



The Mobile Broadband Group

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Department for Business Information & Skills' consultation on legislation to address illicit peer to per file sharing

Response from the Mobile Broadband Group

1. The Mobile Broadband Group ("MBG", whose members are the UK mobile businesses of O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3) welcomes the opportunity to respond to the Department of Business, Innovation and Skills' consultation on legislation to address illicit file sharing, including the further statement issued by the Government on 25th August with revised proposals. This submission does not include the views of Virgin, which have been submitted separately.
2. The MBG has provided answers to the Governments specific questions in the allotted space but, by way of introduction, has set out some comments that specifically relate to the mobile platform:
 - The situation for mobile ISPs is potentially very different to fixed ISPs. First of all, the amount of illicit file sharing occurring on mobile broadband, which is an emerging service, is very small when compared to the fixed Internet.
 - Secondly, there are practical issues. Depending on network architecture, most mobile operators cannot identify individual copyright infringers from public IP addresses, based on the information that a rights holder can provide.
 - Because of the limited supply of IP addresses under the current format, RIPE, the European internet governing body responsible for assigning public IP addresses has generally not been able to assign to mobile operators a sufficient number of public IP addresses for them to allocate one IP address per device. There may be as many as 50 million IPv4 addresses available to RIPE today, which have to be shared across all industries and countries in Europe, and this is not enough for the mobile operators given the growth of mobile broadband.
 - The capital and operational costs that would arise from building and maintaining the logs that could potentially provide the link between a public IP address and a user,

would involve a huge investment and cost significantly more than the investment for fixed ISPs, thus putting mobile operators at a disadvantage and giving rise to further costs that would be borne by mobile subscribers, the vast majority of whom do not engage in illicit file sharing.

- A further practical problem is that for all manner of good reasons, prepaid customers are rightly not obliged to provide customer address details and often exercise their right not to register their name and address. It would not be possible to send such customers a letter in the post, notifying them of rights holders' allegations.
3. As a general comment, the overall tone of this consultation on proposed legislation is potentially placing significant burdens on the ISP community and virtually no obligations on the rights owning community, who, after all, are expected to be the principal beneficiaries – with the concomitant risk that they will use the legislation to perpetuate outmoded business models rather than move to ones that consumers now want and will be prepared to pay for. There is also the risk of creating a perverse incentive on them to rely less on their existing powers of enforcement.
 4. As the consultation document states, the estimated costs imposed on the mobile operators are significant. These are not costs that can somehow simply be absorbed and they must be considered in that context. The impact analysis fails to consider the opportunity cost of the proposed interventions – such as the cost deterrent on further uptake of broadband
 5. Mobile platforms and services have developed very differently to fixed on-line platforms and there has been considerable growth in legitimate content distribution where attractive content is competing successfully against piracy based alternatives on-line. Mobile operators value the relationship with the creative industries, which allows them to offer customers good value entertainment services including extensive content offerings such as music, video and online games.
 6. Given that implementation of the proposed systems on mobile platforms would disproportionately large and that the volume of P2P traffic on mobile is relatively low, we therefore support the proposal of a Named Inclusion Order as set out in the consultation document. The trigger for including ISPs should be one that is relevant for the purpose.
 7. Whatever solution is found, though, the mobile operators must be able to recover any **capital** and operational costs that could arise from the Government proposals, otherwise mobile operators will be at a competitive disadvantage to fixed ISPs. As the proposals stand, such costs would principally need to be recovered from mobile customers, the vast majority of whom do not indulge in illicit file sharing.
 8. MNOs believe that CAPEX and OPEX costs should be recoverable against the notifying rights holder. Cost recovery would then be on the same basis as other information/notifications to communications providers, such as RIPA requests. The MBG sees no reason why the cost of notifications for P2P illegal file sharing should not be fully recoverable as are notifications and requests issued in relation to serious criminal investigations.

Notification obligation

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

9. If the Government is to require notifications to be sent to customers about suspected file sharing, then all reasonable steps must be taken to establish that there has been a copyright infringement, and the wording of the letter must be appropriate in tone and content so that individuals are not unfairly harassed. The reasonable costs of such activity must be met by those that benefit - the rights holders.
10. Warranties should be given to ISPs that rights holders have the lawful jurisdiction to monitor copyright infringement and pursue those legal rights through information obtained from third parties. Rights holders should warrant to ISPs that they have accurate records so that ISPs do not make disclosures on the basis of inaccurate data.
11. As the MBG has pointed out on previous occasions, there are practical problems associated with mobile, which are set out in more detail below, in answer to question 20.
12. We would support the proposal that a request in respect of a specific infringement may only be made by the rights holder or someone authorised to act on its behalf.
13. We are very doubtful that it would be appropriate to outsource such an activity to any industry body. However, if it were to be done, the costs should be fully absorbed by the rights holder in question.

