

DIGITAL ECONOMY BILL

Online Infringement
of Copyright
Clauses 4-17
December 2009

CAMPGAIGN BRIEFING

which
?

House of Lords 2nd Reading briefing Wednesday 2 December 2009

"What they are doing I believe is bullying people in their hundreds of thousands into paying up for something they haven't done just to make it go away."

"Even though I am innocent of the offence, I was worried sick about the threats of court action and nearly paid straight away. I (like many others) cannot afford to hire a solicitor to help me and without support, how on earth can I argue with a large law firm like this?"

The Digital Economy bill sets out how the Government proposes to tackle online copyright infringement. This briefing - which only relates to clauses 4-17 of the bill - sets out what has already been happening to tackle illegal file sharing and how it might continue despite the Digital Economy bill. It focuses on **how alleged file sharers are identified at the front end of the process** rather than what action to take at the end of this process, ie whether to disconnect or not, though it does make some general comments about the bill's wider impact and purpose.

In recent months, Which? has been contacted by many people who have received what they perceive as threatening letters from law firms on behalf of rightholders demanding large payments to settle a claim against them for illegal file sharing. Instead of copyright holders being required to prove that people are guilty, individuals are expected to prove their innocence or pay up. But the high legal costs of fighting the claims, coupled with the emotional stress of increasingly strident lawyers' letters, makes this an unattractive if not impossible option for most people affected. Which? understands that thousands of consumers have been pursued in this way and that the practice of despatching these types of letters is continuing. The potential combined loss in monetary and emotional terms to consumers affected is substantial and seems set to increase.

Which? does not condone unlawful file sharing. However we are concerned that under the Government's proposals in the Digital Economy bill for dealing with illegal file sharing, consumers will have to pay for a new system that may be neither fair nor effective, and that will allow this appalling practice to continue.

for all consumers

What does Which? want to see in the Digital Economy bill?

- > An independent adjudication system to ensure the right people are targeted, that those who have been wrongly accused have access to a fair, free and quick appeals process and that any penalties are proportionate.
- > A mechanism to require rights holders to use Stage 1 of the proposed new system as outlined in Clauses 4-8, except in cases of actual or likely extreme prejudice, rather than as a first step using lawyers to deal with alleged illegal file sharing.
- > A requirement on Ofcom to formally consult with relevant stakeholders including consumer representatives on the proposed Codes (Clause 8: Initial Obligations Code and Clause 13: Code about obligations to limit internet access).
- > Consumers should not have to pay to appeal. The explanatory notes to Clause 15 state that *most of the costs of subscriber appealsshould be funded by industry*. There is no definition of what *most* means. Which? thinks the costs should be borne by the rightholders.
- > We seek clarification as to why the powers set out in Clause 17 are necessary; for example could they be used to amend liability so that responsibility for infringement lies not only with the actual infringer (where the law currently lays liability) but the person whose internet account it was conducted through - even when that individual had no knowledge of it?
- > strengthen minimum standards for notification¹, ensure they are enforced and if they are not, make them mandatory.
- > ensure that disclosure of customer details can only happen under an explicit court instruction and that the information is held for a limited period of time and that its use is narrowly controlled.
- > rightholders agree not to use the information to scaremonger or threaten customers.
- > the accused have the ability to require ISPs to doublecheck the matching of their details with the IP address evidence presented by rightholders.
- > ensure no "technical measures" (from reducing broadband speed to suspending a customer's account) are imposed on an individual without proper and fair due process including a starting presumption of innocence, the need for the rightholders to prove 'guilt' and a process for ensuring that any sanction is proportionate to the individual's particular circumstances.
- > Only allow "technical measures" to be brought in on the basis of the original 'baseline and trigger' approach set out in the BIS consultation document (June 2009).
- > We do however welcome the bill's requirement on ISPs to notify their customers if their IP address has been associated with illegal file sharing as set out in Clause 4.

¹ There must be a clear emphasis on a consensual approach, a firm understanding that people are innocent until proven guilty and the code should include a model notification letter.

Will Which?'s concerns be addressed by the Digital Economy bill?

1. Identifying the right people

The letters sent out by the law firms involved which we have seen state that the individuals contacted are guilty of illegal file sharing and call upon them to pay a sum of money, prove that it was not them or run the risk of being sued. The way that the correspondence is structured means that individuals are, in effect, asked to prove their innocence rather than copyright holders being asked to prove their guilt.

