# Consultation on Legislative Options to Address Illicit Peer-to-Peer (p2p) File-sharing

## Response of the Open Rights Group

### Detail of Respondents


| | |
|---|---|
| Prepared by: | Becky Hogge |
| Responding on behalf of: | The Open Rights Group |
| Address: | Open Rights Group<br>7th Floor<br>100 Grays Inn Road<br>London WC1X 8TY<br>United Kingdom |
| Telephone: | +44 (0)20 7096 1079 |
| Email: | info@openrightsgroup.org |
| Website: | http://www.openrightsgroup.org |


## Contents

# Introduction

When the Gowers Review was published in December 2006, the Open Rights Group welcomed it as "the most important critique of intellectual property in the UK of recent years"[1]. Its recommendations for new exceptions and limitations, and its refusal to bow to industry pressure on term extension, signalled a new age in evidence-based policy making around intellectual property. This is not merely ORG's view, but that of UK Intellectual Property Office's Chief Executive Iain Fletcher[2]. An evidence-based approach can only serve to benefit the UK's creative economy.

Recommendation 39 of the Review, however, has since emerged as highly problematic. On greater reflection (and with the benefit of hindsight), it appears that Gowers did not look carefully enough at the implications of his recommendation that Government:

> "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".

We believe that, with this recommendation, Gowers made at least three mistakes. Firstly, he mistook a *business problem* (for the content industry) for a law enforcement problem. Secondly, he set an unrealistic timetable, and may even have helped to delay the process of business model transformation in the content industries he was so keen to speed up, by hinting to one negotiating party that should agreement to innovate not be forthcoming, legislation to maintain the old way of doing things would. Thirdly he failed to consider the knock on effects of a process that might lead to substantial digital exclusion of sectors of the public in a way disproportionate to the business problem to be solved.

In this consultation response we seek to do a number of things. Firstly, we demonstrate why illicit peer-to-peer filesharing at the level we see it at in the UK today is not a law enforcement problem, but a business model problem, drawing both on our understanding of intellectual property as a market intervention tool, and on our expert knowledge of potential enforcement measures available to Internet Service Providers.

Secondly, we critique the ongoing process of implementing recommendation 39, underpinned by the industry Memorandum of Understanding released in July 2008, and highlight several issues with the timing of that process, this consultation and ongoing legislative processes in Europe.

Thirdly, we challenge the perceived consensus that current law enforcement mechanisms around copyright infringement have already been proven not to be sufficient, and question the need for change.

At stake, we believe, are two things: the future of the internet as a medium for free

[1] See http://www.openrightsgroup.org/press/press-releases/open-rights-group-welcomes-gowers-review/
[2] We refer to Ian Fletcher's remarks at the Westminster eForum's seminar on Intellectual Property and the Future of Copyright earlier this year

expression, enterprise and social intercourse; and the future of the creative industries. The internet is a revolutionary communications tool that puts the many in touch with the many, stimulating innovation and education, rapidly accelerating information dissemination and connecting communities across geographical boundaries. Its structure as a "network of ends" relies on internet service providers acting as simple intermediaries, as mere conduits of data, and not as the information police. There can be no doubt that this new technology changes the game for the creative industries. However, drawing on examples from other creative and media sectors, we believe that the best way for the creative industries to prosper in this new information environment, is if they innovate with business model change, not seek to maintain the old world through legislative fiat.

## Illicit p2p is not a law enforcement problem

According to estimates cited by the BPI[3], the UK is home to around 6.5 million people who share unlicensed copyright files over the internet using peer to peer networks. This is roughly 10% of the UK population. Rather than demonstrate the underlying criminality of UK citizens (as an aside, we note that with regard to private downloading copyright infringement remains a civil law issue, and not a criminal law issue), we believe that these astonishing figures indicate a market that is not being served.

The Open Rights Group does not condone illicit peer to peer filesharing. Current economic thinking dictates that we can reasonably expect the market to supply what consumers demand. Why has this not happened in the case of recorded music? A brief overview of the mechanism of copyright should serve to answer this question, and in doing so highlight the mistake Government is making when framing the problem of illicit filesharing as a law enforcement one.

