



**Consultation on legislation to address illicit peer-to-peer (P2P) file-sharing**



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**Response by UK Music**

1. UK Music is the umbrella organisation which represents the collective interests of the UK's commercial music industry - from artists, musicians, songwriters and composers, to record labels, music managers, music publishers, collecting societies and studio producers. The members of UK Music are: AIM, BASCA, BPI, MMF, MPA, MU, PPL, and PRS for Music.
2. We very much welcome the recognition by Government that urgent action is required to address the unsustainable levels of online infringement if the UK is to retain its position as one of the world's preeminent sources of innovative, creative content. This action is not only relevant to unlicensed peer-to-peer file-sharing but also to other widespread forms of online infringement (such as downloading copyrighted content from unlicensed one-click hosting websites). Only through a coordinated, comprehensive approach will it be possible to achieve Government's stated objective, *"to see the creation of an effective online download and streaming market of scale, providing content that is highly affordable, easily and conveniently accessible to consumers."*
3. Tackling the issue of unlicensed peer-to-peer file-sharing is critical if we are to fully enable a healthy, commercial environment where a diverse range of sustainable, licensed digital services can prosper, providing benefit for all creators, investors and consumers.
4. As stressed in the Digital Britain Report, we welcome the recognition that ISPs need to play an integral part of any solution given their pivotal position in the distribution chain for online music. We acknowledge the constant need to build on the number, range and variety of licensed digital music services and to endeavour to support an increasingly diverse range of licensed digital business models that can meet the differing desires of our music fans, whether by genre, delivery method or budget.
5. UK Music further welcomes Government's additional statement published on 25<sup>th</sup> August 2009.

In the context of an evolving licensed digital music market, we believe that Government's recent intervention is extremely timely and that, subject to assessment, Ofcom should be granted appropriate and proportionate powers as directed by the Secretary of State. This, we believe, would constitute significant progress, while also recognising the *"unacceptable amount of time to complete in a situation that calls for urgent action."*

6. **Direction of the Secretary of State:** We support the proposal that the Secretary of State would be able *“to direct Ofcom to carry out preparatory work on the mechanics of introducing technical measures, including an assessment of their efficacy on different networks, as well as developing the code that will apply to implementing such additional measures, and to consult on their conclusions.”*
7. **Evidence:** We agree that this direction should be based on evidence enabling the Secretary of State to *“carefully weigh the evidence available to him and make any order on the basis of defensible information based largely but not exclusively on the reports from Ofcom.”* This will accelerate the process and provide the flexibility needed in this perpetually evolving field.
8. **Technical measures to be introduced by Ofcom through secondary legislation:** We support the proposal that the Secretary of State can subsequently *“direct Ofcom to introduce the measures they had determined were effective and proportionate should he conclude that such measures are necessary to achieve the overall objective.”* And that *“(a)ny technical measures deemed necessary and appropriate by the Secretary of State would be introduced by Ofcom via secondary legislation.”*
9. **Range of options available to the Secretary of State:** We support Government’s proposals which would see ISPs send notifications and apply technical measures to impede and discourage the distribution of copyrighted content via unlicensed P2P networks and encourage the use of legitimate services. As an industry, we agree that a clear distinction should be made between how technical measures are applied to the casual infringer compared to how they are applied to the egregious or persistent infringer, with temporary suspension of broadband accounts being applicable only as a last resort against the latter. Safeguards and functional definitions should be introduced to ensure that this distinction is made and maintained.
10. **UK Music position on apportionment of costs:** We agree with the cost proposal put forward by DBIS in as far as it recommends *“to allocate costs so that essentially individual parties will have to bear the costs they incur as a result of these obligations.”*

We disagree that the operating costs of sending notifications - which is an obligation on ISPs - should be split 50:50 between ISPs and rights holders. In our view, a fairer apportionment would be for right holders to carry the costs of detection of the infringement and ISPs to carry the cost of communicating with their customers as part of their obligation to notify infringing account holders. That would also save on disputes over accounting for costs.

## Detailed response to the Consultation

### Notification obligation

#### **Question 1: Is this restriction right? Is there anyone else who ought to have a right to trigger the obligation?**

11. We agree with the restriction that a request in respect of a specific infringement may only be made by the right holder of that material or someone authorised to act on their behalf. We understand that this will include the two collecting societies PRS for Music and PPL, as well as BPI. Individual right holders, in particular, don't have the resources to identify infringing activities on peer-to-peer networks, nor to notify them. Since the majority of right holders in the music industry are small and medium-sized enterprises, and individual composers and performers respectively, it is vital that their collecting societies are able to make such requests on their behalf.
12. We agree that the obligation should include all providers of electronic communication networks and services under the definition of ISPs in Section 32 of the Communications Act 2003.

