

**UK Film Council
Submission to
Department for Business Innovation &
Skills Consultation on Legislation to
Address Illicit Peer-to-Peer (P2P) file-
sharing**

September 2009

Executive summary

The UK Film Council is the Government-backed lead agency for film in the UK. Our goal is to help make the UK a global hub for film in the digital age, with the world's most imaginative, diverse and vibrant film culture, underpinned by a flourishing, competitive film industry.

The UK Film Council welcomes this timely consultation and Government's commitment to tackle the increasing problem of illicit file-sharing with legislation. Government intervention is vital to help significantly reduce this illegal activity. If a proportionate and effective legal framework is established that is fair to rights owners, consumers and Internet Service Providers (ISPs), we believe much progress can be made on this challenging area.

In particular, the UK Film Council welcomes the Government's additional proposals made in its statement of 25 August 2009.

We strongly support the proposal to give the Secretary of State powers to direct Ofcom to introduce technical measures, as this will help to prevent a lengthy interval before such powers could be introduced.

The proposal to introduce suspension of accounts for repeat infringers as a last resort brings additional strength to the basket of technical measures proposed.

The proposal to set out the procedures for the sharing of costs on the face of the Bill is a sensible means of avoiding lengthy discussions and disagreements between rights holders and ISPs.

Background

As a body acting in the public interest, the UK Film Council wishes to see a balanced and proportionate approach to the problem of illicit peer-to-peer file-sharing, and approach which is effective in reducing the scale of illegal activity by a very significant amount, which helps encourage the launch of legal sites which offer a wide diversity of films to the consumer.

Online copyright infringement of filmed content needs to be stemmed before broadband speeds intensify. But equally, consumers need to be confident in the due process that will protect innocent online users, who for whatever reason (a good example being malicious software that can infect consumers computers without their knowledge) are accused of unauthorised file-sharing.

Legislation working in tandem with public education campaigns and the proliferation of legal consumer services to the benefit of audiences is vital if the

Government's aim of reducing illicit file-sharing by 70% is to be achieved. The UK Film Council have developed an innovative online tool, Find Any Film (www.FindAnyFilm.com), which helps people to identify the availability of a film in a legal, authorised form in specific media e.g. in the cinema, to download and/or stream legally, on DVD etc. The success of this tool – it has already received over 2million hits since its launch in January 2009 – has clearly demonstrated that there is a strong desire to access films online, but many titles remain unavailable in a legal form due to significant barriers in the form of unresolved rights issues and to the fact that the prevalence of piracy makes it very hard to make viable economic returns from such online models.

There is a clear need to address the barriers which are preventing these films being made available as this will also play an important role in reducing illegal file-sharing. The Government's proposals in its Digital Britain report regarding orphan works and works in which all or some rights are not being actively managed will be important in this regard.

We strongly welcome the Government's additional statement on the proposed P2P file-sharing legislation published on 25 August 2009.

We believe that the proposal to give the Secretary of State a two-part power of direction in relation to the potential introduction of technical measures is a sensible one for two principal reasons:

Firstly, as the Government observes, the original proposals for the possible introduction of technical measures would take an unacceptably long time to bring into being - the second half of 2012 at the earliest.

The Government's Digital Britain report envisages that there will be universal access to broadband at speeds of at least 2Mb/s by that time - with many people enjoying much higher speeds as a consequence of the rapid roll-out of high speed fibre optic networks. This means that it will be easier for those who wish to engage in illegal file-sharing of content to do so, since there will be widespread access to networks which enable rapid downloading of large files such as films; at 50Mb/s for example, a complete theatrical film can be downloaded illegally in approximately three minutes.

Secondly, the Secretary of State's powers will enable him to take into account the broader vitality or otherwise of the content and/or broadband markets. Allowing such a rounded perspective seems far preferable to imposing a binding target upon Ofcom as the trigger of technical measures. If, for example, the UK's film sector were to experience a further and very steep decline in revenues, which was demonstrably linked to the impact of illegal file-sharing, it seems eminently sensible to take that into account regardless of whether a particular target for

reduction in illegal activity has been achieved. We suggest that consideration be given to whether it is possible for rights owners to provide evidence to the Secretary of State to help shape the decision making process working with a common methodology.

Where industry is best placed to contribute to the evidence base is the tracking of the take up of legitimate services and this will provide a valuable insight into any progress being made on changing consumer behaviour. Ideally, a graduated response will migrate consumers from illegal services to authorised ones and this trend information will be of great interest to the Secretary of State. Obviously, Ofcom also has an important role to play in such evidence-gathering.

