
The Digital Britain report and the GOVERNMENT STATEMENT ON THE PROPOSED P2P FILE-SHARING LEGISLATION both seem start from the premise that file sharing is illegal and that rights owners have the right to maximise revenue on their rights at the expense of the economic interests of the ISPs and the human rights of the UK citizens. From a public policy point of view these assumptions are undesirable. The rights trading model of the modern media corporation is not in the public interest, is monopolistic and Welfare Economics shows it leads to sub-optimal allocation of time and resources in the macro economy. (Labour & Capital.) Copyright law grants right holders excessive rights which they abuse by licensing content on 'use case' basis. Copyright law should be liberalised to permit broader interpretations of Fair Use and the right to create derived works. The proposed measures place a cost burden on the internet providers and users but also will cause behavioural changes on the internet providers inhibiting, or at least changing internet innovation and the industry's competitive dynamic. These proposed laws may well compromise some basic human rights enshrined in the Universal Declaration of Human Rights and the European Human Rights Charter, conformity with the later being part of UK law. The contribution concludes by specifically answering ten of the twenty questions posed in the consultation document, focusing on the rights of the accused, the moral hazard of extending right holders rights and opposing the right of rights holders to use agents in the pursuit of alleged non licensed file sharers.

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Copyright & Economic Efficiency

Granting of copyright protection creates a market in 'rights', and unlike most markets not in labour, things or time. Media companies are selling 'rights to use', they license use, and do not **sell** intellectual property; there is no transfer of property rights.

This market in rights is monopolistic. The decisions of the supplier participants effects the market price. Companies restrict supply to increase price, and generates super-profits i.e. profits above the opportunity costs of the resources, the factors of production consumed. Pareto-analysis and welfare economics state that a monopolistic restricted supply means that the macro-economy's resources are being 'inefficiently' allocated. Sub optimal efficiency means that more could be produced. The time & money spent on monetising digital entertainment rights would be better spent on other things. (Nearly anything.)

To put it another way, copyright law defends the wealth of non-creative distribution business, i.e. sales staff, lawyers and accountants, it doesn't increase the excessive wealth of entertainment performers, nor does it enhance or ease entry to the industry, nor does it ensure a just reward to scarce creative talents. Surely it is entry to the industry where true innovation in the business occurs and should be encouraged from public policy point of view. The goal of economic policy should recognise that is fair and efficient to pay for time, and pay for materials. It is not fair and efficient to pay for 'rights', or to contribute to the super-profits of the recording industry. The 'Lost Revenue'

argument used by the recording arts industry is bogus. Legalising the copying of digital copyrighted material for personal non-commercial use and even the for the purpose of creating derived works would increase product in the economy and enhance labour specialisation which would increase the level of activity in the economy.

- *Downloading digital content should be legal irrespective of the copyright status of the content for personal non-commercial use.*

The Welfare Economics argument that Copyright rights introduce inefficiencies in the economy would also apply to commercial use of digital content. This efficiency gain to the economy might be best implemented by reducing the period of time copyright is held for.

- *Copyright grants should be severely restricted in duration.*

A further important aspect of considering the British Government's public policy is to understand how much of the media industry's 'Lost Revenue' is in fact imports; it would be important to understand how much of the inefficiencies in the UK economy accrue as super-profits in dollars or euros.

- *The size of the lost revenue should be researched, trusted values established and the international balance of trade understood*

Monopolistic Practice

Current copyright laws as applied to the entertainment industry permits a licensing 'for use'. Inserting terms in 'right to use' licences is exceptionally common, however there are invidious developments in the entertainment industry. The restrictions in the UK, are designed to protect the commercial exploitation of the content, and usually explicitly prohibits commercial use, which is understandable¹ and copying. The problem with prohibiting copying of 'bought' content is that in order to choose what device(s) to consume the content on, one may have to buy multiple copies. Public policy makers need to be clear that there is unlikely to be a single voter who thinks it fair that they are not allowed to 'buy' a CD or DVD and then choose which device to consume their purchased content on. In fact most consumers probably don't know that they do not buy a CD, they buy a license and right to use. This right to use is unreasonably restricted; it is tied to a device, (or at the least a device class), and in broadcast media often tied to a time period, in that one can only consume the content when its being published. Copying such content to an even temporary store on other playing devices such as walkmans, ipods, home computers and MP3 players is contrary to the terms of most music licences, and thus actionable.

In many cases, it is even illegal to take a backup copy. Public policy makers have a duty to ensure that contracts between consumers and producers are fair. Restricting right to use, and charging more for extended rights is an abuse.