### Copyright as market intervention

Copyright is a time-limited monopoly right granted to creators of specific types of work. It is granted by the state in order to incentivise creators (and those who invest in them) to produce work by allowing them to assign exclusive control over, for example, who can broadcast, display or distribute that work for a limited time. It does so to mitigate against the reality that creative works have a low marginal cost of reproduction, meaning that, without copyright in place, one creator could invest a significant amount of time and effort in creating a work, only to see free-riders hijack that investment by reproducing the work at a low marginal cost and bagging the profits.

As Gowers so rightly observed, so long as policy-makers maintain the balance between the public's interest in access to works, and the creator's interest in being recognised and remunerated for that work, copyright is fit for purpose. Problems arise, however, when new technologies emerge that challenge the business models of incumbent intermediaries. In this sense, illicit peer to peer filesharing is nothing new. The history of the development of communications technology is accompanied by a history of rightsholders and their

[3] See eg http://news.bbc.co.uk/1/hi/technology/7452621.stm

incumbent investors complaining with much hyperbole to legislators that these developments will kill the creative industries, from composer John Phillip Sousa complaining to the US Congress in 1906 that player pianos:

> "are going to ruin the artistic development of music in this country...The vocal chord will be eliminated by a process of evolution, as was the tail of man when he came from the ape."[4]

...to Jack Valenti, as President of the Motion Picture Association of America, testifying before the US House of Representatives in 1982 that:

> "the VCR [video cassette recorder] is to the American film producer and the American public as the Boston strangler is to the woman home alone"[5]

With historical perspective, we can see these complaints for what they are – the rallying cries of those unwilling to adapt their business practices to new technology. Given the benefits that these technologies have since delivered to the global creative industries, it is clear that the solution to new technology is to find business practices that suit it. For understandable reasons, incumbent distributors may be unwilling to move away from tried and tested income streams to new pastures. But just because copyright allows these types of businesses a necessary escape from the free market in one respect, it should not in all respects. Legislators must be decisive in their intention not to stifle innovation around business practices in the creative industries.

## What a market solution should look like

We welcome the third principle outlined in the Memorandum of Understanding supplied as Annex D of this consultation:

> "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."

A recent study commissioned from the University of Hertfordshire by British Music Rights[6] indicates that 80% of those currently downloading music illicitly would pay for so-called "legal p2p" - properly licensed and competitive filesharing alternatives. Were this 80% to migrate to licensed p2p services, additional revenues delivered to the recording industry would be substantial, and the enforcement challenge would be radically different.

However, we do not believe that the adoption of principle 3 of the MoU will inevitably lead to this ideal situation. Putting aside the question of cost, since the overwhelming majority of illicit filesharers have indicated a willingness to pay in order to "go legit", in order to be attractive, any alternative to illicit filesharing must deliver the full range of benefits accorded by the new technology in question. In the box overleaf, we provide 7 principles outlined by

[4] Arguments Before the Comms. on Patents of the S. & H.R., Conjointly, on the Bills S. 6330 and H.R. 19,853, to Amend and Consolidate the Acts Respecting Copyright, 59th Cong. 24 (1906), as reported in Wu, T, Copyright's Communications Policy. Michigan Law Review, Vol. 103, p. 278, November 2004

[5] http://cryptome.org/hrcw-hear.htm

[6] http://www.bmr.org/cms/uploads/files/UoH%20Reseach%202008.pdf

## Fred Von Lohmann's 7 principles

**Voluntary for Music Fans.** People who do not share music shouldn't have to pay for a license they don't need. After all, we don't have a "music tax on restaurants." Restaurants are free to experiment with no music, public domain music, or CC music, as they see fit. Internet users should have the same freedom. But this means that there will still be some enforcement against those who don't pay but keep downloading. That seems fair, and enforcement to get people to become paying subscribers will look very different from today's "mount a few heads on spikes to scare the rest" approach being used by the RIAA and MPAA.

