



ALCS response to BERR Consultation on legislative options to address illicit P2P file-sharing

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## Introduction

The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK rights management society for writers of all genres of literary and dramatic copyright works including fiction, journalism, plays, poetry, academic texts, TV and radio scripts and story-lines, dramatisations, translations, abridgements and adaptations.

Established in 1977 and wholly owned and governed by the writers it represents (of whom there are currently over 60,000), ALCS is a not-for-profit, non-union organisation. Since its foundation, ALCS has paid writers over £170 million in fees and today it continues to identify and develop new sources of income for writers.

ALCS is grateful for the opportunity to contribute to this consultation and would be pleased to provide further information or assistance as required.

## General comments

ALCS broadly welcomes the proposals contained within the Consultation Document to deal with the misuse of P2P file-sharing networks.

We note, along with the consultation, that music has been the sector most affected by this activity. However, as technology evolves, other branches of the creative industries are likely to become increasingly relevant to this debate. Latest figures commissioned by the British Video Association show a 6.8 per cent increase in the number of illegal audio/visual files downloaded between 2005-06 (other copying activities declined). The total amount lost to digital piracy of film and TV programmes in 2006 was £129m according to the Intellectual Property Crime Report 2007. Such losses have clear implications for the authors of audiovisual works. Although the market for E-readers is as yet unproven, if this technology enjoys the same kind of success that digital music and film players have enjoyed, it follows that unauthorised file-sharing will in time impact on the authors and publishers of literary works.

The original Recommendation from the Gowers Report leading to this review aimed to 'remove and disbar users engaged in piracy'. Piracy is not only confined to P2P file-sharing networks. Websites exist that are dedicated to facilitating unlawful file-sharing communities. Furthermore social networking web-sites are often used by individuals to share unlicensed copyright content on the Internet. We note that the scope of this consultation is limited to the 'illicit use of P2P technology' but would welcome further government initiatives addressing the broader canvass of the on-line misuse of copyright works.

The Consultation Document notes that the Government is seeking an industry solution that is 'effective and is fair to all parties, particularly citizens'. We strongly

support this aim and hope that in its implementation the proposed solution will address the rights of citizens that both use and create works in an even-handed manner.

As the Consultation Documents acknowledges, in paragraphs 3.13/ 3.14, the misuse of P2P technology to secure 'free' content is an attractive, well-established, fairly standard part of the on-line use environment. A situation has emerged in which a large proportion of unlawful file-sharing activity occurs at a relatively low-level, while the available legal sanctions - court orders, lawsuits, injunctions - require resources and a level of commitment that is more suited to larger-scale infringements. This places redress for aggregated, individual infringements beyond the reach of most individual creators.

Any industry solution should aim to address this unfairness by tackling not just the large-scale infringements but also the long tail of everyday uses that cumulatively result in significant loss of potential income for individual creators. If the proposed measures are only proven to be successful in terms of reducing the higher-end infringements, further government intervention should be considered.

## Questions

**1. Do you agree that a voluntary solution based on the principles set out in the draft MOU at Annex D, if effective and fair to consumers, would be the best approach to this problem but is unlikely to be achieved?**

ALCS broadly supports the principles set out in the MOU and agrees that these principles should form 'the core' of the overall approach. Without *effective* regulatory oversight there is a danger that this scheme will not secure the participation of all relevant parties, which would greatly diminish its effectiveness and credibility. On that basis a voluntary scheme alone is not sufficient.

In our opening remarks, referring to introductory paragraphs of the Consultation Document, we noted the importance of a solution that is fair and effective to both creators and users of content ('citizens'). This question shifts the emphasis of measuring the value of the solution towards fairness to 'consumers'. It is important that the principles underpinning the scheme are clear from the outset. This scheme is a response to a current imbalance, created by technological developments, in the relationship between those that use works and those that have ownership rights in those works. We agree that the scheme must be fair to consumers. As a matter of fairness the scheme must also rebalance the current position that the owners of rights, particularly individual creators, find themselves in.

As stated above we see the MOU principles as the core, not the complete solution. To be truly effective this scheme should aim, within a realistic timeframe, to reduce

the vast majority of unlawful file-sharing activity. This includes the long tail we refer to above. Looking at the outline of the solution set out in the MOU the onus in many areas lies with the rightsholders - to lead the education programme, to develop licensing packages, to research and gather evidence of infringements and notify them to ISPs. Our concern is that, in allocating dedicated resources to this project, there may be a tendency to focus on the 'higher-end' offenders, leaving a significant proportion of more routine infringements untouched.

In building the detail onto the core principles set out in the MOU, it is important that the non-rightsholder signatories provide the necessary levels of support to make this scheme effective in addressing the full range of unlawful uses of works.

**2. Do you consider this list (of issues) is complete? Are there any other important factors that should be added?**

The top-level list of issues and constraints appears to be comprehensive.

The section on 'copyright protection' focuses on the economic harm suffered when copyright works are misused. It is also important to note that the authors of copyright works also have legal moral rights in their works, which are particularly open to abuse in an environment where works are used without reference to their creators.