- *Digital content licences should not be restricted by use. Consumers should have unlimited/unrestricted non-commercial right to use & copy.*

Copyright law permits a Fair Use. There should be no diminution of consumer's fair use rights. Converting a licensed piece of content to another format should be considered fair use, or otherwise legal. Licences that seek to prohibit these acts should be deemed illegal. The law should be changed to make that clear. Using the internet and downloading digital content to permit the consumption at different time to the original broadcast event on different media, when the original entitlement to consume exists should also be considered legal. Fair Use is a source of value to the world economy as an input to many economic processes, and it is a right that voters claim in exchange for those they yield to copyright holders.

- *Copying or converting digital formats of content to which use title has been established should be 'Fair Use', or a new legal consumer right.*
- *The government should commission research into the value of 'Fair Use' to the british economy. Lets know how much value ignoring.*

In addition to 'Fair Use', rights holders use copyright laws to restrict the creation of derived works. This is a restraint of trade. It should be illegal. This is even more important as we move towards a digital economy, where software and information (bytes) are both the inputs and outputs of the productive process. It is important that time and materials are paid for and allocated by a market based

1 There are usually two classes of licence, one with commerce permitted, which costs a lot more than the no-commerce licence. This is an illustration of price discrimination, an indicator of monopoly supply.

price mechanism, but ideas, which have an opportunity cost of zero should be published and freely available. Again, to tax software, information and bytes distorts the economy away from the Pareto-efficient optimum. It should be noted that basic science publishes under referee for the very purpose of enabling derived works, thus increasing production.

- *Digital content licences should not restrict the creation of derived works.*
- *The government should commission research into the lost value to UK economy of criminalising derived works.*

The Internet Industry

The internet is a source of enormous wealth creation and creativity. Regulating them to protect the interests of the music industry is not a neutral act, it is taking sides in the path of UK innovation. Fundamentally, governments can tax, subsidise or prohibit. The current proposals have the impact of taxing internet users, subsidising the recording companies and needlessly criminalising consumers and voters.

Placing duties and costs on the internet providers, and granting superior rights to some businesses will change the way the internet and its supplier and participant industries grow and develop. These proposals are not a neutral act, they prefer the interests of rights holders, against the internet, its users and providers. Neither the internet nor free music inhibits the growth of 'creative' industries, nor the discovery of creative and popular music. A number of successful music acts today used the internet and free distribution to launch themselves using, creating and popularising sites like myspace and facebook.

The evolution of Napster's business model and its now current and legal activities as a software provider show that the peer to peer file sharing technology is in itself a creative and valuable business. The technology is also evolving. In a modern file sharing environment, all previous down loaders potentially source parts of the next consumer's download and only contribute small parts of the total download. This is well suited for the UK where the slow investment in fibre cabling in the local loop means that the millions of internet devices² can participate in supporting digital distribution. Most of these consumer internet devices are on the slow side of an ADSL link, but by co-operating with other users, large streams of digital content can be shared around the internet. Distributed P2P file sharing is of crucial importance in countering historic infrastructural inadequacies³ in the UK economy. This is specifically so in the software business, which adds more to the UK's competitive advantage⁴ than music & films business. Peer to peer file sharing of large software objects is crucial, such as business software and operating systems. File sharing is both legal and valuable.

The innovation of the technology, topology and structure of the internet should be driven by a 'wisdom of crowds' participating in a price mechanism market. The state may and should be a participant either directly as a service

2 Mainly home based personal computers

3 The copper local loop and ADSL based consumer connections which restrict the speeds in and out of consumer nodes.

4 The UK Games industry, part of the software business which is a significant global player, is not asking for changes in copyright law and has built technology answers to this problem.

provider, or though research funding programmes. It seems obvious to me that some things just won't get done unless society acts collectively. The internet was founded by US tax dollars. The current proposals distort the price mechanism by subsidising the funding of the entertainment industries licence enforcement.

It is clear from the press, that other correspondents to this consultation are concerned at the cost of tracking and notifying those allegedly downloading unlicensed material. Since the ISPs will need to continue to make a profit, their costs will be passed onto their customers.

- Legal Internet users should not have to fund the record companies fact finding or copyright enforcement

Throughout the public discussions on inhibiting copyright breakers, I have seen little discussion⁵ on how internet users will be safeguarded against false accusation. Its not enough that they use a lot of bandwidth or bit torrent ports. There are legal & valuable uses for both bandwidth and bittorrent.