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

14. There should be a time limit, so that the entity holding the relevant information would not be required to hold information interminably. For a more detailed discussion on time limit – see response to question 20.

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?*

15. Bearing in mind the number of instances where completely innocent parties have been distressed and harassed by false accusations of file sharing, it is extremely important that the content and tone of the notification letter is expressed in terms that are not accusatory or threatening and that customers are given simple information

about where they can obtain any explanations they require about the contents of the letter.

16. Notifications should not be sent out until there is evidence that illicit activity exceeds a *de minimis* level.
17. The letter has to be very clear and specific about what is being alleged but it also has to be recognised that letters will undoubtedly lead to some very difficult discussions with customers, which are potentially damaging to the relationship between customer and ISP. Any proposals arising from this consultation will have to accommodate the fact that the ISP is merely an innocent intermediary and has the right to maintain an ongoing relationship with its customer. Government proposals to suspend subscribers are not proportionate. Such action will be very unpopular with the general public and run counter to the Government's (and others') view that a broadband connection is now an essential service and a right.

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?*

18. The MBG does not have a strong view about whether the legislation needs to be this specific. On balance, it would prefer that the legislation does not stray into the detail and that sufficient flexibility is left to adapt the content in the light of experience.

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)?*

19. It would seem hard to be specific about the volume at this stage but the obligation needs to incorporate a sense of reasonableness and proportionality.
20. We would suggest that an ISP should be under no obligation to send more than three notifications per IP address. Linked with Q6, there must be a mechanism by which the volumes to be dealt with can be planned for. Moreover, there should be some requirement on Right Holders to take legal action against serious infringers and demonstrate that they are able to bring a high percentage of successful claims. For example, if they continue to lose cases brought in court where it cannot be proved the evidence trail is trustworthy, then they should lose the right to demand that ISPs write a letter of alleged infringement to their customers. Otherwise the integrity of the whole process will be called into question.

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

21. It would certainly be helpful to receive a regular volume forecast for planning purposes and have an opportunity to agree a reasonable activity level. The core

activity of an ISP is to provide connectivity to the Internet- not deal with copyright infringement queries or send out notifications to suspected illicit file sharers and so its resources must be deployed in a proportionate manner.

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?*

22. The Government has explained that it wants to ensure the cost of operating the notification procedure is efficient. This is understandable. However, it has not explained the logic behind forcing the ISPs to contribute to the costs. The illicit files sharers use the facilities of many actors in the value chain to acquire copyright content for free – PCs, operating systems not to mention the providers of the file sharing software. Just because the ISPs are the ones in the value chain being asked to assist the rights owners protect their commercial interests, it should not also create a liability to bear the cost of doing this. An industry that, according to the Government is losing £400million through filesharing, should be prepared to cover the costs when it is asking others to help them out. The Government estimates that it will also gain £35million per annum from increased VAT receipts. It is therefore in a position to assist with costs.

23. ISPs are not seeking to profit from the notification procedure but it is only right that reasonably incurred costs should be covered. Such costs will not be limited to the sending of letters. They will also include capital and operational costs: recruitment and training of customer support staff to understand and deal with the inevitable customer complaints and grievances, a fundamental investment in infrastructure and system logs to attain compliance, and ongoing maintenance costs of such systems.

24. The MBG welcomes Government's acknowledgement that ISPs should be able to recover the cost of notification from rights holders. Given that such activity is of no benefit to ISPs, it is only right, under the Better Regulation principals, that those who benefit should cover their cost

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?*

25. It is fundamental that data protection issues be properly addressed and that the Information Commissioner be fully briefed and comfortable with proposals.

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 1st infringement, second letter on 10th, third on 20th) For clarity we would anticipate that multiple letters would escalate in tone. Please note the Impact Assessment includes the assumption that multiple letters are sent to persisting infringers. Costs in the IA have been calculated under the assumption that a single letter is sent to 70% of infringers and 10 letters are sent to the remaining 30% over a period of 10 years.

