



Response of the Communications Consumer Panel to the Government's consultation on legislation to tackle illegal peer-to-peer file-sharing

Introduction

The Communications Consumer Panel was established under the Communications Act 2003 as an independent advisory body. Its role is to influence Ofcom, Government, the EU, and service and equipment providers so that the communications interests of consumers and citizens are protected and promoted.

The Panel agrees with the Government that action is needed to address the problem of illegal peer-to-peer file-sharing. The Panel notes that the Government is proposing a two-stage phased approach:

Phase 1

- Enhance the existing system of civil action by rights holders through the introduction of a system of notifying people suspected of illegal file-sharing and recording details of persistent offenders.

Phase 2

- If the steps taken in phase 1 are unsuccessful, consider whether to move to the introduction of technical measures to restrict or suspend the internet access of serious and persistent offenders.

The Panel's response to the Government's consultation sets out the issues that the Government needs to take into account in implementing the proposed system to ensure that the interests of consumers and citizens are protected. In particular, the response:

- sets out the main findings of the Panel's recent research, which shows that broadband is an increasingly essential part of people's lives;
- sets out the Panel's view that the Government should take a phased approach to tackling illegal file-sharing;
- emphasises that consumer bodies should be involved in developing the proposed Code of Conduct;
- sets out the safeguards which the Panel believes must be built into the system of addressing illegal file-sharing, in particular the fact that technical measures should not be imposed without a court decision;
- expresses the Panel's views on the proposed role of the Secretary of State; and

- comments on the proposed arrangements for funding the proposed system.

Broadband is becoming an essential service

We believe that the Government's approach must reflect the fact that participation in society and the exercise of fundamental rights increasingly depend on people being able to access the internet. The Government's universal broadband commitment recognises the important role that broadband plays in people's lives. The Panel carried out research recently to understand better consumers' views on broadband.¹ This research shows that:

- Most people with broadband at home feel already that they could not be without it. 73 per cent of such people described it as essential or important.
- People with broadband at home value it more highly than their mobile phone, land line or digital TV.
- Most people (regardless of whether they have broadband or not) consider that it is essential for some groups of people to have broadband at home, notably people with school-age children and people who are physically isolated.
- Most people consider that in the near future it will be essential for everyone to have broadband at home. People who do not have it are expected to be at a significant disadvantage. This is because people expect that more vital services will be delivered solely online in the future, or be provided offline in a way that penalises people who access them in this way, perhaps at a higher cost or lower quality. It is expected that people will miss out in respect of a wide range of services and activities: shopping, banking, school work, public services, and downloading TV content.

In line with these findings, broadband will increasingly be necessary in order to use public services. In the recent Digital Britain report the government proposed starting a Digital Switchover of Public Services Programme in 2012, and called upon each Government department to identify at least two such services to form part of this Programme.

The fact that broadband now plays such an important part of people's lives is not inconsistent with action to reduce the amount of illegal file-sharing. But it does mean that such action will gain public support only if people believe that the Government is acting in the interests of consumers, citizens and content creators, and not just in the interests of content rights holders.

Public support depends on a phased approach

The public needs to be reassured that the process involved in tackling illegal file-sharing is fair, reasonable and proportionate. This means taking a phased approach. First of all, the Panel agrees that the Government should enhance the current approach to tackling the problem – through rights holders taking court action against illegal file-sharers – by introducing the system of internet service providers (ISPs) notifying consumers that they are

¹ The Panel's research report *Not online, not included: consumers say broadband essential for all* (June 2009) is available on the Panel's website:

<http://www.communicationsconsumerpanel.org.uk/downloads/not%20online%20-%20not%20included%20-%20June%202009.pdf>

suspected of illegal file-sharing and recording details of persistent offenders. At the same time, Government and industry should:

- inform consumers about the impact of illegal file-sharing on content creators and the content industry in general and this information will need to be underpinned by robust evidence; and
- do more to develop, and inform consumers about, alternatives to illegal file-sharing that are affordable for consumers and allow them to use content flexibly and with a variety of devices.

The Government must give these initiatives a reasonable time to have an impact before considering whether move to the introduction of technical measures. In particular, the suspension of people's internet accounts should be seen as a last resort that is reserved for the most serious and persistent illegal file-sharers as opposed to people who copy content that they have purchased already or who access content that is not available commercially. It is essential too that rights holders should have to obtain a court order before technical measures are imposed. Given that broadband is fast becoming an essential service, it would not be acceptable – and would be counter-productive – if a person's broadband connection could be restricted or suspended without the rights holder needing to prove that they had engaged in illegal file-sharing.

