe harbour" where they are offering transmission and routing and acting as "mere conduit". In such instances there is no take-down requirement and no liability provided the ISP adopts a policy for terminating repeat infringers and accommodates technical protection measures.[19]

Although there is no requirement for a "mere conduit" ISP to take action, some studies have shown that rights holders do give notice to ISPs to take action under Section 512(a) on P2P activity and that some ISPs do send users warning letters despite the 512(a) safe harbour (this is perhaps a reflection of the different legal and litigation processes in the USA). These studies have also shown a significant percentage of false or flawed claims (up to 30%). Some flaws were technical in that rights holders had not provided the required evidence etc. Others were more serious – eg where the material was not copyright, or where the complainant was not the rights holder of the material.[20]

Although the US studies are based on a very small population they do demonstrate that legislation in the US has not either addressed the root problem of P2P and the difficulties the issue presents; not least in terms of false or incorrect claims and resulting costs.

European Parliament

On 10 April 2008the European Parliament backed an amendment to the Cultural industries in Europe report by Guy Bono rejecting calls for file-sharers to be barred from the internet. The amendment called on the EC and its member nations to "avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of internet access." [21]

Although not binding on Member States, it is at odds with (eg) the position in France where Government is setting up a body to tackle file-sharing with the power to direct ISPs to ban and blacklist file-sharers.

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[19] http://www4.law.cornell.edu/uscode/17/512.html

[20] http://mylaw.usc.edu/documents/512Rep/ provides a useful summary of the DMCA and the potential limitations of the Act.

[21] http://news.bbc.co.uk/1/hi/technology/7342135.stm

ANNEX D

JOINT MEMORANDUM OF UNDERSTANDING ON AN APPROACH TO REDUCE UNLAWFUL FILE-SHARING

This voluntary MOU between key stakeholders from the ISP industry, the content industries, OFCOM and the Government lays the foundations for a self-regulatory regime to address the issue of unlawful P2P file-sharing.

OBJECTIVE

All parties agree that the objective of this MOU is to achieve within 2 to 3 years a significant reduction in the incidence of copyright infringement as a result of peer to peer file-sharing and a change in popular attitude towards infringement.

PRINCIPLES

This MOU establishes five principles under which action will be taken, and it is accepted that further work will be undertaken on individual issues:

1 Signatories believe that a joint industry solution to this problem represents the best way forward. This will enable progress to be made rapidly on an industry solution as back-up regulatory provisions are implemented and will ensure a light touch and flexible regime. Signatories agree to work together with each other and with Ofcom to agree codes of practice.

2 Signatories, led by the creative industries, will work together to ensure that consumers are educated to respect the value of the creative process, and the importance of supporting creators to invest time and resource in developing new work, and understand that unlicensed sharing of others' work is wrong.

3 Many legal online content services already exist as an alternative to unlawful copying and sharing but signatories agree on the importance of competing to make available to consumers commercially available and attractively packaged content in a wide range of user-friendly formats as an alternative to unlawful file-sharing, for example subscription, on demand, or sharing services.

4 Signatories will work together on a process whereby internet service customers are informed when their accounts are being used unlawfully to share copyright material and pointed towards legal alternatives. In the first instance ISP signatories will each put in place a 3 month trial to send notifications to 1000 subscribers per week identified to them by music rights holders, to agreed levels of evidence, as having been engaged in illicit uploading or downloading. Based on evidence from the trial, which will be analysed and assessed by all Signatories, Ofcom will agree with Signatories an escalation in numbers, widening of content coverage, and a process for agreeing a cap.

5 Signatories will be invited by Ofcom to a group to identify effective mechanisms to deal with repeat infringers. The group will report in 4 months and look at solutions including technical measures such as traffic management or filtering, and marking of content to facilitate its identification. In addition, rights holders will consider prosecuting particularly serious infringers in appropriate cases.

CODES OF PRACTICE

Signatories will draw up codes of practice to cover:

- standards of evidence;
- actions against alleged infringers;
- actions against repeat or criminal infringers;
- indemnity resulting from incorrect allegations of file sharing; and
- routes of appeal for consumers.

All codes would require the approval of Ofcom.

The presumption would be that wherever possible the codes should encourage bilateral commercial arrangements between parties.

Engagement in this process would be open [to ISPs and rights holders], but would not be compulsory. The costs incurred in any action against alleged infringers would be shared between parties; the apportionment to be agreed. The intention would be that members would work together to produce standard processes designed to minimise costs whenever possible and appropriate.