The UK Film Council would like to see the trial assessed in three ways:

- Impact on specific infringers behaviour after they receive notices;
- Consumer research into notice sending;
- Trend analysis to capture what is happening online during the trial period. Success can only be measured if there is a standardisation of the way the data is collected. ISPs tend to have differing ways of collecting data which makes it very difficult to obtain a true picture. A single interface/intermediary between rights holders and ISPs would provide more accurate data.

The UK Film Council welcomes the proposal to introduce suspension of accounts for repeat infringers as a last resort. But this measure must be used transparently and proportionately if it is to have the required deterrent effect rather than alienating large sections of the public, which would clearly be counter-productive. However, we would want to be sure that the necessary measures are in place to enable, for example, people to contact the emergency services – as is currently the case where people are disconnected for not paying their telephone bill for example.

Credible sanctions are necessary to change behaviour but we hope no sanctions, especially suspension, need to be implemented.

The proposals to specify on the face of the Digital Economy Bill how costs should be allocated seems to us to be a sensible way of addressing what the Government has correctly identified as a complex and controversial area.

We note that this consultation “does not examine the issue of commercial piracy, websites dedicated to unlawful copying (or the encouragement of) or the hosting of such websites” and that these issues “will instead be addressed separately by the Department of Business, Innovation and Skills and the UK Intellectual Property Office.” We strongly believe that the Government needs to move rapidly on these issue, and would urge it to follow through on this agenda as rapidly as

possible. Addressing this illegal activity is vital and will serve as an important complement to the measures set out in this consultation.

Question 1: Is this restriction right? Is there anyone else who ought to have a right to trigger the obligation?

This is correct. Responsibility for notifying ISPs of infringers operating over their networks should rest with rights holders or a body or bodies authorised to act on their behalf.

Question 2: Should there be a time limit from the date of a specific infringement by which a request needs to be made? If so, what should it be?

To make the process workable, and ensure people have confidence in it, rights holders will need to notify ISPs of suspected infringing activity as soon as is feasibly possible. Major rights holders have automated investigatory systems, so there is likely to be little or no delay between an infringer being identified and that information being passed to the relevant ISP.

Question 3: Is this list right? Is there anything else that should be specifically added to this list? Should there be any more detail on any of these points in the legislation, or is it OK to leave that for the code?

The UK Film Council believes 4.12 covers the majority of information which the notification letters will need to contain, although it is important to signal that infringement contravenes the Internet Service Providers' Terms and Conditions of service. The letter could also provide links to such services as Find Any Film which help consumers to find legally available material.

Question 4: Does this need to be set out in any more detail in the legislation, or is it sufficient to require it to be set out in the code?

We agree that the template used in the MOU trial is a good model to use and is best to be left to be further defined in the code. Work on the code should begin now (overseen by Ofcom/BIS) so it is ready to be used as soon as the legislation receives Royal Assent.

Question 5: This obligation is specified without any volume limit. Is that right? Should there be a restriction on how many notices a rights holder can serve, or that an ISP needs to honour (either from a specific rights holder or in total)?

No volume limit should be placed on the number of notification letters ISPs individually (or collectively) are required to send. For this measure to have any relevance it cannot be constrained by an arbitrary restriction.

Question 6: Alternatively, should volumes be agreed (say) 6 months in advance between rights holders, ISPs and Ofcom to allow ISP to prepare accordingly?

We do not believe that there should be a limit on the amount of letters ISPs are required to send.

Question 7: Is this approach to costs the right one? Is there anything else in relation to costs that should be taken into account in the legislation? Should the legislation specify exactly how costs are to be shared or is it right to leave some flexibility in how the legislative requirements are reflected to the code?

Agreeing costs between rights owners and the ISPs will prove to be a contentious point in forming the code, so if this area could be dealt with up front by being included in the legislation, it will speed up the drafting process and ensure time is well spent on creating a substantive framework.

Question 8: Do you see any difficulty with linking a new notification with a previously gathered set of anonymised data in this way? If so, what specifically is likely to be the problem?

The UK Film Council has been led to believe that this is an issue which the FACT-led 'Single Point of Contact' (SPOC) system currently under discussion would be able to address.

