

department for
**culture, media
and sport**

Next steps for implementation of the Digital Economy Act

August 2011

Our aim is to improve the quality of life for all through cultural and sporting activities, support the pursuit of excellence, and champion the tourism, creative and leisure industries.

Introduction

The Government has published today its response to Professor Hargreaves' Review of Intellectual Property and Growth. The report is clear that intellectual property is of fundamental importance to economic growth, and that maximising its contribution relies on both enabling use of intellectual property and protecting it.

The Government's response makes it clear that the UK copyright regime does need modernising to enable use of intellectual property rights to promote growth and innovation, and we will pursue the recommendations that Professor Hargreaves makes.

Protection and enforcement are other factors which need our attention. Alongside our response to Hargreaves, we have published the UK Intellectual Property Crime Strategy, which sets out how we will better co-ordinate action on intellectual property crime enforcement.

This paper sets out our plans to move forward with implementation of the enforcement measures in the Digital Economy Act (DEA):

- Following a judicial review ruling, we are removing the obligation on internet service providers (ISPs) to contribute towards the costs of Ofcom and the independent appeals body in setting up and administering the regime. We do not intend to revisit the sharing of other costs between ISPs and copyright owners;
- We have received further advice from Ofcom on the potential costs of the appeals system, which we are publishing today. In order to minimise the risk of the system being disrupted by vexatious or non bona fide appeals, we are introducing a £20 fee for subscribers to appeal. The fee will be refunded if the appeal is successful;
- Ofcom's Code, setting out the details of how the DEA initial obligations will work in practice, will be published shortly;
- Following advice from Ofcom - which we are publishing today - we will not bring forward site blocking regulations under the DEA at this time. We will do more work on what other measures can be pursued to tackle online copyright infringement.

Why we need to take action

Most recent data indicates that £65bn was invested in intellectual property rights in 2008, and 75% of this investment was in copyright and design¹. The creative industries, which make the biggest use of copyright and design, contribute around £59bn to the economy, supporting over 1.3m jobs directly, and 2.3m jobs including further creative jobs in businesses outside the creative industries². Copyright and the creative industries are, therefore, vital for the future growth of the UK economy. However, online copyright infringement is a potential barrier to that growth.

In a recent industry survey, a third of the sampled online population access music content unlawfully. The music industry estimates that 1.2bn tracks are downloaded unlawfully in the UK each year, compared to legitimate online sales of 370m tracks³. Studies by the film and television industries indicate that over 10% of UK adults consume infringing content online and that piracy costs these industries over £535m per year in the UK⁴. The sports industry also tells us of an increasing threat from the unlawful streaming of sports fixtures.

Almost a third of all online copyright infringement is via peer-to-peer file sharing. We are taking steps to tackle this through the initial obligations – the mass notification system – of the Digital Economy Act⁵.

¹ Farooqui, Goodridge and Haskell (2011) *The Role of Intellectual Property Rights in the UK Market Sector* http://www.coinvest.org.uk/pub/CERIBA/IPRsGrowth/IPO_ROLE_OF_IPRS_26April11.pdf

² Department for Culture, Media and Sport (2010) Creative Industries Economic Estimates http://www.culture.gov.uk/images/research/CIEE_Full_Release_Dec2010.pdf

³ Harris Interactive report for British Recorded Music Institute: http://www.harrisinteractive.com/vault/Hi_UK_CORP_News-BPI-Illegal-Downloading-Serious-UKThreat.pdf

⁴ Ipsos Media CAT (2009) GB Movie and TV Piracy 2009

Implementation of the Digital Economy Act initial obligations

Following the successful defence of the Digital Economy Act provisions in judicial review, we are moving forward with the DEA initial obligations. The claimants have so far been refused permission to appeal against the judgment, but have applied for an oral permission hearing in the Court of Appeal to overturn this refusal. The hearing is scheduled for the autumn. However, the Government remains confident that the judgment will stand, and is pushing ahead with implementation.

There are two key steps to implementation. The first is the approval by Parliament of the Sharing of Costs statutory instrument (SI), which sets out how the scheme will be paid for. The second is the approval by Parliament of Ofcom's Initial Obligations Code, which sets out how the details of the scheme will work. Both need to be notified in draft to the European Commission under the Technical Standards Directive, before being laid in Parliament.

The Sharing of Costs SI was notified in draft to the European Commission in September 2010 and subsequently laid before Parliament in January 2011. However, the judicial review ruling requires us to make a change to the SI in relation to "qualifying costs". At the same time we have concluded that subscribers should be required to pay a fee to make an appeal, which will be refundable if the appeal is successful. We also need to make a technical correction to the drafting of the SI, which does not reflect any change of policy.