#### **Question 2: Should there be a time limit from the date of a specific infringement by which a requirement needs to be made? If so, what should it be?**

13. A time limit is neither practical, nor required. The time required to identify infringing peer-to-peer activities and to prepare evidence under the conditions to be set by the Code of Practice is not quantifiable. ISPs already have obligations to retain communication data for specific periods under existing voluntary arrangements based on Part 11 of the Anti-Terrorism, Crime and Security Act 2001. Under the Limitation Act 1980 legal action can generally only be taken within a specific timeframe for torts which includes copyright infringement (6 years).

#### **Question 3: Is this list right? Is there anything else that should be specifically added to this list? Should there be any more detail on any of these points in the legislation, or is it ok to leave that for the code?**

14. The proposed content of the notification letter to be sent by ISPs when notifying the account holder is reasonable. We agree that the wording of any further warning letter should escalate in tone.
15. We foresee that the list will be part of the Code of Practice so that it can be easily adapted should circumstances so require.

#### **Question 4: Does this need to be set out in any more detail in the legislation, or is it sufficient to require it to be set out in the code?**

16. The templates to establish an infringement on the balance of probabilities should be part of the Code of Practice. The inherent flexibility of such a Code will provide stakeholders and Ofcom with the possibility to change and adapt the template according to changing circumstances. We welcome the provision of an agreed standard template which will save costs, particularly for small right holders; it will also provide clarity for ISPs receiving the evidence.

#### **Question 5: This obligation is specified without any volume limit. Is that right? Should there be a restriction on how many notices a rights holder can serve, or that an ISP needs to honour (either from a specific rights holder or in total)?**

#### **Question 6: Alternatively should volumes be agreed (say) 6 months in advance between rights holders, ISPs and Ofcom to allow ISPs to prepare accordingly?**

17. We don't think that a limitation on the volume of notifications is advisable, nor will it be required in practice. The number of notices generated by rights holders will inevitably be limited amongst others given the costs involved in identifying infringers and presenting evidence.

**Question 7: Is this approach to costs the right one? Is there anything else in relation to costs that should be taken into account in the legislation? Should the legislation specify exactly how costs are to be shared or is it right to leave some flexibility in how the legislative requirements are reflected to the code?**

18. Any approach to costs requires transparency in terms of the costs accrued. We agree that the principles of proportionality, transparency, effectiveness, and fairness should be considered in the Digital Economy Bill.
19. We suggest that the legislation should also provide that individual parties essentially will have to bear the costs they incur as a result of these obligations." We disagree that the operating costs of sending notifications should be split 50:50 between ISPs and rights holders. The details can be left to the Code of Practice.

### **Serious Infringer Obligation**

**Question 8: Do you see any legal difficulty with linking a new notification with a previously gathered set of anonymised data in this way? If so, what specifically is likely to be the problem?**

20. The collection of anonymised data by ISPs does not raise data protection concerns given that under current law the data cannot be attributed to individual persons without a court order.
21. ISPs already have to retain data under existing and future legislation implementing Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications.

**Question 9: There is some evidence (research and empirical) that further warning letters result in a further reduction in people file-sharing. Do you think multiple letters should be sent (up to a maximum of (say) three) and, if so, what should trigger these? (For example, should this be on a strict, one infringement one letter basis or should there be specified levels (eg 1st letter on 1<sup>st</sup> infringement, second letter on 10<sup>th</sup>, third on 20<sup>th</sup>)**  
**For clarity we would anticipate that multiple letters would escalate in tone.**

22. The escalation in tone in the various letters sent to infringers is important given that the recipients of multiple letters will already have shown that they don't intend to react to first notification letters.
23. We welcome the Government Statement of 25<sup>th</sup> August 2009 which supersedes the trigger mechanism proposed in the original Consultation which was unworkable regarding the percentage envisaged, the costs involved, and the time frame provided.

**Question 10: Do you agree to the approach on costs set out here? Are there any additional factors that we should take into consideration here?**

24. This question has been superseded by the proposal in the Government Statement which suggested allocating costs so that essentially individual parties will have to bear the costs they incur as a result of these obligations apart from the operating costs of sending notifications, which will be split 50:50 between ISPs and rights holders.

We do not agree with the second part of the proposed approach, i.e. that the operating costs of sending notifications should be split 50:50 between ISPs and rights holders. Parties should essentially bear the costs they incur as a result of these obligations.

### **Ofcom power to impose other obligations**

#### **Question 11: Do you agree with the list of further measures that could be imposed and the conditions to which their application must satisfy?**

25. We support the proposal in the Government Statement that the Secretary of State can subsequently *“direct Ofcom to introduce the measures they had determined were effective and proportionate should he conclude that such measures are necessary to achieve the overall objective.”* And that *“(a)ny technical measures deemed necessary and appropriate by the Secretary of State would be introduced by Ofcom via secondary legislation.”*

#### **Question 12: Is 12 months about right to allow a proper assessment of the efficacy of obligations? If not, what would be a better period, taking into account the need to react both expeditiously and on the basis of good evidence?**

26. We welcome the proposal in the Government Statement that the Secretary of State would be able *“to direct Ofcom to carry out preparatory work on the mechanics of introducing technical measures, including an assessment of their efficacy on different networks, as well as developing the code that will apply to implementing such additional measures, and to consult on their conclusions.”*
27. The originally proposed trigger mechanism for technical measures was too protracted to have any impact in practice. It would also have forced the music industry to start legal action against individual users which is not the ambition of any member of UK Music. Such an antagonistic campaign would also inhibit a sound commercial relation between right holders, service providers and consumers and thus be inconsistent with the objective of the consultation, i.e. the creation of an effective online download and streaming market of scale.