The longevity of copyright grants leads to the phenomenon of abandoned material. An example is content that only exists on obsolete formats. In order to pursue file sharers, rights holders should need to prove that their copyright has not been abandoned. If copyright holders abandon their rights, they should not be able to prohibit others from at least⁶, non-commercial, share-alike distributions.

- Copyright holders must prove that content has been downloaded and that the downloader has no right to use, including no Fair Use rights.
- Copy right holders need to prove that the copyright is not deemed to have been abandoned.
- Copyright laws should be clarified so that corporations need to maintain their ownership.

The internet as a single network of co-operating computers. It is a significant creator of value and wealth. I can see of no public interest argument to make it more expensive, nor to distort its evolution and development by burdening it with these costs and activities. It is clear that a lot of today's software development⁷ effort is being spent of both protecting and evading copyright. Is this really more important than speed, 3D or virtual worlds?

Specialisation and the Pricing Mechanism are the engines of wealth. These proposals are designed to protect a business i.e. Music from competition and change. It will have the side effect of inhibiting the pace and direction of change in the IT and Software industries, both of which are even more valuable to the future wealth of the UK economy.

Citizenship Rights

All proposals around the world to enforce copyright laws against the interests of the majority of the population have rightly led to significant protest. There are some basic democratic citizenship rights to be considered. The

⁵ However the consultation document does talk about it and suggest that rights holders need to prove a balance of probabilities.

⁶ It maybe in the public interest to allow commercial adoption of abandoned content.

⁷ Not to mention court and legislative time.

Government's proposal is to enable and direct internet service providers to disconnect, or in other ways diminish the internet services of serial down loaders of unlicensed content. These may well breach or diminish citizen's rights

- to freedom of expression
- a fair trial
- access to culture⁸
- right to privacy

The right to information and culture are basic human rights. These basic rights are defined in a number of documents including

- the UN declaration of Human Rights,
- the European Convention on Human Rights

which is now incorporated into UK domestic law.

The UN Declaration of Human Rights states in Article 19, that freedom of expression guarantees the right to receive information, this freedom is also reflected in the European Convention on Human Rights in Article 10, which states,

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

That this applies to the internet is reinforced by the Parliament of European Union which has declared that connection to the internet is a human right, and the French Constitutional Court which ruled that a judicial process was required before citizens or residents could have their internet service terminated due to persistent copyright infringement.

The various rights that define a fair trial are the most problematic for the Government's proposals.

The current process proposed is that rights holders, or their agents notify ISPs of 'suspicious activity', the ISPs evaluate the allegation and notify their customers. The detail of the ISP diligence and their duty to their customers are not yet defined.

Most courts and processes of justice would require that evidence is tested by the accused. Anything else breaches the 'Innocent until proved guilty' rights taken for granted in the UK and Europe and defined in both the UN Declaration and European Convention. It is crucial that parliament ensures that rights' holders prove wrong doing in a court, and alleged wrong do-ers are able to test the evidence. The ISPs records may be a breach of their customer's rights of privacy. The gathered evidence by rights holders may also be in breach of individual's right to privacy⁹.

Since accurately accused wrongdoers are in breach of a contract, this should be a civil action, pursued by the rights holders. There should be no fines, no threat of prison, no-prosecution i.e. no state funding of the legal process and no police warrants of search. Remediation

⁸ Defined by the UN DHR Article 27, which also interestingly seeks to protect author's rights. In most cases, the author and copyright holder are not the same person.

⁹ The European Convention states that "Everyone has the right to respect for his private and family life, his home and his correspondence."

should be placed in the context of the lost revenue, i.e. the actual loss¹⁰ caused to the rights holder. The rights holder should also demonstrate their loss, each and every time. There should be no penal damages. I'd argue that in most cases, deletion of all copies of the unlicensed material should be sufficient, particularly where the downloads were performed by a legal minor, or a person other than the ISP customer. There needs to be an appeal process, and also grounds for the deletion of the notice and record of the deletion.

One cost that should be avoided, is that of a successful defence. The UK proposals relate to administrative actions by rights holders and ISPs. ISP customers will have to read and react to the accusation that they have broken copyright law. Where accusations are unwarranted, the accused should bear no costs

- 1/ cost born by accuser
- 2/ eliminate moral hazard, how do we keep the initial accusation within the balance of probabilities when the accuser has a financial interest in maximising the notices
- 3/ because its a civil action rights holders must act on their own behalf, may not sell the right to pursue or pursue on behalf of other rights holders

Conclusion

Fundamentally, the record and film industries have tried to sell the world that bootleg, or illegally copied content is theft. No-one agrees with them, except it seems some politicians. Its only illegal because the law makes it so. Its not piracy, its not theft. It doesn't deny anyone anything.

