Industry self-regulation and proposals for action against unlawful filesharing in the UK: reflections on Digital Britain and the Digital Economy Bill

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Digital Britain

The UK Government has made rather a big deal of its claims to promote the UK as a leading force in the digital world. Let's ignore that the digital world pays little attention to national boundaries; the UK government would really like to spur growth in the digital and communications industries and make Britain a leader in the global digital economy. Its flagship initiative *Digital Britain* was first published as an interim report in January 2009[1] and then as firm proposals in June 2009[2]. It covers a wide range of areas within the scope of a digital strategy: extending broadband coverage, promoting online delivery of government services, encouraging the development of next generation networks, exploring digital radio and playing with the wireless radio spectrum. All good things, but there is a risk that clumsy implementation of one key component may have a detrimental effect on the declared aim. The proposals on copyright enforcement in the Digital Economy Bill[3], the draft legislation emerging from the Digital Britain report, rely in part on industry cooperation and the concept of self-regulation to attain the desired policy objectives. If this element fails, it may leave both the internet players and the content industry disappointed with the Government's intervention.

The Government seeks to tackle the thorny issue of internet piracy with detailed proposals to reduce the extensive use of peer-to-peer filesharing for distributing music, video and other entertainment without the permission of (or any payment to) the content owners. Chapter 4 of Digital Britain "Creative Industries in a Digital Age"[4] sets out the claim to make the UK "one of the world's main creative capitals" by

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1 Digital Britain interim report January 2009 available at http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf
2 Digital Britain final report June 2009 available at http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf
3 Digital Economy Bill [HL] 2009-10 available at http://services.parliament.uk/bills/2009-10/digitaleconomy/documents.html
4 Chapter 4 Digital Britain final report supra

seeking to "protect the creative industries to preserve innovation in content". To achieve this, the government lays out two strategies with the aim of creating an effective online download market of scale. First, by informing the public about the unlawful nature of copyright infringement (although surely by now most people have heard this message, even if many have chosen to ignore it) and secondly by applying sanctions against the "small minority"[5] who persist with unlawful filesharing. Incidentally, we have to overlook the inconsistency of the government's messages about the size of the problem; sometimes it suggests (a claim backed by the content industry) that internet piracy is so widespread that it threatens the very foundation of the creative industries; at other times, particularly when talking about imposing sanctions, it refers to the "small minority" who persist with unlawful filesharing and who must be stopped.

Chapter 4 concludes with the announcement of forthcoming legislation to require internet service providers (ISPs), the unfortunate intermediaries who sit between the content owners whose assets are being stolen and the consumers who use internet access to do the stealing, to step up their efforts to protect the interests of the creative industries. There has been much discussion, in the UK and elsewhere, over the rights and wrongs of forcing ISPs to act for the benefit of content owners (and the justification of forcing one industry to protect the economic interests of another industry) and the extent of the sanctions that might be brought to bear against offending consumers. The UK government sought to bring the debate to an end with a firm speech by Lord Mandelson, the Secretary of State for Business, Innovation and Skills, on 28 October 2008[6] in which he said:

> "*What we will be putting before Parliament is a proportionate measure that will give people ample awareness and opportunity to stop breaking the rules. It will be clear to them that they have been detected, that they are breaking the law and that they risk prosecution. If necessary we have also made it clear that we will go further and make technical measures available, including account suspension. In this case, there will be a proper route of appeal. But it must become clear that the days of consequence-free widespread online infringement are over."*

If this is the declared aim, it's important to examine the structural framework and enforcement mechanisms that the government is proposing to regulate ISPs in order to ensure that they meet the specified objectives behind this policy. There is a good argument, relevant to almost any area of law, that the successful attainment of the desired policy objectives requires a workable, even efficient mechanism to secure enforcement. Regardless of the appropriateness of the law itself, if the enforcement mechanism is flawed, the desired objectives may never be reached. In short, a good law may be seen as a bad law if its enforcement fails. So, this is the practical question: has the UK government devised sufficiently robust and appropriate mechanisms to enforce the proposed laws that it seeks to introduce to reduce unlawful filesharing by UK citizens? If not, the desired policy aims may well fail to be achieved.