COMPLIANCE WITH LEGAL REQUIREMENTS

For the avoidance of doubt this MOU does not affect any of the existing legal rights, remedies or protections of the Signatories, nor does it prevent the Signatories from entering into any agreement, outside the MOU, that they may wish to enter into. Implementation of the MOU will be in compliance with the provisions of the e-Commerce Directive as it affects ISPs and their liability, including mere conduit status, as well as the Copyright Design and Patents Act 1988 and competition legislation.

Dated **24 JULY 2008**

[SIGNED] **British Phonographic Industry** **Motion Picture Association**
BSkyB **BT**
Carphone Warehouse **Orange**
Tiscali **Virgin Media**
Department for Business, Enterprise & Regulatory Reform
Department for Innovations, Universities and Science
Department for Culture, Media and Sport

ANNEX E

EXTRACT FROM OFCOM'S CONSULTATION ON CO-REGULTION

Co-Regulation

2.33 We define co-regulation as an extension of self-regulation that involves both industry and the government (or regulator) administering and enforcing a solution in a variety of combinations. Thus the aim is to harness the benefits of self-regulation in circumstances where some oversight by Ofcom may still be required.

3 Making an initial assessment whether to apply self- or co- regulation: an incentives-based approach

3.1 When Ofcom was formed, it was given a specific mandate to promote self-regulatory solutions, with an expectation that this could achieve better regulation. Ofcom continues to believe that different forms of co- and self-regulation have a useful role to play as a means of achieving policy outcomes more effectively by incentivising industry to cooperate through greater engagement and offering more flexibility and targeting specific issues.

3.2 In order to fulfil this mandate, Ofcom considers that it is important to identify the environment and circumstances that are more likely to lead to effective self- or co-regulation.

3.3 Much of the academic literature and public consultations concerning different co- and self-regulatory schemes have tended to focus on the detailed institutional design and criteria that might be applied. Indeed that this approach was reflected Ofcom in first set of co- and self-regulatory criteria.

3.4 Such criteria remain important today. However they are not suitable to make an initial determination of when self- or co-regulation may be an appropriate means to discharge particular duties or to achieve the outcomes in the interests of citizens and consumers.

3.5 This is because such an assessment requires an examination of the underlying market conditions and the interests of market players in addressing publicly desirable goals. Specifically, Ofcom considers that a self-regulatory scheme is more likely to succeed if the private incentives of companies to maximise profits and return these to shareholders are aligned with companies' public commitments to protect citizens and consumers from harm.

3.6 It should be borne in mind however that even if incentives are not perfectly aligned, self-regulation can still work if certain conditions are met. First, it should be possible to determine clearly that a company has fallen short of its promises. Therefore there needs to be clarity about the nature of the promise and whether it has been met. Second, there needs to be an incentive on the companies meeting the promise to inform on rogue companies.

3.7 There may be a number of reasons why this incentive is weak, including the collective incentive to under-deliver, given the likely profitability of that strategy. Given the above, and because in most cases incentives are unlikely to be fully aligned, some form of co-regulatory solution with formal back-stop or approval powers resting with Ofcom is likely to be required.

3.8 Ofcom proposes that the following steps be taken when making an initial assessment of whether a form of self- or co-regulation might be a suitable solution to achieve a particular policy outcome in the interests of UK citizens and consumers:

STEP 1 - Collective industry incentives to participate. Consider whether companies that are expected to take part in a scheme have a collective incentive in solving a concern. If they do not then the likelihood of a purely self-regulatory solution succeeding is far less likely.

STEP 2 - Delivery of benefits to the citizens and consumer. If there is collective consensus, then the next step would be to consider whether the solution proposed by industry is likely to address the concern at hand to the best interests of UK citizens and consumers. Such an assessment should be made using existing regulatory impact assessment guidelines to determine whether intervention by Ofcom would produce any better results. However a co-regulatory solution might also be appropriate to garner the expertise of industry or because the solution would benefit from a more timely consumer-facing approach than Ofcom investigating and responding to complaints in relation to the issue.

STEP 3 - Would individual companies have an incentive not to participate in any agreed scheme? In such cases consideration should be given to the extent of the number of companies likely to opt out and identification of the difference it would make to the likelihood to the scheme if they failed to participate. Again, widespread opt-out would not point to the likely success of a co- or self- regulatory approach. However, if only a small number of companies failed to participate, Ofcom could consider what measures could be taken to ensure public awareness of the benefits of contracting with communication providers who were members of such a scheme and what enforcement action might be taken where public harm was likely to occur, including compulsion to join a co-regulatory scheme.

STEP 4 - Free-rider issues. Even where most or all of the relevant communications providers joined a particular scheme, consideration should be given to the incentives for member companies to cheat, the extent to which this would be detrimental to citizens and consumers and what monitoring and enforcement measures could be placed against those companies found in breach. In other words, where public interest incentives and private commercial incentives are least aligned there is more of an incentive to cheat and consideration should be given to what punishment mechanisms can be put in place.