2. Problems with using IP addresses to identify targets

An IP address is a code that is attributed at a particular point in time to an individual internet connection. However, an IP address is not necessarily specific to a user and there are a number of ways that an IP address can be incorrectly assigned. These include:

- > *Mistaken IP address* - the ISP provides the wrong customer details for an IP address
- > *The IP address is dynamic* - many internet users are given a "dynamic" IP address which is allocated to them only for the duration of a single period of internet use and is then allocated to another user. If there is any confusion over the date and time during which an IP address is allocated, which is easily possible, the wrong person will be identified.
- > *Insecure internet connection* - illegal file sharers use a range of techniques including botnets and wifi hijacking to hijack the IP addresses of other users for illegal activity.
- > *IP address masking* - experienced file sharers can use a range of measures to spoof or mask their own IP address with someone else's resulting in an incorrect accusation.

3. 'Cost' to individuals

Until receiving the letters these individuals claim to have known nothing of any unlawful file-sharing activity but, although innocent, they have paid the money demanded. This is because the high legal costs make fighting the claims difficult if not impossible, they want to end the emotional stress associated with the process or in the case of allegations relating to pornography, they do not wish allegations (even when untrue) to be made public because of the upset and embarrassment it would cause to them and their families.

"If even 1% of those receiving letters make the payment demanded, this company will make a fortune..... I would like to know how people like me are supposed to protect ourselves against this sort of thing...why should I be out of pocket when I have done nothing wrong?"

"..... the threat of branding [someone] a downloader of hardcore gay porn in open court raises fundamental ethical worries."

"I was at my wits end and this situation was making me ill."

"We do not have, and have never had, any computer game of sharing software. We did not know what 'peer to peer' was until we received the letter. We do not even have satellite or cable TV."

"It's distressing to receive such a letter. I've never heard of this game and I've got no idea how to share it. I've searched my computer but it's not there."

"I have received quite a lot of letters...this has caused me many sleepless nights and depression."

Quotes from emails sent to Which?

Counsel for the copyright owners stated at a hearing on 8 June 2009 that those individuals claiming they are innocent have a remedy in that they can seek a declaration from the court that they are not infringing. But this suggestion is ludicrous when ordinary people are involved. The technology used to obtain the evidence will no doubt be disputed and therefore require the presentation of expert evidence and the claims that are being made include complex points of copyright law. All of this adds up to a long and extremely expensive legal case. The average person - and it is average people affected here - does not have the finances or stamina for such an action.

Why should consumers pay for a system that may not work?

Which? supports efforts to address illegal file sharing and welcomes the Government's efforts to develop a system that will reduce threatening and unfair file-sharing claims by rightsholders.

However, we fear the Digital Economy bill may not:

- > provide adequate protection for consumers
- > uphold the law on liability (i.e. that responsibility for infringement lies clearly with the perpetrator - as distinct from the ISP account holder)
- > ensure the method for identifying infringers is robust
- > ensure standards of due process are observed.

Moreover, while the proposals may encourage a move away from employing "private remedies" (e.g. using law firms or private agreements between rightsholders/ media companies and ISPs that provide for the unilateral imposition of measures such as disconnection²), **the new approach is not mandatory so rightsholders can continue enforcement action as before.**

The bill (Clause 8 and 13) sets out some minimum requirements that the codes governing the obligation processes should include. The codes that will govern these aspects will have to be thorough and wide ranging. To ensure this, the bill should require the codes to be drawn up through extensive negotiation between all interested stakeholders. There should be a permanent body established to ensure that the code adapts in light of experience. This should also involve all stakeholders.

In addition, the bill proposes splitting costs between ISPs and rightholders. This will inevitably lead to the costs being passed onto all broadband users - even those not file sharing - in effect a 'broadband enforcement tax'. The result might be that all consumers will be left paying for a seriously flawed system that allows threatening behaviour from rightsholders to continue and at the same time may not actually tackle effectively the underlying problem of illegal file sharing. As already noted, experienced file sharers can use a range of measures to mask their unlawful activities.

What's the solution?

Which? would like to see the Government establish an independent adjudication system (probably connected to Ofcom) to make judgments on unlawful file sharing cases. This would have several advantages over the current situation and the Government's proposals. For example, it would be relatively inexpensive compared to court action, it would give the accused the opportunity to defend themselves without incurring large costs, the adjudicator would have an in-depth knowledge of the evidence and those involved and having examined the evidence from both sides would be able to question the claims of both sides. Sectoral and technological expertise could and should be easily integrated into the adjudication process.

² BBC (2009). 'Anti-piracy music deal for Virgin', pub: BBC website, accessed at <http://news.bbc.co.uk/1/hi/technology/8100394.stm>

Should consumers be disconnected?