**Voluntary for Artists.** Artists shouldn't be forced to participate if they don't want to. That said, the vast majority of creators and rightsholders will likely opt in, rather than opt to sue individual Internet users. After all, 99% of all songwriters are members of one of the three performing rights organizations (PROs) we have today. It sure beats having to find and sue every radio station every time it plays your song.

**Not a Collecting Society, but Collecting Societies.** Freedom of choice for artists only means something if they have options to choose among. Competition is critical to keeping collecting societies honest and transparent. If you compare the three PROs that service songwriters in the US to the unitary, government-backed collecting societies in the rest of the world, our system wins hands down on these fronts.

**Voluntary for ISPs.** There is no need to force ISPs to offer blanket sharing licenses to music fans. Some ISPs will voluntarily bundle the license with their offerings ("buy the all-you-can-eat music package for $5 more"), some ISPs may choose not to. Universities might choose to buy campus-wide licenses in bulk in order to stop the RIAA's college litigation campaign. Software companies like LimeWire might choose to bundle the license fee into their software, paid either by subscription fees or advertising. At the end of the day, it's the individual fan who needs the license, and she should have lots of ways to buy it.

**All the Music, From Anywhere.** Music fans have made it clear that they are going to use whatever software they like, to download anything that can be found in any "Shared" folder on the planet, including the unauthorized concert recordings, the rarities, the old b-sides, and the alternate takes. It's time to figure out who should be paid for them, rather than wishing for a world where you can somehow make them disappear.

**Technology Agnostic.** Linux, Mac, Windows, iPod, cell phone. Downloads, streaming, buffered streams. Music fans want their music in whichever format, on whichever device, works best for them. Once you've paid, it's nobody's business where your music comes from or where it ends up. It should go without saying that DRM is has no place in this future.

**Protects Privacy.** Paying for music sharing shouldn't entail giving up your privacy. While the collecting societies will need to have some metrics of popularity in order to divide up the revenue pie, we should take our cue from television, where we divide up huge advertising revenues by relying on sophisticated sampling systems like Nielsen's. Sampling and surveys are good -- a perfect census of what every person listens to is not.

*Taken from "Monetizing File-Sharing: Collective Licensing Good, ISP Tax Bad", available at http://www.eff.org/deeplinks/2008/03/monetizing-file-sharing-collective-licensing-good-isp-tax-bad*

the Electronic Frontier Foundation[7]'s Senior Staff Attroney, Fred Von Lohmann, against which we believe legal offers need to measure up.

We call on the Government to halt all regulatory intervention with regards to illicit filesharing until such time as industry has delivered services which satisfy these principles, when we submit that the remaining enforcement challenge will be radically different.

## The options for enforcement

The question of how Government might address illicit filesharing has been the subject of speculation for some time, thanks in part to the contents of recommendation 39, and also to the French "Olivennes Agreement" mentioned in Annex C of the consultation document, which advocates a so-called "3 strikes and you're out" approach to copyright enforcement online. The Prime Minister acknowledged this in a recent response to a petition submitted to Number10.gov.uk:

> "Unfortunately, much of the media reports around this issue have been incorrect. There are no proposals to make ISPs liable for the content that travels across their networks. Nor are there proposals for ISPs to monitor customer activity for illegal downloading, or to enforce a "3 strikes" policy.
>
> Instead, we are focusing on an approach that:
>
> - educates consumers and citizens about the importance of recognising and rewarding content and the dangers of unlawful downloading;
> - encourages the content and telecoms industries to concentrate on ensuring that content is made available to consumers in a variety of attractive packages; and
> - takes action to ensure that where file sharing still happens people are made aware of the unlawful nature of their actions and effective mechanisms for dealing with repeat offenders are identified."

The consultation document mentions in passing several possible such "effective mechanisms" including "to warn, suspend, or terminate the Internet accounts of file-sharers" (which, to us, sounds very much like a "3 strikes policy"), and yet the consultation questions tend to focus on the regulatory format of enacting these mechanisms, rather than asking whether such mechanisms will be efficient, effective, proportionate or just.

