Specific comments to the code.

3.85

There is little real-world evidence that mobile network use is a significant barrier to infringement. It's also noted that evidence and claims are at least two years old at this point, and in this field things have moved on significantly. There are now bittorrent clients designed specifically for use with mobile operating systems such as iOS[1] and Android[2][3]

Also, while mobile speeds are slower than fixed-line internet connections, it is on a par with fixed line connections of a few years ago, and with connection speeds in many other countries now. And yes, while it's a significant cost to mobile broadband providers, it's a significant cost for fixed-line providers too. Since high costs are a significant barrier, why is it not a significant barrier for fixed-line providers?

4.50

In 4.50, the requirement that independent bodies be able to independently verify and certify evidential systems is essential. Norton P2P Consulting is actively involved in several of the mass-bittorrent lawsuits in the US, operating in the capacity of expert witness and consultant for the defence. The qualities of evidence gathered to date in those cases are low and on a par with those collected in the ACS:law/Davenport Lyons cases (indeed, we were involved with some of those cases as well).

However, in 4.51 there is an easy method to circumvent any independent audit or quality assurance test of the evidential standards or methods. That is to claim that such things are "commercially confidential or proprietary information". This is an effective statement that commercial interests of intermediaries are more important that any sort of justice or accountability. Indeed, such commercial confidentialities were key to perpetuating the sham-litigation techniques in the ACS/DL cases.

Norton P2P Consulting STRONGLY opposes any grounds to withhold information about evidential methods, for any reason. Evidential methods MUST be open to scrutiny, and independent verification for accuracy. Commercial confidentiality is something that should be considered by the company providing the service, and leaves them the decision to hide their methods for commercial gain and keep to private suits through the judicial system, or to participate in this non-judicial system, and forgo such confidentiality.

[1] http://lifehacker.com/5808357/itransmission-is-a-fully-featured-bittorrent-client-for-your-iphone
[2] http://torrentfreak.com/riaa-google-refuses-to-remove-pirate-app-from-android-store-111112/
[3] http://torrentfreak.com/utorrent-native-android-client-on-the-way-120225/

General Comments.

While the following comments are not specifically requested by the consultation, they are included to give context and real-world experiences with similar laws implemented worldwide, who are also undergoing reviews, and it is hoped that such references are taken into consideration as the process continues, and are used to check and verify claims made in this and other related consultations.

Throughout the entire process, there has been an unspoken assumption that this whole process will be an effective way to deal with things. All the evidence shows it is not.

Several countries have implemented other, similar proposals, including France, New Zealand, and South Korea. Evidence from those countries has shown that such laws, even with more significant penalties, have had little effect on things. In France, Pierre Lescure is looking into the law as part of a legal review, and has noted that the issue of 'punishment-led legislation' has not been enough[4], and this is from the former head of Canal+, a major content maker and licenser, or 'stakeholder'.

There has been much lauding over the decline in P2P in France, but there has been a decline that started before the law started. Claiming the law caused the decline was disingenuous at best (but this sort of false claims based on cherry-picked evidence is common). In reality, declines can be attributed[5] to two areas.

1) A decline in usage of detectable p2p systems, and a shift to those that are not so easily quantified for metrics, including a shift towards file-locker sites, such as rapidshare.
2) A shift from users from direct usage of their home connections towards obfuscated connections using proxy's and VPN's, as well as external-server usage (such as bittorrent 'seedboxes' – servers in datacentres used nearly exclusively for p2p because of high-speed bandwidth access); often using servers and services located in another country.

Both these activities show a 'decline in infringement' that can be measured and quantified, but which does NOT actually lead to a decline in infringement. Anyone experienced in the field can tell you of this, and as a former copyright enforcer for a record company, I know that it has been common knowledge in the field for years.

Instead of addressing issues, and attempting to deal with the underlying causes, there is instead a desire to blame and accuse rather than accept responsibility. Over the last 15 years, there has been a shift in usage that has been instigated by a technological revolution. In much the same way that the home video recorder led to a shift in the consumption of films and TV, technology has moved on the ways other forms of media can be consumed as well. The major difference is that while TV and movie studios lost their battle in the 1984 US Supreme Court decision[6], and were essentially forced to accept the new technology and adapt (which led to a doubling of income for them by 1987, according to industry publications at the time) now they are enabling an effective moratorium on technological progress to protect their legacy income streams.