The Government should also note that moving too quickly to the introduction of technical measures or being seen to be acting disproportionately could lead to more use of virtual private networks and encryption. This could make it harder to detect illegal file-sharing and could also make it harder to monitor internet traffic for other purposes, including child protection.

Consumer bodies should be involved in developing the Code of Conduct

The Panel notes that rights holders and ISPs will be required to abide by a Code of Conduct, which the consultation document says will be developed by industry, with Ofcom performing a facilitation role. If industry cannot agree, Ofcom will have powers to impose a code. The consultation document says that the Code will have to:

- provide for a fair and transparent appeals process that provides remedies and redress;
- establish the standards of evidence required to trigger a notification under this proposal;
- set out what has to be covered in the notification and other relevant details about the process including the handling of repeat notifications and, if necessary, the number of notifications that any rights holder can request to be made;
- apportion costs of any action (in so far as not set out in the legislation);
- provide for a dispute resolution mechanism between rights holders, consumers and ISPs; and
- set out the process for the identification of "egregious" infringers (i.e. how data is to be kept and in what form and when rights holders should have access to it in anonymous form before a court order is obtained).

As the Code will contain much of the detail about how the system for tackling illegal file-sharing will work, it should not be developed solely by industry. The Panel believes that bodies representing consumers should be involved in developing the Code and it should then be subject to public consultation. For example, it would not be acceptable for industry to decide what constitutes a “fair and transparent appeals process that provides remedies and redress”, even with input from Ofcom. As well as making it less likely that the process would safeguard consumers’ interests properly, it would be harder to gain public support.

Safeguards for consumers

In the Panel’s view, the following safeguards should be built into the process of tackling illegal file-sharing, either through legislation or the Code of Conduct. In particular, if the Government decides to introduce technical measures it must ensure that there are appropriate safeguards to protect the interests of consumers and citizens:

- Information about the notification process and about how to appeal should be accessible for people with disabilities and those who do not speak English. Also, it should not use premium rate telephone lines.
- Rights holders should have to obtain a court order before they can receive any personal information from ISPs in line with the established *Norwich Pharmacal* process.
- People should be able to appeal if they receive a notification that they are alleged to have carried out illegal file-sharing and believe that it has been sent to them without justification. It should be straightforward and inexpensive for people to make such an appeal. One way of doing this would be for an independent ombudsman to hear appeals. This could be quicker, cheaper and more flexible than relying on the court system. People should also have a reasonable time within which to make an appeal.
- It should not be possible for rights holders or ISPs to take any action to restrict or suspend anyone’s broadband access, i.e. impose technical measures, without a prior judicial decision. The burden of proof should be on the rights holder and ISP, and not the consumer. There should be a ‘presumption of innocence’, meaning that before a court order is granted, rights holders should have to provide cogent evidence connecting the consumer to the alleged copyright infringement and consumers should be given a fair and reasonable opportunity to make representations. The court should also take into account the human rights of the person against whom action is being taken.
- The process should not be weighted towards the interests of rights holders. Whereas it may be straightforward for rights holders to show that it is “more likely than not” that a consumer has carried out illegal file-sharing, it may be difficult and expensive for consumers to then prove otherwise. In practice, someone would probably have to pay for an expert to examine their computer hard drive and then give evidence to the court. To avoid the balance being tilted too far in favour of rights-holders they should be required to ensure that the systems they use to monitor copyright infringements meet a prescribed high standard of accuracy and reliability.
- The Code of Conduct should make clear which technical measures are appropriate, why and under what conditions, including the period for which they would apply.

Plus, rights holders or ISPs should have to give reasons for choosing a particular technical measure, and be able to justify this to the court.