This appears to be because signatories to the MoU annexed to the consultation document are, concurrently with this consultation process, meeting behind closed doors to thrash out what these "effective mechanisms" will be. We are deeply dissatisfied that no consumer voice is sat around this negotiating table, and that OfCom are instead expected to represent the consumer interest, at one and the same time as chairing the meeting. We express our disgust at this apparent disregard for the consumer interest.

Although we would assume that any effective mechanisms identified by this clandestine process be the subject of proper public consultation at a later stage, just in case the

[7] The Electronic Frontier Foundation is a digital rights advocacy group based in the United States

legislature is disillusioned enough to believe that choosing how to enforce the law is a simple matter of corporate fiat, we take the opportunity here to identify and critique "effective measures" identified in the consultation document.

We then evaluate the regulatory formats proposed by the consultation document.

## Mechanisms

In the ten years the international recording industry has been fighting peer-to-peer filesharing, every development in enforcement has been matched by a development in technology that circumvents it. The best known example of this is the development of decentralised p2p networks like Gnutella and Kazaa, after the centralised server system of the original Napster was ordered to be shut down by the US courts in 2001.

Now that legislators are beginning to consider targeting individuals based on information ISPs can provide about their activities online, third generation, encrypted and, to a certain extent, anonymised p2p networks are beginning to emerge that will circumvent these tools, such as ANts, I2P and the Japanese system Perfect Dark. Although these third generation systems are currently yet to reach the mass usage stage, thanks to the overhead incurred by anonymisation procedures, in countries with fast broadband connections, like Japan, these systems are already proving popular.

### *Disconnection*

The consultation document notes that:

> "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."[8]

Disconnecting people from the internet for engaging in illicit file-sharing is, we believe, a wholly disproportionate sanction. It would deny people access to a range of services beyond simply accessing content (lawfully or unlawfully) – from communications services to public services to commercial services such as online shopping.

In this respect, it is instructive to understand current practice with regards to who society deems it appropriate to disbar from the internet. In a small number of cases, courts have found it appropriate to disbar convicted sex offenders from the internet[9], or to prevent them from accessing certain internet tools, such as chat rooms[10]. Is BERR really suggesting that 6.5 million UK citizens are as much of a threat to society as these convicted child abusers?

Disconnection would unjustly affect entire households when only one member of that

[8] Consultation document, p35
[9] See http://www.theregister.co.uk/2004/01/16/paedophile_gets_fiveyear_net_ban/
[10] See http://www.theregister.co.uk/2004/07/22/paedo_net_ban/

household may or may not have committed an offence. It may also affect entire households when no member of that household had committed an offence, for example if the household is running an open wifi connection which was being accessed, or "piggy-backed" from elsewhere.

Notwithstanding these substantial issues, we wonder as to the practicalities of this proposed sanction. What mechanism does Government propose to have in place to ensure that those disconnected by one provider do not immediately sign up with another? Do they propose to simple ignore this problem, putting those providers who diligently apply the sanction at a competitive disadvantage to providers who are less diligent? Or do they propose to maintain a centralised blacklist? Blacklists present administrative issues with regards to competition law. Further, as demonstrated by the controversial no-fly list maintained by the United States government, of individuals not permitted to board a commercial aircraft for travel in the United States, blacklists present a remarkable number of false positives which can lead to "lengthy costly legal action" such as the case brought against the US Government in 2004 by the American Civil Liberties Union.

In this respect we note that cutting of household electricity supply could be an easier option since it would be harder for repeat infringers to sign up with another service provider. We hope that the disproportionate nature of that sanction serves to underline how ludicrous a sanction we consider internet disconnection to be. In these increasingly wired times, turning off someone's internet connection could be as serious and as damaging as turning off their electricity supply.

