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Review

Commercial Dispute & Resolution



Digital Britain Report – Taking action against illegal file sharing

Lord Carter's final Digital Britain report was released yesterday (16 June 2009). The conclusions it reaches will directly affect stakeholders across the technology and media industries, including sport, music and media rights-holders and broadcasters, and ISPs.

The Culture Secretary, Ben Bradshaw yesterday proposed new legislation to curb unlawful file sharing:

"The ease...with which digitised content can be copied makes it increasingly hard to convert creativity and rights into financial reward. The government believes that taking someone else's property and passing it on to others without consent or payment is tantamount to theft.

"Developing legal download markets will best serve both consumers and the creative industries. But we will also legislate to curb unlawful peer-to-peer file sharing. Ofcom will be given a new duty to reduce significantly this practice, including two specific obligations: the notification of unlawful activity and, for serial infringers, identity release to allow targeted legal action by rights-holders.

"We also propose technical measures by internet service providers, such as bandwidth reduction for serial infringers, if the other measures prove insufficient."

Notably, the Government does not propose to introduce a "3-strikes" policy obliging ISPs to disconnect users, nor to require ISPs to monitor the activity of their customers. The Government has also acknowledged that the issues of commercial piracy, websites encouraging unlawful copying and format-shifting will be addressed separately by the Department of Business, Innovation and Skills and the UK Intellectual Property Office.

The Digital Britain report states that the new measures are intended to result in a targeted 70% reduction in the incidence of unlawful file sharing. The measures will, in short, *"create an enforcement climate that will focus consumers on legal sources of content rather than unlawful ones."* The Government has now launched a formal

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consultation on the new measures – the closing date for responses is 15 September 2009.

THE NEW MODEL

The proposed legislation will place a duty on Ofcom to take steps to reduce copyright infringement. Ofcom will be required to place two specific obligations on ISPs:

Notification Obligation

ISPs will be obliged to notify individual account-holders that they are behaving unlawfully on receipt of appropriate evidence of this from a copyright rights-holder. The notification must set out details of the alleged infringement and set out certain advice and information. This idea is based on evidence cited by BERR that a single such warning can cause around 70% of recipients to cease illicit file sharing. ISPs and rights-holders will jointly contribute to fund the costs of this obligation, but the precise split is yet to be determined.

Serious Infringer Obligation

ISPs will be obliged to maintain data based on the number of times they have been requested to send notifications (see above) to each of their customers by each rights holder.

Rights-holders will be able to request such data from ISPs to see who, on an anonymised basis, has received the highest number of notifications at any given point (i.e to identify serious infringers, but not to obtain their personal details). The rights-holder could use that as the basis to go to court to get an order for the release of the account-holder's personal details in order to take legal action.

The Digital Britain report noted that a power already exists under section 97(A) of the Copyright, Designs and Patents Act 1988 for rights-holders to apply to the High Court for an injunction against an ISP which has actual knowledge that another person is using its service to infringe copyright, but that this provision has never yet been tested in the courts.

It is proposed that rights-holders will meet their own costs in taking action against infringers, but ISPs will meet their own costs in collecting, maintaining and processing data in relation to this obligation.

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WORKED EXAMPLE

The consultation paper included the following example of how the notification process and possible court action could work:

1. *Rights holders identify cases of infringement and send details including IP addresses to ISPs.*
2. *ISPs verify standard of evidence and link infringement to subscriber account.*
3. *ISPs send (multiple) letters to subscribers identified as infringing. Those identified as the most frequent added to the serious infringers list.*
4. *Rights holders use the serious infringers lists as the basis for a large scale "Norwich Pharmacal" order to obtain the names and addresses of those on the list.*
5. *Rights holders send "final warning" letter direct to infringer asking them to stop file sharing. Clear warning of likely court action if warning ignored.*
6. *Rights holders take court action against those who ignore final warning.*

Ofcom will also be given the power to specify, by Statutory Instrument, other technical measures to be imposed on ISPs aimed at preventing, deterring or reducing online copyright infringement. These may include:

Ofcom's backstop powers

Ofcom will also be given the power to specify, by Statutory Instrument, other technical measures to be imposed on ISPs aimed at preventing, deterring or reducing online copyright infringement. These may include:

- Blocking of specific websites, IP addresses and URLs;
- Protocol and port blocking;
- Bandwidth capping (capping the speed of a subscriber's Internet connection and/or capping the volume of data traffic which a subscriber can access);
- Bandwidth shaping (limiting the speed of a subscriber's access to selected protocols/services and/or capping the volume of data to selected protocols/services); and
- Identification and filtering of internet content being uploaded and downloaded.