- We note that the Government says in the statement published in August that, “It would be important to ensure as far as possible that innocent people who may be affected by...technical measures would retain access to the internet services they need, including online public services.” The Panel agrees with this and would like to understand how the Government plans how to achieve this objective. It should look in particular at the impact which technical measures would have on households with school-age children, people who are particularly vulnerable and depend on internet access for support purposes, people who use access technology, such as screen readers, in order to use the internet, and people who need internet access in order to run a business from home.
- The Government should clarify the impact that technical measures would have on members of a household other than the person involved in illegal file-sharing. Will another household member be able to enter into a contract with another ISP? How will Government ensure that a blacklisting procedure (formal or informal) does not prevent this?
- A graduated response to applying technical measures may be appropriate, with measures short of suspension being used first. But first of all, we need more research about which technical measures work, and we should learn from any experiences of applying technical measures in other countries.
- There should be a right of appeal against a decision to impose technical measures in relation to:
 - the decision that copyright has been infringed either at all or by the identified subscriber;
 - the nature of the technical measure or measures sanctioned; and
 - the duration of the technical measure or measures.
- An appeal against a decision to impose technical measures should be heard before the measures take effect.
- There should be funding available to lower income consumers to defend themselves against actions to impose technical measures. They should also be able to get funding to pursue appeals, in response to both notifications and decisions to impose technical measures. The ability to mount a defence, and appeal where necessary, should not be limited to those people who can afford it. This is important for people on low incomes and in order to ensure public confidence in the system.

The role of the Secretary of State

The Panel agrees that the Secretary of State should have a two-part power of direction:

- to direct Ofcom to carry out preparatory work on the mechanics of introducing technical measures, including an assessment of their efficacy on different networks, as well as developing the code that will apply to implementing such additional measures, and to consult on their conclusions; and
- to direct Ofcom to introduce the measures they had determined were effective and proportionate should he conclude that such measures are necessary to achieve the overall objective.

Deciding whether to introduce technical measures would involve an element of political judgement and in order for such a decision to carry legitimacy it is right for it to be made by Government. In making this decision, the Government should take into account, and learn from, any experiences of introducing technical measures in other countries.

As well as directing Ofcom to carry out preparatory work on the mechanics of introducing technical measures, the Panel believes that it would be valuable for Ofcom to carry out research to understand better the scale and impact of illegal file-sharing. At the moment there is not a clear and commonly-shared understanding of how extensive illegal file-sharing is and the net impact which it has on content industry revenue. Without this information it would be hard to make the case publicly for introducing technical measures.

More broadly, the Panel notes that in the Digital Britain final report the Government acknowledged that, “on the broader question of modernisation of fair use rights, further work remains to be done.” The Panel thinks that Government should now seek to make progress on this issue, in parallel with action to tackle illegal file-sharing.

Funding the proposed system

The Government’s consultation discusses how the costs of the proposed system should be allocated. In thinking about the costs of the system, it is essential to consider the costs that that will be borne by consumers, as well as by rights holders and ISPs. For example, it will be costly for consumers to defend themselves against actions brought by rights holders, in terms of both time and money.

The Panel has outlined above the safeguards that it believes are necessary to ensure that the system is seen as fair and reasonable, and that consumers are protected properly. These safeguards will be expensive, which makes it important that they are taken into account at this stage and funded properly.

As far as industry costs are concerned, the Panel notes the Government’s proposal that the operating costs involved in sending notifications should be split 50:50 between ISPs and rights holders. We are concerned that splitting the operating costs only may discourage ISPs from making capital investments in reliable systems for issuing notifications. Relying on manual systems instead would probably be more expensive and might increase the risk of error. Also, the idea of sharing the operating costs evenly seems arbitrary. The Panel believes that it would be more appropriate to share the costs on the basis of the benefits that will accrue to rights holders and ISPs respectively as a result of a reduction in illegal file-sharing, with Ofcom arbitrating if necessary.

Conclusions

The Panel supports the Government’s intention to enhance the existing system of civil enforcement by introducing the proposed notifications process. At the same time it should take steps, together with industry, to inform consumers about the impact of illegal file-sharing and the legal alternatives that are available.

The Government should ensure that there are proper safeguards to protect consumers and citizens, both in relation to the notifications process and the process of deciding whether technical measures should be imposed. In particular, technical measures should not be imposed without a prior judicial decision.

Given that the proposed Code of Conduct will contain much of the detail about how illegal file-sharing will be address, it is essential that bodies representing consumers are involved in developing the Code and that it is subject to public consultation.

The Government should recognise the costs that a system with proper safeguards would impose on consumers, as well as on rights holders and ISPs, in terms of both time and money. Such safeguards are expensive, which makes it important that they are taken into account early on and funded properly.

The Government should do more to promote a clear and commonly-shared understanding of the nature and scale of the problem of illegal file-sharing. In the absence of this information, it will be hard for the Government to gain public support for the action that it is proposing to take, particularly the idea of introducing technical measures.

If you would like to discuss the Panel's response, please contact Alistair Bridge: alistair.bridge@communicationsconsumerpanel.org.uk, 020 7783 4195.