Pareto-economic efficiency suggests that the copyright laws should be relaxed. The copyright laws are a constraint on the wealth creation in the UK and should be reformed and liberalised. Economic policy goals suggest that copyright laws should be relaxed.

The internet industry is as important a wealth creator as the music & film business, (at least in the UK), why should it be disadvantaged by incurring the costs of the rights owners.

Fundamental rights such as the right to a fair trial, innocent until proved guilty, the right to culture and freedom of expression should not be compromised to prop up any business.

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¹⁰ This is an interesting concept in a world where different rights to use have different prices, who's to say that the person who loses revenue isn't a third party library service and not the rights holder, or what is the lost revenue where a rights holder is not pursuing the commercial opportunity. It should be noted that original rights holder's move to the internet and pay/view TV networks has virtually eliminated private sector, for profit video rental businesses.

Q1 The current rights of copyright owners and their practice of of licensing for use is unacceptable. ISPs should not be required to breach their duty of confidentiality to their customers as this breaches their right to privacy nor should they be required to fund any discovery acts i.e. Rights holders should have no rights to trigger. (If this is considered a bit extreme, then only rights holders should have these rights, industry associations and class agents should **not** be permitted to trigger notifications. Rights holders should not be allowed to outsource these legal privileges and especially not on anything other than a time and materials basis.)

Q3 Any notice of alleged unacceptable activity should state how to appeal, and how to get the notice withdrawn. How to seek compensation from rights holders for wrongful accusation. This would mean that the OFCOM rules and legislation would need to take this into account.

Q4 Without a cost to the rights holder for wrongful accusation, there is a moral hazard that rights holders will not honour a duty to only trigger where there is a balance of probability, and that the ISPs will not evaluate the right holder's cases; it becomes cheaper to send notices to all the accused. Rights holders must not be permitted to make wrongful accusations with impunity. How much are the fines or compensation they expect to levy on their suspects? The duty of the accuser to only ask for notices where there is a 'balance of probabilities' should be statutory and penalties for persistent vexatious rights holders should be stated and in place. OFCOM should have a duty to protect ordinary users from over enthusiastic rights holders.

Q7 The copyright laws need to be liberalised. This will reduce the amount of cost involved; there will be less alleged breach of tort. Neither the ISPs nor their customers should pay for any of this. The whole of the cost should be borne by the rights holders.

Q10 The privileges granted rights holders and duties placed on ISPs act as a tax on being an ISP. This distorts the competitive process. I also oppose the use of a rights agency, or any acting as an agent in pursuit of right holders interests. Rights holders that wish to enforce their rights should be sufficiently interested to pursue them themselves. The use of a third party introduces the principal agent problem, and shared risk/reward pricing introduces a moral hazard. See 4.22

Q11 How do you propose to consult ISP customers? The whole proposal is based on the premise that content right holders rights are more important than the right to use the internet. I don't agree. The internet services should be delivered to the ISP customers according to their contracts and the burden of proof on wrong doing should be on the rights holders. Any re-mediation should be between the rights holder and the person in breach of copyright. Deleting the proven offending material should be sufficient in most cases. The trade off between using the internet and breach of copyright is illegitimate. If people have downloaded material they have no right to use, then the rights holder should be compensated by payment proportionate to the market price value of the downloaded material or by agreeing to delete the right holder's content. It is not right or desirable to expect people's internet connection to be in jeopardy, because they haven't payed £10 for a CD. It should be born in mind that some downloaded content may have been undertaken to allow different devices to play the content, or to time shift, both of which I consider to be morally acceptable even if currently in breach of right holder's rights as defined by the law. The law should be changed to permit these activities.

Q15 Appeal and Redress should be in the legislation not an industry code. The code or legislation needs to deal with vexatious or incompetent rights holders.

Q17 Anything that delays this 'till after the election would be good.

Q18 Rights holders should not be able to out source the pursuit of alleged breach of copyright actors. This is a civil, not a criminal offence, people are in breach of copyright and the rights holders need to pursue their rights themselves. Allowing agents creates a moral hazard in favour of pursuing the innocent, and may create a new business model of selling the right to sue, which should not be permitted. They currently restrict the right to use, and if permitted will create a right to sue, by selling their unrevenued rights as debt.

Q20 This is bonkers. Now the rights holders can determine if a whole ISP i.e. Business can be excluded. I know where I'll be looking for my services in future. If I can find some one to provide to me over the local loop.