BERR is in danger of advocating a policy that stands in stark contrast to policy with regards to internet connection as pursued by the rest of this administration. Research published by UK Online Centres reveals that those with access to the internet were likely to perform better academically, and that computer/internet use commands significant salary premiums[11]. Government has recognised the important social benefits the internet can deliver UK citizens by investing considerable amounts in ensuring internet access for all UK citizens. Government investments in the internet space include DirectGov and the UK Online Centres network, as well as the newly outlined £300 million scheme "Broadband for All". Announcing the programme on 21 October this year, Schools minister Jim Knight said:

> "There has to be a culture where families see home access is as important as making sure their children have pen, paper and calculator at school. The bottom line is that having home access to the internet or a computer is no longer an optional extra for school work – it is fast becoming essential."[12]

We question why BERR does not appear to share this view that the internet is an essential tool, and seeks to pursue a policy that could disconnect as many as 6.5 million homes from the internet for committing a civil offence. Why would Government, having invested so

[11] *Economic benefits of digital inclusion - building the evidence* UK Online Centres, April 2008, available at http://www.ukonlinecentres.com/corporate/images/stories/downloads/economic%20benefits%20of%20digital%20inclusion%20-%20building%20the%20evidence.pdf

[12] See http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2008_0234

much in getting UK citizens online, now seek to systematically disconnect vast swathes of them in order to protect the business models of an industry that refuses to innovate?

***Filtering / watermarking and traffic management***

The consultation document notes that:

> "Some form of effective sanction is needed to ensure that the more serious infringers can be stopped...solutions [might include] technical measures such as traffic management or filtering and marking of legitimate content to facilitate identification..."[13]

Neither filtering / watermarking nor traffic management can, from an informed perspective, be described as an "effective sanction". And both proposed sanctions present a number of unavoidable ancillary issues.

The feasibility of filtering as a way to combat repeat infringers is simply illusory. Repeat infringers will simply (and indeed have already started to) encrypt illicit traffic. No filtering system - no current one, nor one that, as an organisation which includes several distinguished computer scientists among our number, we can conceive of - will be able to deal with this.

The first problem is that the encryption layer means that it is impossible to distinguish between illicit traffic and the many legitimate uses of p2p technology. Since p2p is an excellent architectural choice for content distribution, reducing costs and avoiding bottlenecks (high profile uses of p2p include the BBC's iPlayer, distribution of free software such as Red Hat's Fedora, and Blizzard Entertainment's employment of p2p for features of the popular game World of Warcraft), we think it would be extremely disadvantageous to UK business and UK citizens for p2p solutions to become unavailable.

The second problem is that the current level of detection is very variable, and all of the "carrier class" filtering systems (suitable for ISPs) are unable to reliably detect one or more of the most common p2p protocols. The short term outlook must be that illicit traffic will migrate to the systems that are not detected. In the longer term it remains a matter of academic debate as to whether, as p2p systems evolve to hide current tell-tale traits, the use of a p2p system will be detectable at all.

Hence deployment of filtering systems, of any kind, by the ISPs (whether at the expense of the tax payer or the consumer), would in practice be for nothing.

This notwithstanding, filtering presents enough ancillary issues for it to be thrown out entirely. Filtering will throw up false positives, that is, it will filter material that should not be filtered, either because it is being accessed by the user under one of the limitations and exceptions to copyright law, or simply through error. In this respect we note the continued failure to develop products which effectively filter spam at the network level and gently suggest to BERR that there is a technical truth underlying this. It is also, in our view, simply bad practice to establish the architecture of a filtered net on simple freedom of expression

[13] Consultation document, p30

grounds. Such an architecture will inevitably be subject to mission creep.

Traffic management is also an ineffective mechanism for the simple reason that traffic related to illicit filesharing can easily be disguised to look like something else. Managing traffic either in respect of the individual connections of repeat infringers (for which all the problems related to proportionality detailed in our section on disconnection apply) or in respect of the entire network, whilst missing disguised traffic, target perfectly legitimate traffic, including p2p traffic that represents legitimate information and content exchange.

ISPs want to and do engage in traffic shaping. Such practice, as OfCom have recently established, should be transparent and communicated in an effective way to the consumer. But traffic management targeted at repeat infringers will not work.

### *Notification*

We accept that notification may have some part to play in reducing the incidence of illicit p2p filesharing, provided that it is done in a manner consistent with European Data Protection law, and that a way can be found to pay for it that does not adversely affect consumers.