26. If more than one letter is to be sent, it makes sense that the contents be different, providing there is a strong basis for believing that the letters are being sent to the copyright infringer and that the letters do not harass potentially innocent people.
27. To reinforce and underpin the activity being undertaken by the ISPs, the MBG would expect that there should be an obligation on rights owners, when it comes across instances of serious rights infringement, to take court action to enforce their rights. An obligation to take court action would need to be referred to in a letter, if, for example, a third one is sent. Such actions will reinforce the message that rights are legally enforceable and infringement has consequences.

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?*

28. See answer to question 20. The legislation may need to be more specific on cost recovery but as we have stated elsewhere, ISPs must be able to recover both reasonably incurred **capital** and operational costs for assisting the rights holders in enforcing their commercial interests. The proposal to apportion costs 50:50 between ISPs and rights holders and write this into legislation is effectively asking ISPs to write a blank cheque, when no benefit to ISPs has been identified. It would therefore make sense for there to be some flexibility to review the cost issue on an ongoing basis.
29. Section 24 of The Regulation of Investigatory Powers Act deals with the matter thus “*It shall be the duty of the Secretary of State to ensure that such arrangements are in force as he thinks appropriate for requiring or authorising, in such cases as he thinks fit, the making to postal and telecommunications operators of appropriate contributions towards the costs incurred by them in complying with notices.*”

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?*

30. MBG is concerned that the consultation proposals are one sided with all obligations placed upon ISPs. There was a degree of consensus among stakeholders responding to previous consultations over the need for prevention through new business models and education rather than enforcement.
31. Yet there are no firm obligations on rights holders to undertake consumer education, pursue court orders or to offer realistic clearance fees to content providers wishing to

offer legitimate services. Perversely the less the rights holders do, the more likely it will be that technical measures will be imposed.

32. The Government has correctly stated that the 'further measures' proposed will be contentious with the public. While ISPs employ techniques such as bandwidth shaping, they are used in a non-discriminatory way in order to manage traffic and ensure that limited resources are shared fairly among customers. For example, they are not distinguishing (and could not) between customers that are using p2p for legitimate or illegitimate purpose.
33. As a matter of principle, it is a big step for the state to give itself powers to intervene so actively in people's Internet connections. We anticipate that the public will perceive this as a significant curtailment of what is increasingly recognised as a fundamental right (i.e. to use the Internet free from government control). They will also feel that such action is just the 'thin end of the wedge'. Only the courts should be the judges and the very important principle of the presumption of innocence should remain.
34. As a matter of practice, we also anticipate that there will be many problems implementing these techniques in a targeted and proportionate way. Take for example URL or site blocking – even if the sites themselves were to be blocked directly, customers could reach them through the use of legitimate proxy sites; protocol blocking is also fraught with difficulties – how will, for example, the legitimate use of p2p be distinguished from the illicit use?
35. The MBG feels that it would not be proportionate or in the public interest for the Secretary of State to acquire such powers, even though, in practice, he or she would find them very difficult to exercise.
36. The MBG is deeply concerned that the proposal to suspend users' accounts is yet again being considered as a potential sanction. This is completely disproportionate. Many consumer groups and some musicians have also repeatedly argued against this.

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?*

37. The MBG understands that this question has been overtaken to the extent that that the amended statement proposes a different approach. Nevertheless, if any technical measures are to be invoked, there will still need to be an objective way of judging whether any actions beyond notification and enforcement through court action could be justified. The Government proposals for triggering further action, as set out in the original consultation, are not reasonable

38. 70% is a number that permeates the consultation: 70% of illegal music downloaders agree that a basic reason for their unlawful behaviour is that legal downloading sources don't have the same range of content as illegal sources; 70% of mobile broadband costumers are pay-as-you-go; 70% of [Thus] customers did not infringe again [after the first letter]; 70% of those pirating digital content say they would stop downloading unauthorised content if they received an email or call from their ISP.
39. Somehow this has translated into 70% being the measure that is 'commonly accepted' as representing a significant reduction.
40. The MBG does not accept that this in any way fair or realistic. In no other context would so high a bar be set before the use of the word 'significant' was appropriate.
41. Take a few examples: 'Significant market power' is commonly held to be around the 20-25% mark. Or the announcement of crime reduction figures: "*The 14% fall in crime in South Oxfordshire over the last year is based on reductions in four out of the six offences used by the Home Office to measure crime.... The significant reduction in crime is largely due to the work carried out by members of the South Oxfordshire Community Safety Partnership*¹ "
42. One survey and one set of empirical data is a completely inadequate basis on which to characterise this as a 'commonly accepted' measure or set as a realities target for the first year. While the MBG, with others, can hope for such an impact, in reality, the success of the campaign will depend on many factors, only one of which is the efficacy of notifications: the extent to which the content owners make available alternative sources of legitimate content at prices and on terms that consumers are prepared to pay, will be equally relevant.
43. Because of the external contextual issue, the MBG rejects the notion of a fixed target for 'significant reduction' and proposes a more subtle assessment that takes account of the overall pace of change and a more normalised use of the word significant. It is also seems unlikely that 12 months will be sufficient time in which to give all the components (education, new business models and notifications) an opportunity to have gained sufficient momentum.
44. Moreover, the timeline assumes that one can implement any measure in some 3 months. This does not make sense: any project specification, tender and implementation of such significant measures would take 18 months at least.
45. Ultimately alternative business models based on attractive legitimate services will be the determining factor in changing customer behaviour – not technical measures.