Given the uncertainties we have uncovered around the reliability of the investigatory tools and methods set out in this briefing paper, we are reluctant to support the power to suspend internet accounts (Clauses 10-13) at this time. This will not only impact on the accused who are not necessarily guilty, it also impacts on others in the household who have not received any Copyright Infringement Reports (CIR). Given this context, without greater certainty as to the reliability of the evidence gathered, suspension seems a disproportionate power.

Developing new ways to engage with consumers online

Which? believes that an adherence to old business models has meant the media industries failed to adapt to changing technologies and consumption patterns. It left a large unfulfilled consumer demand. New business models are therefore key to reducing unlawful file sharing. There is already evidence that the introduction of new business models (eg Spotify) is reducing unlawful file sharing. These developments need to move faster and further.

Consumer education and information

It is also of paramount importance that, whatever changes are brought by the Digital Economy bill, they should only be implemented in an environment of extensive public education and information about online copyright.

Unfair illegal file sharing claims - what has been happening?

Which? has gathered extensive evidence³ of unfair pursuit of illegal file sharing claims by rightsholders.⁴ Individuals have received lengthy letters stating that they have been implicated in illegal file-sharing and demanding an immediate payment ranging from £400-600. The impact of these claims is highlighted in this letter from a Which? member:

"I received a letter from XX Law Firm at the beginning of June '09 accusing me of downloading a porn film and demanding £500. I replied immediately using one of the pro-formas from one of the web sites set up to fight these accusations.

I am one of many who is innocent, I have never heard of the film nor do I use bittorrents, I don't even know how to use a bittorrent. I am middle aged and happily married (not that that is any defence), but I simply did not do what I am accused of, nor do I know who has downloaded it.

I heard nothing from XX Law Firm until September when they say I have not responded to their original letter and demanding £500 within 7 days. If I do not pay they say they will seek damages to be determined by the Court, together with an order for an immediate interim payment of £1,000. I of course replied with a copy of my original letter by recorded delivery.

After reading the various web sites this is a familiar story, they write to people either ignoring peoples replies or saying they never had a reply, what chance have we got when they are not even reading our pleas of innocence.

Although I know I am innocent, to defend myself in Court would mean employing a solicitor which will cost an arm and a leg. I will not pay them because why should I if I did not do what they say I did.

³ To date Which? has received over 180 communications from individuals who have received letters from law firms representing rights holders demanding payment for illegal file sharing. In the absence of payment for the alleged copyright infringement court action is threatened. We understand the Solicitors Regulation Authority has received in excess of 220 consumer complaints about the actions of the law firms concerned.

⁴ Which? (2008). 'Who Controls Your Downloads?' in Which? Computing November 2008 issue, pub: Which?: London.

Which? (2009). 'News: More Framed for Game Sharing' in Which? Computing January 2009, pub: Which?: London. Which? (2009). 'New attack of 'file sharers'', in Which? Computing July 2009, pub: Which? London.

I do not agree with illegal downloading and understand copyright has to be protected, I have written to my MP but have got nowhere.

This is all very, very worrying, I am being bullied by this law firm and there is not much I can do. This is speculative invoicing or "legal" robbery."

Illegal file-sharing claims - the process

In 2008 (and possibly earlier), Davenport Lyons, a firm of solicitors, began acting on behalf of a number of clients including Atari Europe SAS, Atari United Kingdom Limited and Topware Interactive Inc., to carry out investigative and enforcement work relating to copyright works. In all of the cases that we are aware of, a company called Logistep was used to monitor internet activity and obtain data on websites or internet accounts that were making copies of their clients' copyright works available for copying by third parties without consent through the use of "peer to peer" software - so-called illegal file-sharing. Copyrighted works include computer games, music and pornography.

In Which?'s experience, the process is as follows:

1 Internet Protocol (IP) addresses⁵ for unauthorised file-sharers obtained

Logistep monitor internet activity relating to the availability and use of specific copyright works and record the IP addresses involved in any unauthorised sharing of these works.

2 Court order against ISPs

The legal firm acting for the copyright holder seeks and obtains a Norwich Pharmacal court order against all relevant ISPs, requiring each ISP to disclose the personal details of the customer that was allocated the specific IP address at that particular time on that particular day. The latest order was granted on 19 November 2009 enabling the release of the personal details of approximately 30,000 ISP customers, we understand mainly relating to allegations of illegally sharing pornography.

3 Letters sent out

The law firm sends standard letters before action to the alleged unauthorised file sharers. An example of one letter is appended as Appendix 1. The lawyers' letters we have seen are pretty uniform. They broadly state that:

- > they act for Client X who owns the copyright in work Y
- > a forensic computer analyst has been monitoring the illegal file-sharing of their client's copyright work
- > a copy of that work was illegally file-shared through a specific IP address and that IP address was identified by the relevant ISP as being associated with the individual's internet account
- > this amounts to illegal and unlawful copyright infringement
- > their Clients would be willing to settle this matter if the individual gives undertakings as to future activities and pays a sum ranging from £400-600
- > if the individual does not agree to this compromise, legal proceedings may be brought against them.