We note with concern recent reports that significant numbers of people have been falsely notified of filesharing (and threatened with court action) by games firms. In one case, a letter alleging copyright infringement was sent to a household giving them the chance to pay £500 compensation or face a court case. The couple involved, aged 54 and 66 respectively, told *Which?* Magazine:

> "We do not have, and have never had, any computer game or sharing software. We did not even know what 'peer to peer' was until we received the letter."[14]

Under existing sanctions imposed by the E-Commerce Directive, some rightsholders have gained a reputation for notifying on the basis of flimsy evidence, or motivated by concerns other than protecting intellectual property. There have been several cases of rightsholders taking advantage of legally expedient routes to remove content from the internet created to efficiently protect copyright online, in order to suppress legitimate free expression[15].

ORG would be keen to see legal sanctions against those who falsely accuse individuals of illicit p2p activity. The US Digital Millennium Copyright Act procedures provide a good template. An analogue in UK law would be to oblige the notifying party to make a statutory declaration, which attracts criminal liability.

## Regulatory formats

The bulk of the BERR consultation appears to focus on the regulatory format of legislative

[14] See http://news.bbc.co.uk/1/hi/technology/7697898.stm

[15] The US website *Chilling Effects* (http://www.chillingeffects.org) details 60 “notice and takedowns” for copyright infringement submitted by the Church of Scientology. Also see: http://www.newstatesman.com/scitech/2008/09/copyright-scientology-youtube

options to address illicit peer to peer filesharing, rather than on the content of such legislation, or, more specifically, to the types of obligations Government intends to put on ISPs to act against repeat infringers. As we have outlined in our response so far, we do not believe that legislation is the best way to reduce the amount of illicit filesharing that takes place in the UK, and further, it is our considered and informed opinion that all of the sanctions briefly mentioned in the consultation document fail to meet the proportionality and effectiveness tests.

All of the above renders a consultation on regulatory formats moot. Nonetheless we attempt to address some of the questions posed by the consultation in the following section.

The consultation asks:

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

In fact the list of issues presented by the consultation omits two vital benchmarks , which we will call “encouraging innovation” and “delivering money to artists”. We are deeply shocked that the consultation omits to consider these factors, and we are lead to question what exactly BERR wants to achieve by this consultation, and by any legislation that is informed by it. Is the object to nurture the UK’s creative industries? To maximise potential revenue streams for young talent? Or is it to prop up a section of industry – record labels – that refuse to adapt their business practices to new technology, no matter how much artists and consumers suffer?

***Self regulatory and co-regulatory approach***

We remain dissatisfied with the self-regulatory approach advocated by the consultation paper and underpinned by the MoU in Annex D. Thanks to the lack of engagement with consumer groups during the MoU drafting process, this approach is unlikely to deliver solutions with adequate protection for consumers, for example around standards of evidence, or routes of appeal. We remind BERR that consumers are reluctant litigants, and that alternative dispute resolution mechanisms remain complex and unproven.

Consumers should be around the negotiating table now. Regardless of whether the Codes of Practice currently being developed by MoU signatories eventually feed into a self-regulatory or a co-regulatory approach, it remains the case that consumers have been entirely absent from these discussions. This is highly likely to preclude consumer groups from meaningfully feeding into the Codes of Practice at a later stage, and initiating measures that protect consumers, since negotiating parties will be naturally unwilling to revisit their positions.

We are also sceptical about the order in which issues around the complex legal, technical and economic problems underlying illicit filesharing have so far been approached. Negotiating parties (not to mention this consultation) seem content to discuss obliging

ISPs to enact sanctions, without being clear what those sanctions might be. This could lead to a Trojan horse effect, where legislation is enacted that obliges ISPs to act, and that action is governed by a Code of Practice that is subject to change and susceptible to capture by the interests of one or other negotiating party, harming consumers and the creative economy in the process.

We welcome the participation of OfCom in the MoU process, but we do not find that their participation is sufficient to mitigate our concerns. Our private communications with officials at OfCom indicate that they are unsure of their role in the MoU process, and unsure of the best approach to take to these negotiations in order to protect consumers. This is unsurprising. OfCom are not content regulators in the internet space. Further, they do not have an adequate picture of the benefits of an open internet to society and the economy developed through research either quantitative or qualitative. They are thus unable to engage in evidence-based policy-making in this space.