STEP 5 - Clarity and simplicity. A scheme is more likely to be effective where companies can readily sign-up to the objectives (i.e. they have the incentive to comply) and it is relatively straightforward to understand what the purpose of the scheme and its rules are. Therefore, the final consideration in determining the suitability of self- or a particular self-regulatory solution is the extent to which:

- there may have more complex objectives of diverse value to consumers
- whether the membership of companies is diverse and
- where compliance with particular objectives may adversely impact on the profitability of some members more than others.

4 Subsequent factors in implementing co- or self-regulation

Criteria to consider following decision to adopt a form of co- or self-regulation

4.1 After an initial assessment has been made of whether self-regulation or some form of co-regulation is desirable and appropriate to address a particular issue in the UK communications sector, further work will be required to ensure effective and efficient administration of the scheme.

4.2 Ofcom's experience as well as evidence from the running of schemes outside the sector and internationally indicates that there are a number of core criteria that are important to the performance of the majority of schemes. The weighting of each factor may vary depending on the objectives of the scheme in question.

4.3 As part of our analysis, we have identified the following criteria to consider when establishing any new co- or self-regulatory scheme in the UK communications sector:

a) **Public awareness and visibility of schemes:** Scheme objectives, particularly in relation to information provision or consumer protection, are unlikely to be met, and incentives to members to participate will be weakened, if consumers and citizens are not made aware of their existence and their remit by active promotion.

b) **Transparency:** The adoption of a scheme in place of statutory regulation, and confidence in its ability to deliver on objectives, will be dependent on maintaining stakeholder confidence. This will require openness and transparency in operation and a degree of public accountability about performance. As a minimum this should include publishing annual reports – with an element of objective review - on the scheme's progress. Schemes' procedures should also be open, transparent, easy and generally free of charge to use. Effective arrangements for wide public consultation on significant issues is desirable.

c) **Significant number of industry are members:** The private commercial incentives of companies may either conflict with the public interest, or may lead an individual company to free-ride on the reputation created by other members. To have an effective impact, a scheme should represent a very high proportion of traders in the market place, or traders representing the vast majority of consumers. It will then be in a position to influence and act independently of individual members, to ensure that its influence extends across the industry and also allow identification of companies who are not bound by the scheme. It also is desirable that citizens and consumers are then able to differentiate between companies which are, and those companies which are not, members of a particular scheme.

d) **Proportionate cost:** In some cases, the direct costs of funding a bespoke scheme may not be outweighed by common or evenly distributed benefits to members. Industry members must ensure there are adequate resources to operate the scheme effectively, and that this is commensurate with the scale of the industry that it is imposed on. Staff resources would need to be sufficient to cope with the volume and type of work which is likely to arise. The operation of the scheme should dictate proportionate costs, rather than vice versa.

e) **Enforcement measures:** In many industries, individual companies will have incentives to cheat on individual obligations and the scheme's effectiveness will depend on punishment mechanisms. Schemes need to have sanctions that provide a clear incentive to comply, and which can be imposed promptly and successfully. To administer this, the disclosure and transparency of information from members is essential if participants are to monitor the health of these schemes. Where applicable, it is also important to disclose what penalties can be imposed and whether they have been imposed for identified breaches. Some forms of sanction may necessitate Ofcom exercising specific statutory powers. The co-regulatory body should be

able to identify circumstances and pro-actively recommend where it would be more appropriate for Ofcom to use back-stop powers.

f) **Audit of members and scheme:** Insufficient governance and administration of a scheme will prevent its benefits being widely realised. Schemes must be active in setting and auditing KPIs of members to ensure that these are met individually and consistently across the industry. Similarly, relevant KPIs for the scheme itself in meeting its objectives should be identified. Where KPIs have been set, they should be published and regularly reviewed in the light of changing circumstances and expectations.

g) **System of redress in place:** In some cases companies may under-deliver or fall short on promises. Consumers and citizens should have the right to adequate complaint handling standards where they have been dissatisfied by the initial response of a provider. It is desirable for there to be a genuinely independent appeals mechanism that can ensure that complaints are resolved quickly and effectively, and their outcome disclosed. An effective scheme will have an alternative redress mechanism such as independent arbitration, or an ombudsman scheme, which is easy to access and readily identifiable at the point of need and has even-handed and transparent procedures.

h) **Involvement of independent members:** There is a clear tension between the desirability of autonomous schemes and the objectives of drawing on the experience, expertise, resources and engagement of the industry within them. The benefits of self-regulation may only be realised if the scheme is respected by other stakeholders including consumer and citizen groups, government and parliamentarians. Consequently a system involving a mixture of independent lay and industry members will be appropriate in both the scheme's governing body and further operating committees.

i) **Pro-active and planning in research and regulation:** Schemes are often introduced for particular objectives which may be overtaken by changes in the market or the expectations of stakeholders. Schemes should actively review the needs of stakeholders and trends in the industry, and monitor whether their remit and operations are sufficient to meet these.
j) **Non-collusive behaviour.** Finally, it is important that any scheme does not provide a forum for collusion and is compliant with both European and UK competition law. Again sufficient transparency and approval will have to be built into the design of any solution to demonstrate to third parties that industry members are committed to non-collusive behaviour and are agree to comply with the relevant codes.