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[5] Chapter 4 para 21 Digital Britain final report supra

6 Lord Mandelson. Cabinet Forum speech. 28 October 2009 available at http://www.cabinetforum.org/blog/lord_mandelson_speech_transcript_on_p2p_copyright_and_creative_industries/

Digital Economy Bill

As prefaced in the Digital Britain report, on 20 November 2009 the Government introduced the Digital Economy Bill ("the Bill")[7] to deal with, among other initiatives, online infringement of copyright with the following key provisions:

- To require ISPs to notify account holders that their accounts have been used to infringe copyright;
- To require ISPs to collect data to identify serious repeat infringers and make it available (on the basis of a court order) to a rights holder—who may use it to assist in enforcement action;
- To authorise Ofcom to approve a code of practice devised by industry on notifications, identification of infringers and data management and to require Ofcom to step in with its own code if industry fails to produce an acceptable version within six months after the new law is introduced; and
- If needed (in the opinion of the Secretary of State[8]), to require ISPs to apply various "technical measures" aimed at limiting internet access of persistent infringers with the objective of deterring copyright infringement (e.g. site blocking, bandwidth capping, account suspension, etc).

These provisions introduce a two-tier framework to combat unlawful filesharing. First, clauses 4 to 8 of the Bill propose a framework whereby an ISP is required to send a notification to any account holder (subscriber), triggered by the receipt of a "copyright infringement report" sent to the ISP by a content owner, indicating that his or her account has been reported as having been used for an apparent infringement of copyright. Content owners are able to use online tracking devices to identify when an IP address is used to copy one of their media assets without authorisation, but cannot link that IP address to an individual consumer without the help of data held by an ISP (which can tell which IP address was being used by a particular access account at a particular time).

The Government hopes that the mere sending of notices to account holders will deter further copyright infringement and reduce unlawful filesharing in the UK. If not, and Ofcom is required under clause 9 of the Bill to prepare periodic progress reports for the Government on the continuing level of internet piracy, the Government will have the power (under clause 11 of Bill) to introduce the second tier of enforcement and require ISPs to impose "technical measures" against persistent infringers. These "technical measures", which will be spelled out in a code to be devised by Ofcom, are intended to limit the subscriber's internet access (e.g. by restricting bandwidth or blocking internet ports) in order to prevent further sharing of large files. They may also, as a last resort, include the suspension of the subscriber's internet access account.

A key element of the first tier of enforcement, referred to in the Bill as the "initial obligations" on ISPs, is the approval by Ofcom (under clause 6 of the Bill) of a code of practice compiled "by any person"[9] for regulating the receipt of copyright

[7] Digital Economy Bill [HL] 2009-10 available at http://services.parliament.uk/bills/2009-10/digitaleconomy/documents.html
[8] Clause 11 ibid
[9] Clause 6(1) ibid

infringement reports, the despatch of copyright infringement notices, the keeping of information by ISPs about their subscribers, the time limits for keeping such information, the sharing of costs and the provision of infringement data to content owners[10]. The reference to "any person" is intended to mean a combined effort by industry to devise and agree a code to cover these vitally important issues. Under clause 7(1) of the Bill, Ofcom is required to issue its own code for these issues if it hasn't approved an industry code within six months after the relevant provisions come into effect. Accordingly, industry has been given a limited time to agree a code, failing which Ofcom will step in. Although not expressly stated in the Bill, this industry initiative was originally expected to be undertaken by a self regulatory body known as the Rights Agency.

Rights Agency

In its preliminary proposals for Digital Britain published in January 2009, the Government anticipated a wide ranging role for a new Rights Agency[11] designed to resolve the competing interests of ISPs and content owners in this area and supervise an industry-led approach to educating the public on copyright matters and tackling unlawful filesharing. Immediately following the publication of the Interim Report, the Government issued a consultation document seeking responses to this proposal, explaining that industry needs to support and fund an agency which will promote education and information, encourage commercial offerings, aid voluntary rights registrations, be a guarantor of quality and act as a self-regulatory enforcer against copyright infringement.

The consultation attracted responses[12] from rights holders, ISPs and consumer groups with the following general conclusions:

- there was little support for voluntary rights registration as this was seen to be costly with little benefit;
- there was some demand for more research on a badge of quality system ("kite marking") for dealing with online content and copyright ownership;
- rights holders favoured the idea of Ofcom enforcing a code of practice developed by the Rights Agency, whereas ISPs did not want the agency involved in preparing a code;
- the funding and composition of the Rights Agency was not agreed; and
- many respondents could not see the value of a Rights Agency acting as a dispute resolution body on the basis that the Copyright Tribunal already performs this service.