Amendment to responsibility for "qualifying costs"

The judicial review ruling stated that ISPs cannot be made responsible for the costs incurred by Ofcom or the independent appeals body in setting up, administering and enforcing the provisions of the DEA ("qualifying costs"). This does not apply to the costs incurred by ISPs in performing their own duties under the DEA, or to appeals case fees. Therefore, we have amended the Sharing of Costs Order to require participating copyright owners to pay 100% of the qualifying costs. We do not intend to revisit the sharing of other costs between copyright owners (75%) and ISPs (25%).

Introduction of a subscriber fee for appeals

Notification letters sent under the DEA will not be a direct precursor to legal action being taken against the subscriber. The notifications are intended to tell subscribers when their account has been identified as infringing copyright and to provide appropriate information and advice, including suitable warning that the copyright owner might take legal action in the event of repeated infringement as they currently can. However, subscribers will nevertheless

be able to appeal against every notification letter received from their ISP, and against every instance of infringement identified.

Ofcom has given us further advice on the potential costs of the appeals system and the possible options for keeping these costs to a reasonable minimum. We are publishing that report alongside this document.

It is clear that a large volume of vexatious or non bona fide appeals claims could drive up the cost of the appeals system by a substantial degree. Naturally, it would be undesirable for these costs to be driven so high that the system becomes unworkable.

Therefore, we have concluded that subscribers should be required to pay a £20 fee to make an appeal. If the appeal is successful, the fee will be refunded. We believe that setting the fee at £20 will serve the purpose of deterring vexatious appeals intended to disrupt the system, but will not have a disproportionate effect on those with legitimate reasons to appeal. We will consider the level of the fee after one year of the notifications being in place, to make sure that it is still appropriate.

Correction of Schedule 3(3)a

We have also corrected a drafting error in schedule 3(3)a of the original published draft of the Sharing of Costs SI. The wording should have referred to the total amount of the qualifying costs to be incurred in the notification period, rather than the total “annual” amount of qualifying costs. This is not a change in policy.

Tackling websites dedicated to infringement

We expect that the DEA notification system will have a significant impact in tackling unlawful file sharing online. However, file sharing is only part of the problem. Just over half of unlawfully accessed content is acquired from illegal MP3 sites, MP3 search engines and links via online forums to cyber-lockers⁶. For the UK to create the best environment for our fast growing creative content industries to develop new ideas and new business models, we need urgently to find a way to tackle these growing forms of piracy – and we need to do this alongside measures to educate users, promote effective markets and modernise copyright laws.

The DEA contains reserve powers to tackle copyright infringing websites through a court based process to block access to these sites⁷. Following concerns raised in the Your Freedom exercise last year, the Government commissioned Ofcom to report on the practical workability of these measures. We are publishing that report today. Ofcom concludes that the blocking of infringing sites could potentially play a role in tackling online copyright infringement, but that the approach set out in the DEA is unlikely to be effective because of the slow speed that would be expected from a full court process. This would provide site operators with the opportunity to change the location of the site long before any injunction could come into force.

The Government will not bring forward regulations on site blocking under the DEA, at this time. However, we are keen to explore the issues raised by Ofcom's report and will be doing more work on what measures can be pursued to tackle online copyright infringement.

The Intellectual Property Crime Strategy⁸ sets out an action plan for Government to tackle counterfeiting and criminal piracy. It will include work on websites that are predominantly used for digital piracy and work with other states to develop international responses to these issues. Together with industry and law enforcement bodies, we are already exploring measures which target the revenue streams of websites dedicated to infringing copyright, such as banning advertising on these sites and withdrawing payment facilities. We also want to work with search engines to investigate how it could be ensured that unlawful sites do not appear higher up in search rankings than legitimate sources of digital content, without distorting legitimate online business or harming fair competition.

⁶ http://www.harrisinteractive.com/vault/HI_UK_CORP_News-BPI-Illegal-Downloading-Serious-UKThreat.pdf

⁷ Digital Economy Act (2010) sections 17 and 18 <http://www.legislation.gov.uk/ukpga/2010/24/contents>

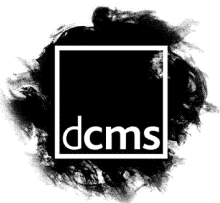
⁸ HM Government (August 2011) *Prevention and cure: The UK IP Crime Strategy 2011*

Next steps

The amended draft Sharing of Costs SI, which we have published today, now needs to be notified to the European Commission under the Technical Standards Directive. This requires a standstill period of at least three months, after which it will be laid in Parliament. Parliamentary timetable permitting, we expect the Sharing of Costs SI to become law at the beginning of next year.

Ofcom's Initial Obligations Code will be published shortly, at which point it will also be notified to the European Commission and then laid in Parliament.

We hope that the first notification letters will be sent to subscribers by the end of 2012



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