4.4 Not all of the above criteria are applicable in equal measure to all schemes. There may be specific instances where a criterion will be more appropriate depending on the scheme's objectives and the degree of alignment of these with private company incentives. For example, a scheme that is intended to facilitate consumer choice in a highly competitive industry with high customer churn may require more focus on public awareness and less on enforcement measures. Similarly, for a scheme focused on improving industry co-ordination and standards it may be more appropriate to focus on an audit of members rather than a system of redress

4.5 Across all schemes, however, suitable funding, involvement of independent members in decision making and transparency for both members and external stakeholders seem a given for operational effectiveness since self-regulation does not the same goal as, say as trade association, to simply promote the interests of industry members. A scheme is unlikely to be able to accomplish its objectives, or do so with any confidence, if it is poorly resourced or judged to promote the interests of industry before consumers.

Clear division of responsibilities

4.6 It is essential that there is a clear division of responsibilities between the co-regulatory body and Ofcom. It should be clear to all concerned, including consumers, who is responsible for which area, and what the precise role of Ofcom is.

4.7 In order to provide clarity about remit and responsibilities it may be appropriate to agree and publish terms of reference or a memorandum of understanding. Such a document could also address the issue of the body's independence from Ofcom.

4.8 In general terms, Ofcom would serve as an enabler and evaluator but would not have responsibility for, nor powers to, second-guess individual decisions of the co-regulatory body. Ofcom would approve the co-regulatory body's governance and funding arrangements, and any significant modifications to them. Ofcom would expect to approve any codes and/or guidelines which the co-regulatory body publishes. Ofcom would also need to have an ability to make directions where it came under a specific legal obligation.

Annex F: Code of Practice on Consultation

All Government consolations must adhere to the Code of Practice on Consultation. In particular they must follow the six consultation criteria. These are:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

A copy of the full Code can be found at:

http://www.berr.gov.uk/files/file44364.pdf

ANNEX G: Impact Assessment Summary: Intervention & Options

Department /Agency:	Title: Impact Assessment of Legislative Options to Address Illicit Peer-to-Peer File Sharing	
Stage: Consultation	**Version:**	**Date:** 9th July 2008
Related Publications:		

Available to view or download at: http://www.

Contact for enquiries: Tim Hogan **Telephone:** 020 7215 1628

What is the problem under consideration? Why is government intervention necessary?

Government intervention is being proposed to address the rise in unlawful file-sharing which can reduce the incentive for the content industries to invest in the development, production and distribution of new creative content artists because they cannot reap all the returns from their investment.

A principle objective of the consulation document, which this IA accompanies, is to gather evidence as to the need for government intervention, and the costs and benefits, and feasibility of the various options presented to inform further policy development.

What are the policy objectives and the intended effects?

The government is looking at the possibility of bringing in legislative options aimed at reducing unlawful downloading. These include making it easier and cheaper for rights-holders to bring civil actions against suspected unlawful file-sharers, placing an obligation on ISPs to address such activity or use of technological solutions such as filters which can help block unlawful downloads.

The case for government intervention however is not yet clear as unlawful downloading is still a recent phenomenon and the economic evidence to date on the impact of unlawful file-sharing is so far inconclusive.

What policy options have been considered? Please justify any preferred option.
Government is considering several legislative options, some of which are more viable than others.

The preferred option is for a co-regulatory approach. Industry Code of Practices would require Ofcom approval underpinned by a legal requirement for ISPs to have an effective policy for addressing unlawful infringement of copyright. This option would provide the greatest flexibility in a fast-changing area and impose a lower burden on industry.
Other options identified are:
a) Requiring Internet Service Providers (ISPs) to provide personal data on a particular user (on request) to rights holders
b) Requiring ISPs to take action against individuals identified (by the rights holder) as unlawfully file-sharing
c) Appointment of a third party body with statutory powers to consider allegations of file-sharing
d) Mandatory use of filtering technologies which help block unlawful downloads

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?
The co-regulatory approach would have an initial review after [3] months to evaluate the success of the trial. Progress on the high level objective to reduce unlawful filesharing would be reviewed every [6] months.