[4] http://gigaom.com/europe/french-anti-piracy-chief-punishment-is-not-enough/
[5] http://paidcontent.org/2012/03/28/419-france-claims-three-strikes-has-hit-piracy-but-has-it-really/
[6] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)

The DEA has a lot on common with the 1865 Locomotive act, which, like the DEA, attempted to deal with technological progress, by starting with the assumption "everything was good before, technology can't interfere with that". It enforced a slow pace, and dissuaded innovation, in favour of the status quo. An amendment in 1878 made some of the restrictions optional, but added new ones to deal with concerns that we now know are not an issue; modern cars and heavy goods vehicles are as loud, and smelly as ones from then, and horses today are not so concerned. It required changes in horse training, but for over 30 years the technology was considered the problem. Today, the idea behind the locomotive acts seems ludicrous, and farcical, but the idea behind the law – to protect the incumbent from consequences of new technology – existed. In the modern Highway Code, the entirety of the restrictions for vehicles around animals has been reduced to two sections (216&217) and the emphasis on 'scaring' them has shifted, from being the fault of the vehicle owner (1878 act) to that of the horse owner (Highway code section 52).

Regardless, attempting to legislate to control the uses of technology is a foolhardy scheme. Despite it being against the law in the UK to retain a VHS recording for an extended period of time (beyond the period needed to time-shift) the majority of VHS recorder owners did just that, building up collections of dozens of tapes. No enforcement method was even contemplated to deal with this. In fact large packs of tapes clearly designed to facilitate archiving were available from every electronics retailer, from Argos to Radio Rentals.

It was understood then, that large scale, non-commercial infringement of copyright was not significantly damaging to copyright owners and distributors, and hence no plans were proposed for a method to police this. It was understood that any measures had to be overly intrusive and would lead to more ill-will than any potential gain.

Likewise, in New Zealand, there is increasing ill-will between ISPs and the Media Industry (it should be noted that media industry groups represent only a subset of copyright owners, just as Asda, Tesco and Sainsbury's may represent a majority of grocery sales in the UK, but they do not represent all grocery stores) as their graduated response program - Copyright (Infringing File Sharing) Amendment Act 2011 – has been overly expensive[7].

As under the DEA, cost sharing is in place there. However, for every notice sent, it has massively cost more for the ISP, than for the industry the law was designed for. On July 23 2012, news reports from New Zealand illustrated the problem. The cost for a notice by a rightsholder is $25. The cost for implementing the required system cost Telecom New Zealand $534,416. Since September 2011, the system, named 'skynet', was used 1238 times, meaning the cost-per-notice was over $481, and so would like the cost-per-notice to rise to $104. Meanwhile the Recording Industry Association of New Zealand (RIANZ), a major supporter of the bill, wants to have the cost to file a notice dropped from $25 to "$2 or less". All this data comes from submissions to the NZ Government's Economic Development Ministry who is reviewing the fees for notices.

Perhaps more interestingly, three major NZ ISPs have had consumers reach their third strike, and had nothing happen. There would seem to be little interest in any sort of adversarial process, where poor evidential claims can be contested. Further, under such a scheme, piracy rates have not been significantly impacted at all.

[7] http://www.stuff.co.nz/technology/digital-living/7318453/Four-in-10-Kiwis-still-flout-piracy-laws

Additionally, a major push for the DEA came from Lord Mandelson after being assured by Lucian Grainge (of universal Music) in private, that "sales were being decimated"[8]. In fact, BPI sales figures[9] showed a 3.9% decline in album sales from 2000 to 2009 and a 174% INCREASE over the same time period for singles.

Finally, a leaked RIAA presentation intended for use on US-based graduated response programs, has shown that only 15% of music is acquired from P2P systems in 2011, down[10] from 21% in 2010. Instead burning and ripping from others (27%) and hard drive trading (19%) are bigger sources, and the DEA has absolutely no means to impact that at all.

[8] http://www.whatdotheyknow.com/request/correspondence_with_representati#incoming-197387
[9] http://bpi.co.uk/assets/files/UK%20Market%20-%20Top%20Lines%20(2000-2009).pdf
[10] https://www.npd.com/wps/portal/npd/us/news/pressreleases/pr_120306