

ISPs and File Sharing

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The story so far

- ▶ 20 billion tracks allegedly illegally shared or downloaded in 2005 (IFPI)
- ▶ Loss of £460 million in UK economy due to piracy/downloads (say BVA/IPSOS 2006)
- ▶ How can the industry/govt act to stop file sharing?
- ▶ Sue P2P vendors? – *Napster, Grokster*
- ▶ Ineffective in a distributed post Bit Torrent world
- ▶ Sue individual file sharers?
- ▶ Slow, expensive and counter productive.
- ▶ What next?



So how can ISPs “help” the content industry

- ▶ So far...
- ▶ Notice and take down – doesn’t scale
- ▶ ? Sharing of anonymised logs of high-level downloaders/uploaders (for targeted disclosure actions) – not very helpful

- ▶ Disclosure of IDs of filesharers identified by IP address
 - ▶ Issues
 - ▶ *Totalise v Motley Fool* – established disclosure legal if possible legal proceedings, even despite DPA 98 (see s 35) and despite privacy policy of ISP itself (or implied legal obligation of confidence)
 - ▶ Some attempt to balance privacy rights of subscriber against property rights of potential plaintiff, but very low standard
 - ▶ Despite near rubber stamping in courts (though see *Sheffield Wednesday* case) not as satisfactory to content industry as (eg) automatic disclosure available under DMCA in USA.
 - ▶ But mainly - Disclosure then only first step to (threat of) legal action.



So– notice and disconnection?

- ▶ Ask ISPs to disconnect subscribers connected to file sharing
- ▶ Needs *all* ISPs involved, or ineffective
- ▶ What if some won't agree?
- ▶ *“We will consult on legislation that would require ISPs and rights holders to cooperate in taking action on illegal filesharing – with a view to implementing legislation by April 2009.”* (p 51, “Fostering and protecting IP”)
- ▶ ? *“3 strikes and you're out”* – step 1, warning letter; step 2, short suspension of service; step 3, termination.
- ▶ No details as to process, arbitration of disputes, appeals to courts.
- ▶ Similar schemes in France; proposed Japan, Australia.



Legal issues and objections - 1

DUE PROCESS

- ▶ Should a right as important as access to the Internet be withdrawn *ab initio* by ISPs/industry rather than a court?
- ▶ Lack of transparency, public examination of evidence, impartiality, etc.
- ▶ ISPs are providers of services, not police or judges – no knowledge of law, evidence rules, etc.
- ▶ Where does *onus of proof* lie? Eg if downloading done by someone *other* than account holder associated with IP address? If machine infected by uploading Trojan? If wi fi piggybacker?
- ▶ What rights to defend against false accusation? To lawyer and legal aid? Pre or post any access / appeal to courts?
- ▶ See Art 6(1) ECHR (but “civil *rights*”)?
- ▶ French scheme involves *independent* tribunal under directions of a *judge*.



Legal issues - 2

- ▶ *PROPORTIONAL* response to the problem?
 - ▶ Defends property rights but steamrollers due process rights.
 - ▶ What if 3 (or 30) songs downloaded lead to loss of job?
 - ▶ Impact on rest of household?
 - ▶ Since Internet access now also vital to expression, association, education, much commerce, and much civic engagement, other rights may be infringed – eg ECHR Art 10; EC Charter of Rights, Arts 11, 12, 14, 36(?). (See Swedish choice, Mar 08.)
 - ▶ If ID data used for “3 strikes” then released to police/courts/industry, also *privacy* issues involved. ECHR, Art 8; Charter of Rights, Arts 7, 8.
 - ▶ ECJ – *Promusicae* – national legislatures (and interpreting *authorities*) not to prejudice other “*fundamental rights*” **or** “the other general principles of Community law, such as the principle of *proportionality*” when implementing/enforcing EC laws (eg copyright).
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Legal issues - 3

- ▶ THE LAW OF UNINTENDED CONSEQUENCES
- ▶ Disconnection likely to be sanction for breach of ISP terms and conditions, by account holder, regardless of *who* breaches
- ▶ But what if downloading by wi fi piggybacker?
- ▶ To prevent disputes , will ISPs impose a requirement all home wi fi be secured?
- ▶ Loss of public benefit of unsecured wi fi – “a resource, like water fountains”?
- ▶ Possibly illegal under EC E-Commerce Directive - are wi fi operators “mere conduits” (Art 12) not liable for traffic via their service?