Ministerial Sign-off For SELECT STAGE Impact Assessments:
I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.
Signed by the responsible Minister:

..... Date:

Summary: Analysis & Evidence

Policy Option:	Description:

COSTS

ANNUAL COSTS

One-off (Transition) **Yrs**

£

Average Annual Cost (excluding one-off)

£

Description and scale of **key monetised costs** by 'main affected groups' Costs to ISPs of supplying personal data on suspected unlawful file-sharers, taking action against alleged infringers or installing filters which block unlawfu downloads. Costs to rights holders of bringing civil actions. A principle objective of the consultation document will be to gather further evidence on the key costs of potential government intervention.

Total Cost (PV) **£**

Other **key non-monetised costs** by 'main affected groups' Consumer welfare may be reduced by restricting access to free content.

BENEFITS

ANNUAL BENEFITS

One-off **Yrs**

£

Average Annual Benefit (excluding one-off)

£

Description and scale of **key monetised benefits** by 'main affected groups' Reduced of bringing civil actions against suspected unlawful file-sharers. Also potentially higher future investment stemming from increased revenue from legitimate media sales. A principle objective of the consultation document will be to gather further evidence on the key benefits of potential government intervention.

Total Benefit (PV) **£**

Other **key non-monetised benefits** by 'main affected groups' Higher legitimate sales of media content may also increase value added and thus VAT receipts. Consumers may also gain from increased investment in new content and their creators (e.g. greater consumer choice)

Key Assumptions/Sensitivities/Risks There is significant uncertainty as to the scale of the problem. Technological developments could provide tools to deal with the problem or conversely make effective enforcement action very difficult. New business models could reduce the impact of P2P. It is possible that intervention may lead to government failure (i.e. costs of intervention outweigh benefits).

Price Base Year	Time Period Years	**Net Benefit Range** (NPV) **£**	**NET BENEFIT** (NPV Best estimate) **£**

What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	2009

Which organisation(s) will enforce the policy?			BERR/Ofcom	
What is the total annual cost of enforcement for these			£	
Does enforcement comply with Hampton principles?			Yes	
Will implementation go beyond minimum EU requirements?			Yes/No	
What is the value of the proposed offsetting measure per year?			£	
What is the value of changes in greenhouse gas emissions?			£	
Will the proposal have a significant impact on competition?			Yes/No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	Yes/No	Yes/No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)					(Increase - Decrease)
Increase of	£	Decrease of	£	**Net Impact**	**£**

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Background

File sharing

File sharing is a recent phenomenon whereby users on a computer network share content files containing audio, video, data or anything in digital format by means of a series of ad hoc connections without the need of a central file server. File-sharing is becoming increasingly widespread, driven by increases in the number of households with internet and broadband access, quicker upload and download speeds, and improved connectivity, capability and reliability of service.

In economic terms, file sharing displays many characteristics associated with public goods[22]. It is non-rival in that a user downloading a file does not preclude another user downloading the same file while it also non-excludable in that files within the network are available to all network users. Further, file sharing also gives rise to spillovers[23] or more specifically network externalities. Network externalities arise here because the value of file sharing increases as more users join the network since the number and diversity of content files shared across the network increases.

Rationale for government intervention

In content industries like the music, film, software and computer games industries intellectual property rights (IPR) can play an important role. If effectively enforced, IPR can create an incentive for businesses and private individuals to invest in the development of new products since it permits them to capture the gains from the new products they create.

However, with file-sharing and illegal file-sharing in particular, the incentive for industries to invest in developing creative content (e.g. new software, music or films) and bringing it to the market is undermined because industry cannot capture all the gains generated from its investment. This is because the public good nature of file-sharing and the spillover effects which exist creates a free-riding problem whereby users may enjoy the benefits of file-sharing without paying the product's price[24].

Consider, for example, the music industry. Here, the disincentive for record companies to invest in the production and distribution of new material produced by composers and music artists as a result of free riding is a particular problem because the industry is characterised by large investment costs and high risk.

Record companies invest large amounts of money in the success of a composer or music artist. These costs are typically in production, distribution, marketing and promotion of making a CD album and selling it to the consumer (advance payment to artists, advertising costs, retail store positioning fees, listening posts in record stores, radio promotions, press and public relations to the artist, television appearances and travel, publicity and internet marketing). The industry is characterised by large fixed costs and low variable costs. The increasing trend in music downloads may see a change in the investment cost structure. Some costs will remain like marketing costs, which are not likely to change, while distribution costs will decrease. Overall, variable costs are likely to increase relative to fixed costs which may give small, relatively less known artists more room for manoeuvre.