In April 2009 Davenport Lyons announced that it was no longer carrying out this "file-sharing enforcement" work and that ACS Law Solicitors (ACS) had been appointed to continue this work in their place. All active files, save those involving legal proceedings, were transferred to ACS and

⁵ An Internet Protocol (IP) address is a unique string of numbers that identifies a particular internet connection.

ACS have advised Which? that they intend to take action against thousands of individuals whom they claim, on behalf of their clients, have been shown to be illegally file sharing.

In December 2008 Which? lodged a complaint with the Solicitors' Regulation Authority, arguing that the manner in which Davenport Lyons pursued claims amounted to a breach of the Solicitors' Code of Conduct. That complaint is still being investigated and we await the result. In the meantime, all rightsholders should ensure that the lawyers they instruct target the correct individuals treat them fairly and with due regard to standards of professional conduct.

Which? is encouraged by the response from some ISPs to this issue. For example, Talk Talk has made a commitment not to consent to any disclosure order and to require that it is decided upon by a judge based on the merits to ensure the evidence is properly tested.⁶ Which? would like to see all ISPs follow this example and challenge the evidence provided by rightholders.

Which? would like to see:

- > Rightsholders ensure that the lawyers they instruct target the correct individuals, and treat them fairly with due regard to standards of professional conduct.
- > Internet Service Providers (ISPs) challenge the evidence provided by rightholders.

For further information or if you are interested in Which?'s views on potential amendments to the bill please contact Mark McLaren, Public Affairs Department on:
Email: mark.mclaren@which.co.uk or Tel: 020 7770 7823

About Which?

Which? is a non-profit making organisation that aims to make consumers as powerful as the organisations they deal with in their daily lives.

Which? is an independent, not-for-profit consumer organisation with over 700,000 members and is the largest consumer organisation in Europe.

Which? is independent of Government and industry, and is funded through the sale of Which? consumer magazines, online services and books.

More information on Which? campaigns can be found at www.which.co.uk/campaigns

⁶ TalkTalk Group. Response to BIS consultation on illicit peer-to-peer filesharing. September 2009.

Your Ref:
Our Ref: SCTR_30001737
Email: info@acs-law.org.uk
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[REDACTED]

**WITHOUT PREJUDICE SAVE AS TO COSTS
NOTICE OF OFFER TO SETTLE - PART 36**

THIS IS AN IMPORTANT LEGAL NOTICE INTENDED TO HAVE CONSEQUENCES IN RELATION TO THE AMOUNT OF LEGAL COSTS YOU MAY BE ASKED TO PAY IF THIS MATTER PROCEEDS TO TRIAL AND A JUDGMENT IS MADE AGAINST YOU. IF YOU ARE IN ANY DOUBT PLEASE OBTAIN LEGAL ADVICE FROM A SOLICITOR OR CITIZENS' ADVICE BUREAU

Take notice that our client offers to settle the claim. This offer is intended to have the consequences of the Civil Procedure Rule Part 36.

If the offer is accepted within **twenty-one (21) days** of service of this notice you will be liable for our client's costs in accordance with Rule 36.10 of the Civil Procedure Rules ("CPR") **SAVE THAT** if you accept the offer within this time our client will waive any claim for costs. If you choose to accept the offer after the time limit given in this offer you will be liable for our client's legal costs in accordance with CPR 36.10.

The offer is to settle: **the whole of the claim.**

The offer is: **£625.00 (the "Offer Sum")**

If you decide to accept this offer you must do so in writing and pay the Offer Sum in full within **14 days** of notification of acceptance.

If you decide not to accept the Offer Sum we will rely on CPR 36.14 if the matter proceeds to court and a judgment is obtained at or in excess of the amount claimed.

Please note that there is an explanation of what a Part 36 offer means on our website www.acs-law.org.uk with a separate link to the Ministry of Justice website that sets out the Civil Procedure Rules in full.

The rules relating to a Part 36 offer to settle are complicated and if you are in any doubt about the meaning and effect of this notice we respectfully suggest that you obtain independent legal advice from a solicitor or Citizen's Advice Bureau.

Yours faithfully,
Signed 
Andrew J. Crossley

Position held: Principal
Name of firm: ACS Law Solicitors

Image: letter sent from ACS Law Solicitors - 27th July 2009

APPENDIX 1