
Intellect response to:

Ofcom Consultation Online Infringement of Copyright and the Digital Economy Act 2010 Draft Initial Obligations Code

30 July 2010

About Intellect

Intellect is the UK trade association for the IT, telecoms and electronics industries. Intellect represents over 750 companies ranging from SMEs to multinationals. Membership includes contributors to the creative industry and technology providers whose hardware, software and services provide access to content over the internet.

Introduction

Intellect thanks Ofcom for sharing their rationale behind the Draft Initial Obligations Code and the opportunity to comment on the text. Intellect does however have a number of issues with both the rationale and the text. We have not addressed the specific questions in the consultation document because we see the issues raised below as being central and should be addressed before the finer details raised by the questions.

Comment

The Digital Economy Act established a framework for combating on-line copyright infringement that focuses on cutting people off from internet. It largely ignored the fact that today's digital citizens want and need to access their content legally. Recent research by the Strategic Advisory Board for Intellectual Property (SABIP) confirms the view that enforcement alone will not solve the problems of on-line infringement and that a comprehensive approach based on a greater understanding of people's attitudes and behaviours is required¹.

Today, the UK has one of the most innovative markets for legally accessing music, film and other content in the world. During 2009, 98% of singles, (some 149.7m single tracks and

¹ Attitudes and behaviours of consumers in the digital age, policy bulletin. SABIP 15 July 2010
<http://www.sabip.org.uk/report-digitalage.pdf>

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bundles), were sold in digital formats, with the total value of digital sales growing by 48%². Sales of music on-line are growing substantially, with a 56.1% increase over the course of 2009³ and a higher percentage of UK music fans are regularly purchasing downloads (19%) compared with obtaining tracks by illicit file sharing (17%).

Today's technology providers operate a range of services which provide legitimate access to content online, some of which can provide a platform for new forms of digital advertising, which ensures that artists and organisations that own the rights to the music, and other media distributed on them, receive remuneration. 85% of illegal downloaders say they would be interested in paying for an unlimited, download service of this nature⁴. However, many of the on-line services that downloaders state would discourage them from breaking the law are emerging more slowly than we might want. Government's priority should be to stimulate such services by establishing a framework to protect copyright that is conducive to innovation, experimentation and investment. The market can and will allow for the growth and success of our creative industries on-line. Government can help them to do this through creating the right framework in the UK for content distributors and rights holders to work together, and promoting that framework across Europe in order to promote the international competitiveness of our creative and technology industries.

Intellect feels that it would be more effective to promote and implement a European Digital Single Market – which, according to a study by the European Policy Centre⁵, will increase EU GDP by at least 4% by 2020, representing a far greater opportunity for copyright owners and consumers than cutting citizens off from the internet. Intellect hopes that UK Government will take a lead in Europe in achieving this important aspiration. Further, we believe that once those models become more pervasive, the corresponding trend for consumers to access content illegally will reduce. In this way, the need to enforce the provisions of the Digital Economy Act, and the resulting costs for both government and industry could be drastically reduced.

Observations and concerns raised by the Code

Intellect fully agrees that the creative industries should have mechanisms for dealing with infringement of their copyright. However requiring Internet Service Providers (ISPs) to cut their customers off from the internet is not an effective or proportionate approach to the problem. Wilful infringers will soon be able to find ways to hide their IP address or move to a small ISP not covered by the code, thereby limiting action that can be taken against them.

In cases where an internet service provider is required to assist law enforcement activities (for example, in monitoring the communications of suspected criminals or a rights-holder seeking disclosure) the beneficiary is required to compensate the provider in full. There is no clear evidence for departing from this precedent, derived as it is from existing better regulation principles of the "the beneficiary pays". Enforcing copyright legislation is a law enforcement activity. The same principles to allocating cost burdens should apply. The Government's proposal to assign 75% of costs to copyright holders and 25% to ISPs constitutes an unjustifiable departure from this principle.

² <http://www.bpi.co.uk/press-area/news-amp3bpress-release/article/2009-music-sales-show-decline-but-digital-retail-market-starts-to-deliver.aspx>

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⁴ *Music Experience and Behaviour in Young People* (UK Music & University of Hertfordshire, 2009)

⁵ EPC's Digital Single Market project April 2010 <http://www.epc.eu/dsm/1/>

Government should be wary of distorting the ICT markets with an unbalanced approach of blunt exclusions and arbitrary thresholds.

In the future Digital Britain it should be possible to move around an area whilst seamlessly connected to the internet. Also many businesses are being built on open connection to the internet. Any legislation that introduces risk to a business based around an open internet service could be seen as a barrier to innovation.

It is also essential not to discourage the consumer from going on-line. Making a citizen worried about the possibility of receiving a notification could affect the delivery of those services government is trying to encourage (including government services).

There is some question about the legitimacy of the code. In Intellect's view it is poor business practice to expend valuable resources before this has been resolved.

Notwithstanding the above, to implement the code ISPs will need to put a cost effective system in place to respond to the Copyright Infringement Reports (CIRs). It should be recognised that this will have to be an automated system and that two months is not sufficient time to specify and implement a system of this nature. It is further suggested that a big bang launch with hundreds of thousands of notifications swamping ISPs and their customers should be avoided; a soft launch and updating of the code with lessons learned would be a better approach.

It is suggested that only Qualifying Copyright Owners should be able to take advantage of the code. Consideration should be given to the small, independent copyright owner ie someone having rights in one or a small number of works. How will this code help them? They will not be able to "Qualify" ie tell each ISP how many claims they will make in a year and make a contribution to costs in advance.