Record companies take on considerable risk as not all music artists which they invest money in actually succeed. Typically less that 15% of all sound recordings released will break even and fewer return profits. However when a recording makes it big, the financial returns can be very large and this then goes to finance the next round of investment. The small success rate is due to the competitive nature of mass-media market in which exposure to the public is scarce and firms maximise audience by selecting a relatively small number of potential one-size fits-all super star artists rather than promoting more originally creative composers and artists.

How strong is the case for government intervention?

[22] Public goods are defined as those which are non-rival and non-excludable in consumption. Non-rival in consumption means that one person's consumption of a good or service does not reduce the amount which can be consumed by another person. Non-excludable in consumption means that it is not possible to prevent a person from consuming a good or service.

[23] Spillover effects arise when one person's actions unintentionally have a positive or negative effect on a third party which are not taken into account by the market.

[24] A similar case arises with Research and Development (R&D) whereby a company cannot capture all the benefits of its R&D activity.

Illegal downloading can result in a reduction both in the volume of legal downloads and physical media sales. This is because all three are close substitutes in consumption. To date, the empirical literature on file-sharing – and more particularly illegal file-sharing – has focussed on the music industry and the impact on album sales in physical format. For this reason, relatively more attention is given in this impact assessment to the problem of illegal downloading in the music industry than other content industries where it is also becoming more prevalent.

The evidence which has emerged so far on the impact of file-sharing and illegal downloading is inconclusive. There are three reasons for this. First, file-sharing is a recent phenomenon and more time needs to have elapsed before its impact becomes clearer. Second, there are methodological difficulties associated with estimating the impact of file sharing on album sales (e.g. biases in survey based studies). Third, there is little availability of good quality data.

Overall there are two schools of thought. One argues file sharing reduces album sales through the assumption that downloaded and physical music are close substitutes. The other argues that downloaded music serves as a *taster*, whereby the user samples the downloaded music first and then, if he/she decides, purchases the physical format (perhaps because it comes with extras which cannot be obtained by download).

In reality, these two effects are likely to appear at the same time and in some cases may correspond to different purchasing patterns amongst different age groups. According to Peitz and Waelbrook (2005)[25] younger consumers have lower purchasing power and lower opportunity cost of time than older internet users – who are also later adopters of the internet – and consequently are more likely to substitute physical formats for downloaded content.

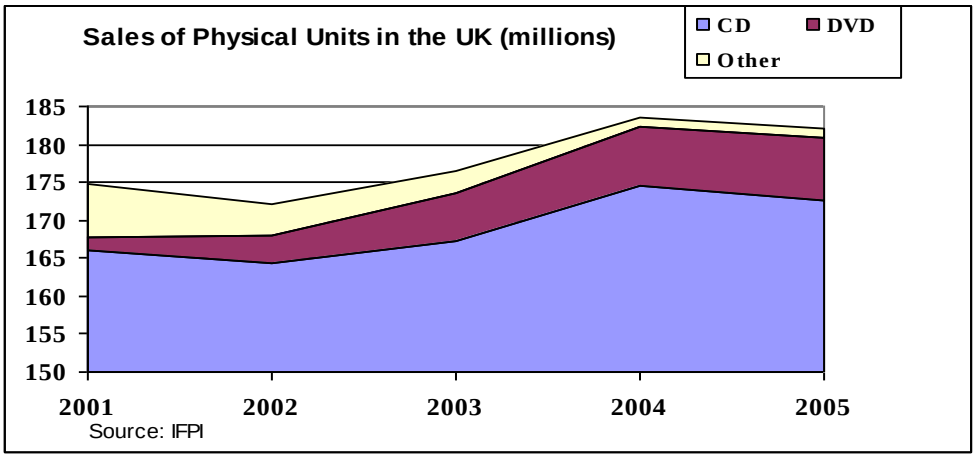
Industry research indicates that unlawful file-sharing has been a key factor in the 22% decline in the recording industry's worldwide sales between 1999 and 2004. The UK music industry has presented evidence showing that illegal file-sharing can have a negative effect on album sales. Research carried out for the industry suggests that illegal file-sharing has resulted in a revenue loss of an estimated £1.1bn between 2003 and 2005.

Peitz and Waelbroeck (2004)[26] found that there are three main factors that influence cross-country variation in sales over the period 1998-2002. These are: GDP growth, MP3 downloads and broadband penetration. They estimate that the overall impact of internet piracy on sales is 20% for the period. (These estimates should be interpreted with caution since they only considered a small number of countries). Oberholzer and Strumpf (2004)[27] use actual downloads and sales data. They find that the number of times a file has been downloaded does not have a statistical significant effect on sales. Critics of this study state there are flaws with the analysis since it does not establish causality between file sharers and music sales.