While co-regulatory structures supposedly provide greater democratic legitimacy through participation of government in the process, this co-regulatory process is an example of exactly how not to do things. The lack of consumer participation (and that of other stakeholders such as the Information Commissioner's Office) means the result will be highly unsatisfactory.

If Government wish to pursue a co-regulatory approach, we would advise them to restart the process, involving at least the Open Rights Group, Consumer Focus, UK Online Centres and the Information Commissioner's Office. We would further advise the Government to commission an evidence-gathering exercise at OfCom so that they might at least be able to understand what it is they are being asked to regulate.

We now turn to evaluating the other options proposed by the consultation. This analysis should not be understood to prejudice our conclusion above that no effective, proportionate sanctions have yet been, or are likely to be, identified.

### *Option A1*

> "Streamlining the existing process by requiring ISPs to provide personal data to a given IP address to rights holders on request without them needing to go to Court."

This option is unacceptable.

The Data Protection Act should preclude any such process of streamlining. If it doesn't, then pursuing this option will instead add to the pressure building in Brussels to take legal action against the UK for its failure to implement the Data Protection Directive correctly.

In practical terms, this option will expose consumers to harassment from rightsholders, who, it appears, will be judge and jury as to the standards of evidence required. The Norwich Pharmacal process, the route through which rightsholders currently obtain personal data to a given IP address, provides the minimum consumer safeguards. The bar should not be lowered further.

### *Option A2*

> "Requiring ISPs to take direct action against users who are identified (by the rights holder) as infringing copyright through p2p."

This option is also unacceptable.

Although this option does avoid data protection issues, it does not avoid the perils of turning rightsholders into police, judge and jury. This option will again expose consumers to harassment from rightsholders. How will rightsholders be made to have a stake in the social and economic harm associated with false accusations? How will consumers seek redress?

### *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."

This option should be subjected to a rigorous cost-benefit analysis if it is to be further considered.

Although third party bodies presiding over disputes in the online space (such as the Domain Name Resolution Service) have enjoyed some success, we suspect that the issues – technical, legal and economic – involved in illicit peer-to-peer filesharing disputes are too complex to make this sort of approach any more cost-efficient than the existing court process. The cost-benefit analysis should include costs incurred to consumers, ISPs, rightsholders, the tax payer, as well as to the creative economy as a whole.

### *Option A4*

> "Requiring the 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 fiultering equipment that will block infringing content."

This option is an expensive waste of time (see section on filtering and traffic management, above).

It's also worth adding that the idea of compelling ISPs to fit equipment operated by third parties that snoops upon the internet traffic of law-abiding citizens, simply to prop up the business model of another economic sector, strikes us as abhorrent.

## The situation in Europe

The consultation documents notes in Annex C that:

> On 10 April 2008 the European Parliament backed an amendment... rejecting calls for filesharers to be barred from the internet.

Ongoing negotiations in the European Parliament and at the Council of Ministers over updates to telecommunications regulations, the so-called “Telecoms Package”, are worthy of note here.

In particular, two provisions that have emerged during these negotiations appear to be laying the foundations for a "3 strikes" approach similar to that being implemented in France under the Olivennes Agreement. The first provision requires ISPs to provide public information, including specifically information relating to copyright and unlawful content. The second provision requires member states to promote cooperation between ISPs and industry sectors affected by the distribution of so-called "unlawful content". What is "lawful content" - or a "lawful service" - remains to be determined by the regulators of each member state. This might be crucial if "information" concerning such actually comes to mean a "warning that you have downloaded, used or accessed such". Further, this uncertainty as to what is "lawful content" is bad both for clarity and harmonisation of consumer access rights across the EU. The reference to "lawful services" is also crucial. For example, is Tor or Freenet a lawful service, because it is a tool that could be used for beneficial social actions, such as whistle-blowing, or is it unlawful because it can be used to assist in copyright infringement?

Although Member States may yet not be obliged to implement these provisions in domestic law, it is by no means clear at this stage that they will be optional. Further, negotiations at Council of Minister level indicate a will on the part of some Member States to underline these provisions.