### **Code of practice**

#### **Question 13: Do you agree with this list of things that Ofcom need to satisfy themselves of before approving a code? Is there anything else that Ofcom should be obliged to consider before approving such a code?**

28. We agree that the drafting of such a Code of Practice based on the criteria developed in Section 121 of the Communications Act 2003.

#### **Question 14: Do you agree that a code needs to be in place in time for common commencement? Is it realistic to expect such a code to be developed in less than 12 months, could it be done sooner, and if not what would be a realistic estimate?**

29. We agree that in light of the urgency of the problem it is key that Ofcom starts drafting a Code as soon as possible in order to have it in place in time for the common commencement date.

#### **Question 15: This list seeks to set out all the requirements of the code to enable the operation of the first two obligations. Does it do so? Is there anything else that the code must cover in order to enable the effective operation of those obligations and if so, what?**

30. We agree that the requirements set out in the consultation for the Code of Practice are comprehensive.

**Question 16: Are there any other restrictions or requirements that should be placed on Ofcom in pursuit of their role in relation to this code?**

31. We agree that Ofcom needs to be vested with powers to act in case of non compliance with the Code of Practice; we consider the powers as described in the consultation to be appropriate and sufficient (i.e. fines for non complying ISPs and non application of the obligations in the case of non-compliant right holders).

**Question 17: What are your views on the time line suggested above, and the ways in which it could be reduced? Are there other ways in which this could be shortened without hazarding essential safeguards and the need for decisions to be made on the basis of the best available evidence? Do you think a 6 month review point during the initial assessment period would be useful?**

32. We welcome the recognition in the Government Statement that the previous proposals on the time line, *“whilst robust, would take an unacceptable amount of time to complete in a situation that calls for urgent action.”* We are supportive of the Government proposals that the Secretary of State be given a two-part power of direction. We are hopeful that these proposals will render the approach imposing the two obligations regarding unlawful file-sharing effective; something the more explicit *“baseline and trigger”* approach previously proposed for Ofcom would have failed to do.
33. We support the proposal that the Secretary of State would be able *“to direct Ofcom to carry out preparatory work on the mechanics of introducing technical measures, including an assessment of their efficacy on different networks, as well as developing the code that will apply to implementing such additional measures, and to consult on their conclusions.”* We welcome that under this proposal Ofcom’s role is only to make recommendations to the Secretary of State.
34. We agree that this direction should be based on evidence, enabling the Secretary of State to *“carefully weigh the evidence available to him and make any order on the basis of defensible information based largely but not exclusively on the reports from Ofcom.”*
35. We support the proposal that the Secretary of State can subsequently *“direct Ofcom to introduce the measures they had determined were effective and proportionate should he conclude that such measures are necessary to achieve the overall objective.”* And that *“(a)ny technical measures deemed necessary and appropriate by the Secretary of State would be introduced by Ofcom via secondary legislation.”*

**Role of a self regulatory body**

**Question 18: Do you agree that this is an appropriate role and structure for the rights agency?**

36. We welcome the establishment of a forum for discussion between right holders and ISPs to develop a business-to-business approach of commercial agreements and business models. Such forum could also be useful to discuss the application of the Code of Practice.
37. We welcome the development of a list stating the most egregious illegitimate sites; filtering access to such sites, which would also cover other websites, such as unlicensed one-click hosting sites, would be invaluable. Such a list could be developed and regularly updated within an informal forum, including right holders, ISPs and consumers.

38. However, there is no role for a formally established Digital Rights Agency. This was agreed by most consulted parties in the context of the respective consultation on a Digital Rights Agency in March 2009.

### **Impact on Small Businesses**

**Question 19: Do you agree that we should proceed with an intention to exempt small businesses? If so, have we chosen the right criteria?? Do you have a preferred method of exemption? Please give reasons if you object or if you foresee any unintended consequences not discussed here.**

39. We disagree with the proposal for an exemption for small ISPs as suggested in the original Consultation. Such an exemption will defy the purposes of the proposed procedure, giving small ISPs an undue competitive advantage over the big five ISPs. ISPs falling under a small-business exemption might even try to pro-actively position themselves as a haven for repeat serious infringers.

### **Proportionality**

**Question 20: Do you consider there to be a case for considering any exclusions on other grounds including technical or proportionality?**

40. We don't consider that a proportionality exemption is required; moreover it will provide certain ISPs a discriminatory competitive advantage. As outlined in our response to question 19 we foresee that proportionality could be addressed internally by ISPs.

*29<sup>th</sup> September 2009*