¹ <http://www.southoxon.gov.uk/ccm/content/cmt/press-releases/july/crime-falls-by-14.en;jsessionid=aWo2qoo76Tth>

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?*

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?*

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?*

46. Taking questions 13-15 together, the provisions of Section 121 of the Communications Act and the proposed code contents appear appropriate for this purpose. The MBG is conscious, though, that co-regulatory codes are required to go through a process of public consultation. This will make a 12 month timetable very tight (PhonpayPlus take a bit longer than this updating their code).

47. As mentioned above, costs reasonably incurred by ISPs should be reimbursed – not apportioned. If it is thought necessary to promote efficiency, other methods of doing this should be sought [perhaps the reimbursement reduces over time]. ISPs can certainly deploy their staff to more productive activity than sending out notifications etc. and certainly have not interest in perpetuating file sharing.

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?*

48. The role should not be one of enforcement of IP rights but of encouraging distribution of content on-line through the development of legal offerings

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?*

49. A six month point is likely to be far too soon to be carrying out any meaningful review. If a mobile operator were to be required to implement an automated solution

for matching public IP addresses to individuals, it would take at least 18 months. Changes to core network architecture are required.

Role of a self regulatory body

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

50. The MBG does not support the establishment of a rights agency. The MBG submitted a response to BIS on this subject in April 2009². Our principal objection was to the suggestion that the Rights Agency help to draft and oversee a co-regulatory code. This appeared to be a rehash of a previous proposal on which the Government consulted and concluded did not command any industry support.

51. Nor do we think it is appropriate that an industry body be involved in the enforcement of individual rights owners' rights. With respect to education, there are already industry bodies such as FACT engaged in public awareness activity.

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.*

52. No comments

Proportionality

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

53. The MBG believes that there are strong grounds for not including mobile networks operators on the grounds of proportionality, as the situation for mobile ISPs is potentially very different to fixed ISPs. First of all, the amount of illicit file sharing occurring on mobile is very small when compared to the fixed Internet.

54. Secondly, there are practical issues. Depending on network architecture, most mobile operators cannot identify individual copyright infringers from public IP addresses, based on the information that a rights holder can provide, with a sufficient degree of confidence to support sending notifications customers.

² http://www.mobilebroadbandgroup.com/documents/mbg_rights_agency_draft_3_4_09_f.pdf

55. Because of the limited supply of IP addresses under the current format, RIPE, the European internet governing body responsible for assigning public IP addresses has not been able to assign to mobile operators a sufficient number of public IP addresses for them to be able to allocate one public IP address per device. There may be as many as 50 million IPv4 addresses available to RIPE today, which have to be shared across all industries and countries in Europe, and this is not enough for the mobile operators given the growth of mobile broadband.
56. In order to maintain the logs that could potentially provide the link between an IP address and a user, a significant amount of extra data storage would need to be built and somehow paid for. The length of time any data was required to be kept (i.e. the time limit on rights holders placing a notification request) would have a direct bearing on the cost.
57. A further practical problem is that for all manner of good reasons, prepaid customers are rightly not obliged to provide customer address details and often exercise their right not to register their name and address. Prepaid offerings are recognised to be particularly popular with customers from the most vulnerable sections of society, a group that the government, through its digital inclusion work, are particularly keen to ensure have Internet access. It would not be possible to send such customers a letter in the post, notifying them of rights holders' allegations. The Government must bear these points in mind and ensure that any outcome from these discussions can accommodate such limitations.