Under the sub-heading 'Responsibility' it is noted that industry has a role to play in helping consumers to use and navigate the on-line environment in a responsible way. Consideration must also be given to the companies operating open content platforms which host illegal uploads (P2P file-sharing networks and so-called 'user-generated' web-sites). The focus of the present proposals is on the role of ISP's, but the responsibility of content platforms and their owners in combating illicit activity should not be overlooked.

**3. Are any of these criteria (or any omitted criteria) more important (or less important) than the others and therefore should attract a weighting?**

The 'Better Regulation' heading notes that government intervention should 'address a demonstrated market failure'. The Summary in Annex G of the Consultation Document suggests that 'the evidence which has emerged so far on the impact of illegal file-sharing is inconclusive.' The data set out in Section 3 of the Consultation Document links whole-sale infringing activity (including unauthorised P2P file-sharing) to major (past and future) economic losses to industry. While figures from different surveys may vary, conclusions can be drawn - perhaps the most obvious being that the existing markets for creative content have been subverted by the emergence of unauthorised file-sharing.

At a basic level, sales generate royalties for creators enabling them to generate fresh content to sustain and develop the market. The unlawful use of creative content effectively breaks this chain. This is the kind of market failure that the present proposals must address to be truly effective.

**4. Do you agree that the preferred approach set out in section 8 is capable of dealing effectively with all of these constraints? If not, which are problematic and how?**

**Please give reasons.**

The Consultation Document identifies the importance of ‘media literacy’ education in helping to provide consumers with the sense of responsibility needed to avoid misusing Internet services. While we strongly support an education campaign as part of this overall strategy, a constraint to its effectiveness, in the context of P2P file-sharing networks, is the brand loyalty that they appear to attract. Research produced for the MCPS/PRS Music Alliance this year showed that 2.5 million downloads of Radiohead’s ‘In Rainbows’ album were made from file-sharing websites between 10 October to 3 November 2007, despite the availability of free, authorised downloads on the band’s web-site.

If loyalty to illicit P2P use is sufficiently engrained in the culture of on-line content consumption, this represents a significant constraint on the effectiveness of using alternative licensed options designed to attract users away from illicit file-sharing activity.

We support the establishment of a system for notifying consumers engaged in online piracy. Whilst the 3 month trial will send notifications to those engaged in music piracy, all right-holders should eventually be able to notify ISPs of copyright infringements.

We believe that the overall aim to curb online piracy will be undermined if only ‘serious infringers’ are identified. It would send the wrong message to those who make occasional illegal downloads, and may lead to the perception that they are beyond the touch of this scheme. To the extent that the cumulative loss attributable to occasional illicit activity is significant, it should be addressed through these measures or any extensions of them.

Despite the description of the nature of a co-regulated approach provided by the Consultation Document, we are still not clear how this scheme would operate effectively if adherence to the Codes is not mandatory for all ISPs. It is suggested in Paragraph 8.10 that non-participating ISPs would ‘remain bound’ to having an ‘effective policy on unlawful file-sharing’. We would be interested to learn how this

requirement would be enforced and what variances may be considered acceptable between the OFCOM approved standards and an independent 'effective policy'.

**5. Do you agree that a self-regulatory only approach may not be sufficient to resolve this problem? Please give reasons.**

Yes. The success of a self-regulatory approach depends on the willingness of stakeholders to develop effective codes which industry feels comfortable adhering to. Where there is an obvious lack of agreement in either respect, further regulation is necessary. Regulatory oversight of the Codes of Practice should ensure that an agreed and understood industry standard is set. As per our comments to the previous question, the effectiveness and credibility of this standard will in part be measured by its application to *all* the industry.

A purely self-regulatory scheme may not be suitably equipped to evaluate its own effectiveness. We suggest that, as part of the regulatory oversight, an annual evaluative analysis should be undertaken, in conjunction with the latest digital piracy figures, to measure the success of the proposals. This may form the basis of any additional provisions or modifications that may be necessary to allow the scheme to develop effectively.

**6. Do you support the described co-regulatory approach? Please set out clearly what aspects of this approach you support and which you do not support. Please provide reasons and, where appropriate, evidence.**

Yes, on balance we support the co-regulatory approach. We believe it harnesses the resolve of industry to deal with this problem, whilst providing a degree of certainty in the system which can be delivered through appropriate regulatory measures.

We welcome an approach to education initiatives undertaken jointly between rightsholders and service providers, as this promises to facilitate a direct connection to the target audience.

Our reservations about this initiative refer more to the underlying detail than the overall approach. Briefly summarised they are as follows:

- a) Scope. The target of this scheme is individual Internet users. We feel that to fully address the Recommendation from the Gowers Report, government should also pursue initiatives to facilitate greater regulation of sites and platforms that enable individuals to share unlicensed content.