Some commentators have remarked that the sharp decline in physical CD sales starting in 2000 coincides with the creation of Napster in 1999 and the emergence of new file sharing technologies in 2001. While, the introduction of new format such as DVD audio and super audio CD have helped the UK music industry to reverse the decline in the volume of sales after 2002, since 2004 volume sales have again started to fall, reflecting the growing popularity of downloading (see Figure 1 below).

Figure 1: UK CD and DVD sales since 2001

[25] Peitz, M. and Waelbroeck, P. (2005) "An Economist's Guide to Digital Music" *CESIfo Economic Studies*, Vol 51 2-3/2005, p359-428.
[26] Peitz, M. and Waelbroeck, P. (2004) "The effect of internet piracy on music sales: cross-section evidence" *Review of Economic Research on Copyright Issues* 1, p71-79.
[27] Oberholzer, F. and Strumpf, K. (2004) "The effect of file sharing on record sales: an empirical analysis". Mimeo.



Overall most commentators agree that the decline in album sales cannot be wholly attributed to illegal file sharing citing a host of other factors including:

- Macroeconomic conditions (e.g. consumer confidence, economic growth)
- Number of new releases and radio playlists' role in influencing music sales
- Substitution with other forms of entertainment, CD burners, DVD and computer games, internet activities

Another important point to consider is that there is significant uncertainty as to whether illegal downloading will become less or more of a problem in the coming years. This makes the case for government intervention much more difficult to determine. This uncertainty stems from several sources:

- Information and communication are constantly evolving. Broadband connections and capabilities are like to improve further in the future permitting files of much larger size to be downloaded more quickly than before. This will have the effect of greatly increasing the possibility and convenience of illegal downloading, particularly of larger content files such as film and video[28].

- Future trends in home entertainment point at the direction of music and other forms of entertainment being moving more to a digital format. Downloads – legal as well as illegal – are likely to dominate over traditional music formats in the future. In the long term, these are most likely to be close substitutes for traditional formats. New business models have to develop in order for the content industries to reap the benefits of this new emerging market.

- New technologies are being developed which may help block illegal content files from being downloaded. If these technologies are effective there may be little need for government intervention. However, if these technologies are not successful then there may still be a case for action. There may also be a need for regulatory intervention to enable these new technologies to be deployed.

- The content industry is also moving to new business models. Some of these models may be more vulnerable to illegal downloading and therefore greater revenue losses. Creators of original content are also making greater use of the internet to distribute their material directly to consumers rather than through intermediaries.[29]

[28] It must be remembered that not every download corresponds to a lost sale since downloaders face no limit (in terms of budget and space) in the number of downloads they can make; there is no incentive for them to be selective.

[29] New business models like the one used by Radiohead could only work for those major, established artists with a large, loyal fanbase. However, other internet applications and the fact that digital releases have scope for more price variability than physical ones it could also be beneficial for new artists.

Policy options

All policy options need to judged against the costs and benefits of the Government not taking any regulatory action

In those circumstances file-sharing is likely to increase further in coming years driven by faster downloads speeds, improved broadband capability and reliability of services. This may lead to a rise in illegal downloading and accordingly a further increase in lost revenue and reduced investment in the development, production and distribution of new creative content.

In the long-run, these costs could outweigh the welfare enhancing attributes of peer-to-peer file-sharing such as:

- Users have a wider choice of content since they are able to access music from less well-known artists (increasing consumer welfare)

- Easier access to a greater number of sources of information than previously possible

- Stimulating competition by providing a less expensive means of obtaining different forms of media, potentially reducing the price of physical formats and the market power of key players in the content industries
- Increasing social welfare by helping to deliver broader social objectives such as improvements in media literacy

However, there is much uncertainty as to the long-run impact of illegal downloading as it is still a relatively phenomenon. It is possible that industry and internet service providers (ISPs) may respond to revenue losses by deploying new technologies which help block illegal downloading or adopting new business models which can reduce the size of any revenue losses.

Options for government intervention

There are number of legislative options being considered by the Government, some of which are more viable than others.

The preferred option is for a co-regulatory approach whereby the ISPs and content industries would work together in developing a number of Codes of Practice to include issues such as:

- standards of evidence (required to trigger action against alleged infringers)
- actions against alleged infringers
- actions against persistent or criminal infringers;
- indemnity and compensation resulting from incorrect allegations of file sharing; and
- routes of appeal for consumers.

The Codes would be subject to approval by Ofcom. In parallel signatories to the co-regulatory approach would commit to:

- developing new commercial models to allow consumers to easily access content legally and to work together to ensure that consumers are educated to respect the value of the creative process; and
- the importance of supporting creators to invest time and resource in developing new work, and understand that unlicensed sharing of others' work is wrong

The co-regulatory approach would be underpinning by regulation to require ISPs to have an effective policy for dealing with cases of alleged infringement. The regulation would also give Ofcom the responsibility for approving the Codes.