MEPs recognised the concerns raised by these provisions at a plenary vote of the European Parliament in September, when they voted in favour of inserting further provisions intended both to protect the consumer interest in access to a transparent and unfiltered internet and to provide safeguards for the human right to due process and judicial oversight of a sanction as important as disconnection. However, according to a leaked Council of Ministers document[16] these provisions are likely to be removed at Council of Ministers level. Specifically, a requirement known as EP Amendment 138 - which said that "restrictions could not be placed on fundamental rights and freedoms of end users" - like freedom of expression  and access to education - "without a prior judicial ruling" - has just apparently been removed, according to the leaked Council of Ministers version of the Framework Directive. A similar amendment (EP Amendment 166) demanding proportionality when restricting users' rights, has also been removed.

The Open Rights Group is concerned that this state of affairs indicates an irresistible force towards a pan-European 3 strikes approach, driven by a French Presidency concerned with legitimising its own poorly thought-through domestic policy. We would urge the UK to use their position at the Council of Ministers to counter this force. As we have outlined, a position with which the European Parliament appears to agree, the 3 strikes approach - quite aside from being ineffective with respect to delivering the best opportunities for the UK creative industries - is fundamentally incompatible with human rights.

[16] See http://www.iptegrity.com/index.php?option=com_content&task=view&id=185&Itemid=9

## Recommendations for action

We call on the Government to halt all regulatory intervention with regards to illicit filesharing until such time as industry has delivered competitive services designed to satisfy consumer demand for recorded music in the digital age (with reference to Fred Von Lohmann's 7 principles), when we submit that the remaining enforcement challenge with regards to illicit p2p will be radically different.

In all matters of policy change, it is advisable to test the matter by starting with the law as it stands, and seeing whether a case for change has been made.

If a rightsholder detects that someone is infringing his copyright by downloading or uploading his work, but only an ISP can supply information that will or may lead to the suspected infringer, then the rightsholder can apply to court for a Norwich Pharmacal order compelling the ISP to provide such information as is available about the suspected infringer. The ISP is entitled to insist on the protection of an order, as the information is confidential. The court should check that the evidence justifies the making of an order. This process at least compels the rightsholder to make a statement of the facts in a context where lies can lead to sanctions.

The information provided by the ISP may lead to the name and address of the account holder. If the account holder denies responsibility, the Norwich Pharmacal process can be repeated to oblige the account holder to provide whatever information is available; or the rightsholder can seek an order for the examination of computers at the account holder's address to see whether that produces evidence of who was responsible.

This process, with its dependence on establishing justification for interference with the privacy of those affected, stands a decent chance of leading to justice. It is expensive, and its cost will fall heavily either on those found to be infringers or on the rightsholder whose efforts fail to find an infringer. But interfering with privacy shouldn't be cheap and easy; and those infringers who shelter behind rights of privacy can hardly complain at the cost of breaches which they make necessary.

The cost and inconvenience of these procedures has the advantage that they will be reserved for cases where they are justified. If this means that numerous small infringements will escape sanction, that may reflect a fair balance between the impact of small infringements and the defence of privacy. That balance will be part of what gives rightsholders the incentive to develop new business models.

Those who seek to alter the balance to make enforcement cheaper, more arbitrary and less respectful of privacy rights must show a sufficient justification. We do not believe that this has happened.

Instead, the consultation describes a problem which we have adequate evidence to conclude could just as easily, and considerably more profitably for everyone concerned, be

solved by market forces. Those content industries who have gone cap in hand to Westminster and Brussels to have legislation enacted which they believe will allow them to continue to profit from 20th century business models in the 21st century, must be turned away, and forced to innovate. Were this to take place, the additional revenues delivered to the recording industry would be substantial, and the remaining enforcement challenge would be radically different.

## About the Open Rights Group

The Open Rights Group is a grassroots digital rights advocacy group based in the UK. It aims to increase awareness of digital rights issues, help foster grassroots activity and preserve civil liberties in the digital age. It is funded by individual donations and small grants.