- b) Coverage. The Consultation Document makes the following observation, “the combination of a large population of down-loaders each making a few copies, allied with the evidence on the attitudes to downloading, has significant implications for possible remedies.” Unauthorised file-sharing is an established part of Internet usage. Broadband speeds are increasing; hardware designed for (legitimate) digital use of content is evolving. Demand for digital content continues to grow. An average Internet user may ask the question - why should I pay for this when I can get it for free? This raises the ‘deterrent value’ of the co-regulated scheme, referred to several times in the Consultation Document. A scheme that is not applied consistently to all service providers, and has only the more serious repeat infringers as its primary focus is unlikely to act as a sufficient deterrent for the vast majority of the down-loading population. This raises the question of resource.
- c) Resource. The Consultation Document refers to the Olivennes Agreement in France and the plans for a government-funded agency to undertake the task of sending an anticipated 250,000 messages per month. Under the terms of the MOU the UK scheme will start with a trial phase that will aim to send 4,000 messages per month; a review will then take place to include discussion of capping numbers. We note above that the main burden, in terms of resources and costs, for making this scheme work appears to lie with those seeking to defend their legal rights. This seems a disproportionate burden in a scheme which is trying to find a solution to a commonplace illegal activity that is taking place on such a grand-scale.

**7. Do you agree that Ofcom is the right regulator to oversee the selfregulatory body?**

Yes, we support the role of OFCOM to oversee the self-regulatory body although we welcome clarification on where the final regulatory back-stop lies in cases where ISPs fail to meet their obligations.

**8. Do you agree that the regulatory oversight should include approval of Codes of Practice?**

Yes. Aside from the credibility that this lends the Codes, final approval by a party not directly involved in the mechanics of the scheme should provide a degree of impartial oversight in assessing their fairness.

**9. What do you think the coverage of the self-regulatory approach should be? The proposal above suggests rights holders and ISPs. Is this right? Should any**

**other stakeholders such as consumer organisations have a place in the selfregulatory approach? If so, which?**

We agree with the coverage of the proposed approach but would suggest that along with ISPs and right-holders, there is an economic and moral case for including content platforms which act as a conduit for illicit activity taking place (P2P file-sharing platforms and the ‘user-generated’ web-sites). Admittedly many of these operate in overseas territories and may be ‘untouchable’ by UK regulators. Other legitimate businesses however, are multi-national organisations with offices in the UK. We are particularly concerned that the notion of ‘democratising content’ has been used to justify hosting a vast amount of illegal uploads for which the creator receives nothing. In this area, we feel the Government has a role in advocating ‘lines in the sand’ in terms of the breadth of content available to download on what are perceived to be entirely legitimate web-sites.

On a separate point, as rightsholders, creators should be able to inform ISPs of content which has infringed their copyright. We appreciate this must involve an appropriate form of notification with the required information, but this must be reasonable enough as to not exclude creators from this process. In short, the system needs to be inclusive and transparent.

**10. What do you think the scope of the legal obligation should be? Do you agree that as described its effect would be limited to P2P networks? If not, how could such a limitation be achieved?**

Our chief concern in the current proposals, concerning legal obligations, is in the system described by paragraph 8.9. It seems that ISPs will be obliged to apply the Code of Practice and/or maintain an ‘effective policy’ which has similar terms to the Code. As a system this seems hard to police or enforce. More definite, statutory measures should be considered to provide the necessary underlying level of certainty.

**11. The costs of the self-regulatory approach would have to be met by industry. How do you think this should be split between the stakeholders, including between the different content industries?**

In our responses to earlier questions concerning the suggested co-regulatory approach we raise concerns that a disproportionate costs burden placed on rightsholders may have a detrimental impact on the scope and effectiveness of this scheme. We would therefore suggest that the overall funding of the scheme should reflect a balance between the ‘content industries’ and the service providers. To the extent that the education and enforcement measures outlined within the MOU dovetail with broader government IP policy, we would suggest that an element of

central funding may be appropriate as part of the proposed co-regulatory approach.

**12. The costs of the activities envisaged under the codes of practice could be met either by those responsible for carrying them out, or by some form of cost sharing between parties. It is envisaged that this should be agreed by industry as a part of relevant codes of practice. Do you agree with this process?**

Yes, subject to our above comments on the need for proportionality and inclusivity in the overall funding scheme.

**13. The [draft] MOU at Annex D provides the principles within which the selfregulatory approach could work. Do you think these are the right principles?**

Yes, we feel that these principles provide the core of a workable approach.

#### Questions on Alternative Options

**14. Do any of these alternative options seem more likely to achieve the objective of significantly reducing illicit P2P use? If so, which? Please give reasons.**

On balance we feel that the preferred approach is likely to prove more effective than these alternatives. However we repeat our concern that the enforcement elements of the current proposals - described in paragraphs 8.9 and 8.10 of the Consultation Document - need more substance, to avoid any impression that the chosen option is in effect a 'watered-down' version of option A2.

Our only other comment on these Alternatives is to support an industry working group to look more closely at the viability of filtering technologies. Rather than categorising filtering technology as an alternative to the proposed approach, it may be more useful for industry to investigate these technologies as part of the process of delivering legitimate on-line content in line with the third principle of the MOU.

As we support the co-regulatory approach described in the consultation document, we have chosen not to comment further on the alternative options outlined.