A number of alternative regulatory options have been identified. These include:

- Legislation to require ISPs to provide personal data of a particular user (on request) to rights holders

- Legislation to require ISPs to take action against individuals identified (by the rights holder) as unlawfully file-sharing

- HMG appoints a third party body with statutory powers to consider allegations of file-sharing

- Mandatory use of filters

Consumers may lose from these proposals in that they will no longer be able to access some free content. The costs to rights holders, ISPs and Government of the different options may include:

- The costs involved in supporting a co-regulatory approach, in particular in identifying infringers, action against infringers, the education process and in providing a route for consumer appeals.

- The costs of supplying additional information on suspected illegal file-sharers or deploying filtering technologies which help block illegal downloads

- The costs of setting up and operating a regulatory body charged with considering allegations of unlawful file-sharing and running an effective appeals mechanism

Uncertainty surrounding the effectiveness or suitability of these options might mean that in the long term regulation is not needed. As such, there could be a risk of government failure where the additional regulatory burden imposed on the content industries and ISPs as a result of government intervention exceed the benefits.

Some of the potential benefits of government intervention include:

- Cost savings arising from reduced need and/or time and effort bringing civil actions against suspected illegal file-sharers.

- Higher revenue to businesses in the content industries enabling increased future investment in the development, production and distribution of new creative material

- Consumers may also gain from increased investment in new content and their creators (e.g. greater consumer choice)

- Higher value added and, accordingly, VAT receipts stemming from future increase in physical media sales

Competition assessment

Scope of proposals

The proposals would mainly cover the music, film and video, computer games and software industries where illegal downloading is particularly prevalent[30]. Based on the industry definitions used in the Work Foundation report *Staying ahead: the economic performance of the UK's creative industries*, these industries together generated an estimated £32bn in gross value added and employed approximately 520,000 people. This represents very roughly 3% of total UK GDP and 2% of total UK employment.

There are over 250 internet service providers in the UK, although the market is dominated by the main players (BT, Orange, Carphone Warehouse , BSkyB, Tiscali and Virgin Media). All ISPs would incur further costs associated with proposals to supply additional information on file-sharers suspected of illegal downloading or the mandatory use of filters to block illegal downloads.

If the costs of proposals to install filters are the same for all ISPs regardless of their size – in terms of number of subscribers – then these costs are likely to be proportionately larger for smaller ISPs than larger ones. If this is the case, then these proposals could create a barrier to entry for new small ISPs.

The costs of proposals to supply information on suspected illegal downloaders or take direct action against such individuals are likely to vary according to the number of subscribers that an ISP has. As such, the costs of these proposals are likely to be

[30] See the Work Foundation report "*Staying Ahead – the economic performance of the creative industries*" published in 2007 for details of how these industries were defined using standard industrial classification codes. The report can be found at http://www.theworkfoundation.com/products/publications/azpublications/creativeindustries.aspx

proportionately greater for larger ISPs than smaller ones, although there may be economies of scale available to the large ISPs if any notification or data sharing processes can be automated.

Similarly the cost of involvement in the co-regulatory approach might be proportionally higher for the smaller ISPs or content industries, although it would be open for industry to decide trigger thresholds for cost sharing.

ISPs that elect not to sign up to the co-regulatory approach would not have to contribute to the costs involved. However they would still be required to have in place an effective policy for dealing with cases of alleged infringers and would not have the regulatory certainty of compliance with approved Codes of Practise.

Content providers that elected not to join the co-regulatory approach (either via a trade body or as individuals) would still benefit from the halo effect of the education programme without contributing to the cost of co-regulation. However they would not be able to use any co-regulatory mechanism for tackling cases of alleged infringers and therefore would still face the costs involved in taking court action against alleged infringers. They would continue to suffer loses associated with file-sharing.

Small Firms Test

Co-regulatory Approach

For small firms participating in a co-regulatory approach the direct impact is most likely to be neutral or positive. The main trade bodies already fund anti piracy/anti file sharing activities and these (in the UK) would be largely channelled instead via the mechanisms established via the Codes of Practice. Greater economies of scale offered by co-ordinated action across industries and companies may lead to economies of scale resulting in cost reductions. Indirectly any widespread reduction in unlawful file-sharing would bring a net benefit to small firms.

As noted above, smaller ISPs are likely to be more adversely affected by proposals to install filters which block illegal downloads since these are likely to be independent of the ISP's size, in terms of the number of subscribers it has.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	*Results in Evidence Base?*	*Results annexed?*
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No

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