Question 9: There is some evidence (research and empirical) that further warning letters result in a further reduction in people file-sharing. Do you think multiple letters should be sent (up to a maximum of (say) three and, if so, what should trigger these? (For example, should this be on a strict, one infringement, one letter basis or should there be specified levels (e.g. first letter on first infringement, second letter on tenth, third letter on twentieth)? [For clarity, we would anticipate that multiple letters would escalate in tone.]

Timings should be left to the code to decide but we anticipate an acceptable delay between the sending of the first letter and the second to be in the region of two weeks. During this delay, however, data should still be gathered on the incidents they infringe which would then be used as a clear justification for the sending of a second letter and any accompanying sanction. With the second letter having been sent, the time between this one and the sending of any third letter or more could be in the region of a week.

Question 10: Do you agree to the approach on costs set out here? Are there any additional factors that we should take into consideration here?

The allocation of costs outlined in 4.22 appear to be reasonable. Rights holders will incur substantial litigation costs and therefore it is reasonable that the cost of collecting, maintaining and processing data in relation to the serious infringer database is met by the ISPs.

A 50/50 split on costs being proposed in the bill will set a firm foundation for all concerned to build their working relationships upon.

Ofcom power to impose other obligations

Question 11: Do you agree with the list of further measures that could be imposed and the conditions to which their application must satisfy?

We agree with the list of further measures that could be imposed. We also agree with the revised proposal that the power to direct the introduction of technical measures should rest with the Secretary of State.

The legislation, as now proposed, would see technical measures introduced via secondary legislation following a direction from the Secretary of State to Ofcom. The abandonment of the 'trigger' and any arbitrary evaluation period is to be welcomed.

Question 12: Is 12 months about right to allow a proper assessment of the efficacy of obligations? If not, what would be a better period, taking into account the need to react both expeditiously and on the basis of good evidence?

12 months is too long a period for assessment. Incidents of file-sharing are growing at an expeditious rate. Six months of notice sending will be an adequate time frame to evaluate if notice sending alone is proving to be successful.

Question 13: Do you agree with this list of things that Ofcom need to satisfy themselves of before approving a code? Is there anything else that Ofcom should be obliged to consider before approving such a code?

The UK Film Council agrees with the list in 4.32.

Question 14: Do you agree that a code needs to be in place in time for common commencement? Is it realistic to expect such a code to be developed in less than 12 months - could it be done sooner and, if not, what would be a realistic estimate?

We believe enough time has been spent in reaching this point (it is now over a year since the MOU was signed) and we agree that a code could and should be drawn up in less than 12 months.

Question 15: This list seeks to set out all the requirements of the code to enable the operation of the first two obligations. Does it do so? Is there anything else that the code must cover in order to enable the effective operation of those obligations and, if so, what?

Crucial to the effectiveness of the code is the evidence standards required to activate notification sending and the provision of serious infringer data. With this transparency, all the stakeholders and Government can see how effective the letters are on consumer behaviour.

Question 16: Are there any other restrictions or requirements that should be placed on Ofcom in pursuit of their role in relation to this code?

An annual public report from Ofcom would suffice.

Question 17: What are your views on the time line suggested above, and the ways in which it could be reduced? Are there other ways in which this could be shortened without hazarding essential safeguards and the need for decisions to be made on the basis of the best available evidence? Do you think a 6 month review point during the initial assessment period would be useful?

Include technical measures in the primary legislation in readiness if the notification sending test is proving inadequate in changing online infringement behaviour. Allowing the Secretary of State to trigger the technical measures stage as the evidence from the notification process is proving no real deterrent to repeat offenders.

Role of a self-regulatory body

Question 18: Do you agree that this is an appropriate role and structure for the rights agency?

We see this body easily being undermined by bureaucracy and therefore the automated processes that SPOC can deliver make this system a core requirement of the agency.

Question 19: Do you agree that we should proceed with an intention to exempt small businesses? If so, have we chosen the right criteria? Do you have a preferred method of exemption? Please give reasons if you object or if you foresee any unintended consequences not discussed here.

See below.

Question 20: Do you consider there to be a case for considering any exclusions on other grounds including technical or proportionality? Please give reasons.

Taking questions 19 and 20 together, we do not agree that there should be a small business exemption. There has to be one rule for all, otherwise, the small ISPs could start attracting those repeat infringers who have been sanctioned by the larger ISPs. Small ISPs have less traffic, so in theory, there would be less notification letter sending and the costs would be relative to their cost structure.

A level playing field must be employed to give the deterrent effect true validity.