This power would be triggered if, and only if, the two ISP obligations above do not succeed in significantly reducing the level of unlawful file sharing (i.e. at or close to the target of a 70% reduction). This will be measured against a baseline level 6 and 12 months after the new powers have entered operation.

DIGITAL RIGHTS AGENCY

The Government recently consulted on the role of a new Digital Rights Agency ("DRA"). This will be a self-regulatory body formed by stakeholders in the industry, which the Government hopes will come into being to draft a new Code of Practice with which ISPs and rights-holders who want to trigger the ISP obligations (see above) must comply. Ofcom will have the power to fine ISPs for failure to comply with the Code, and if rights-holders do not comply with it when making requests to ISPs, those requests will be void.

It is anticipated that the DRA will have a draft Code in place for Ofcom to approve by the time the legislation is passed. The Code will provide greater detail to support the legislative obligations set out above. For instance, it will:

- specify what level of evidence is appropriate to trigger the notification obligation (at a minimum, this should establish an infringement on the balance of probabilities) and what must be covered in the notification;
- apportion the costs of any action, including notification, covered by the Code; and
- provide for an appeals process for consumers and a dispute resolution mechanism between rights-holders, consumers and ISPs.

However, the Digital Britain report acknowledges that "*there needs to be a backstop power for Ofcom to impose its own code if it is satisfied that the industry cannot produce, and has no immediate prospect of producing, a code itself.*" Indeed, Ofcom will be required to do so if the DRA fails to produce its own satisfactory code.

The consultation document admitted that outside the area of drafting the Code, there had been no consensus amongst industry stakeholders on the role of the DRA. However, it suggested that such a role might "*develop organically*" over time, and could, for example, see the DRA acting as an agent for rights-holders in pursuing civil actions.

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The DRA could also undertake the role of identifying a list of illegal sites to which access would be blocked, if industry members wished it to do so, but the identification of such sites would need to be subject to *"appropriate court processes to ensure that they were indeed operating illegally before ISPs could be obliged to block them."*

There is no intention to place the DRA on a statutory basis for the purposes of addressing unlawful file sharing.

OTHER DEVELOPMENTS

Matched Penalties

The Digital Britain report re-emphasised the Government's intention to partially implement Recommendation 36 of the Gowers Review, which called for the matching of penalties for both online and physical copyright infringement (currently, the penalty for online infringement is less severe than for physical infringement). It is intended that statutory maxima of £50,000 for all IP offences will be introduced by legislation.

Fair Use

Finally, it was also stated that the Government had considered whether there should be *"a modernisation of 'fair use' rights for consumers to reflect the realities of the digital age"*. The current "fair dealing" defences to copyright infringement only allow use of copyrighted material without consent in a number of very limited circumstances. Broadening or revising them could alter the scope of what consumers can legally do with copyrighted content.

The Government has concluded that *"the scope for such modernisation is heavily constrained within the EU copyright framework"*. Although limited amendments to the copyright exemptions regime in areas such as distance learning and the preservation of archive material are under consideration (and will be consulted on later in the year), on the broader issue of modernisation of fair use rights, the report stated that *"further work remains to be done"*. So, on this issue at least, there will be no immediate revolution, but stakeholders should keep an eye out for further developments.

FURTHER INFORMATION

If you would like any more information about the issues raised in this article or to discuss other ways in which we can assist you, please contact Stephen Sampson or Vicky Brown using the contact details below:

Stephen Sampson
Partner, Hammonds LLP
T: +44 (0)20 7655 1481
E: stephen.sampson@hammonds.com



Vicky Brown
Partner, Hammonds LLP
T: +44 (0)20 7655 1420
E: vicky.brown@hammonds.com



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