Following this consultation exercise, the proposed role of the Rights Agency was much reduced in the Digital Britain final report. Paragraph 25 of Chapter 4 reads:

[10] Clause 8 ibid
[11] Action 11 Digital Britain interim report supra
[12] Summary of responses to consultation on Digital Britain interim report available at http://www.culture.gov.uk/images/publications/summaryofresponses_digitalbritain.pdf

> "*These obligations [of ISPs under the legislative proposals] will need to be underpinned by a detailed code of practice. We hope that an industry body (the "rights agency" envisaged in the interim report or "rights authority" as some now term it) will come into being to draft these codes for Ofcom to approve and we would encourage all rights holders and ISPs to play a role in this."*

On the same day that the final report was published, the Department of Business, Innovation and Skills (BIS) issued a consultation paper[13] with a preamble saying[14]:

> *"The implementation and effectiveness of the proposals in this paper would be facilitated by the establishment of some form of industry body representing both rights holders and intermediaries and others with a direct interest, which might correspond to the rights agency floated within the [Digital Britain] Interim Report. Such a body would be capable of agreeing the relevant codes of practice to support this legislative approach. It could also work on other important issues such as public education and awareness and developing new approaches as online piracy changes."*

Although the Government clearly wants to involve industry in tackling this issue, there must have been some temptation to introduce legislation to hand the necessary powers directly to Ofcom (rather than to give industry six months after implementation to devise a code before Ofcom is required to step in). Some commentators have remarked that it is undesirable to leave such important matters to a code rather than having them clearly set out in the primary legislation[15]. In any event, the BIS consultation document clearly proposes "a self regulatory body" that will be created:

- to draft a code (for Ofcom's approval) under which ISPs' obligations would operate;
- to develop a list of illegal sites to which access should be blocked "*if industry members wished it to do so"*;
- to develop organically *"e.g. as an agent for rights holders in pursuing court orders if consensus is developed between the parties*" or as an industry body "*coordinating education and awareness raising*."

And, as if to head off further debate on a stronger level of state intervention, the document firmly concludes: *"We do not intend to place the rights agency on a statutory basis for the purposes of addressing unlawful P2P filesharing."*

However, the Digital Economy Bill makes no express mention of the Rights Agency at all. The Bill merely grants powers to Ofcom to approve a code "*made by any person*"[16]. Accordingly, it is assumed that the industry players are being given a very limited time to propose a code—with the backstop proviso under section 7 of the Bill that Ofcom must step in and make its own code if it hasn't approved "*any person's*"

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[13] BIS consultation on legislation to address illicit peer-to-peer file-sharing published 16 June 2009 available at http://www.berr.gov.uk/files/file51703.pdf

[14] Page 2 ibid

[15] Liberty. Briefing paper on Digital Economy Bill at Section 10 available at http://www.liberty-human-rights.org.uk/pdfs/policy-09/digital-economy-bill-house-of-lords-second-reading-briefing.pdf

[16] Clause 6 Digital Economy Bill supra

code within six months after the introduction of the Act. So, industry is facing a burning fuse.

It's not entirely a standing start for industry to devise a code. A code of practice on anti-piracy cooperation was envisaged in the Memorandum of Understanding signed by several content owners and ISPs in the summer of 2008[17] to record a cross-industry agreement on measures to be taken to tackle online copyright infringement (part of which is now reflected in the Digital Britain proposals). The momentum for its creation was lost with the emergence of the Government's own initiative on Digital Britain, but some work on drafting a code was done under Ofcom's guidance and preliminary drafts are said to be in existence. However, while it might be feasible for industry to resurrect these drafts and try to agree a code on the notification and data-gathering processes, it would be a significant step (floated in the BIS consultation, but not in the final Digital Britain report or the draft Bill) if the Rights Agency were to be responsible for compiling a blacklist of pirate websites to be blocked by ISPs. Or, again floated in the BIS document, if the Rights Agency were to become the "*agent for rights holders"* in pursuing court orders against ISP account holders.

It's true that the BIS draftsman qualifies these roles with cautionary words such as "*if consensus is developed between the parties*", but in giving support to the idea that the Rights Agency's role and powers might evolve into something far removed from notifications and data-gathering is a major step. The creation of a cross-industry body without clear limits on its scope of authority, and an explicit instruction from government for one side to push those limits, might undermine the confidence of participants from the very beginning. It certainly sends a signal to rights holders to press for a deeper level of public intervention by the Rights Agency (if it ever emerges) even to the extent of getting directly involved in the court process, a move that would surely alarm the ISPs as they would be seen as becoming directly involved in suing their own customers.

It's important to remember that any regulatory process must ensure due consideration of the public interest; this becomes a critical component when dealing with, as here, fundamental rights such as freedom of expression. A key difference between self-regulation (where industry administers a solution to address regulatory objectives) and co-regulation (where industry combines with designated public authorities to administer a solution) is that co-regulation introduces a supervisory role for the public authority specifically with the aim of protecting the public interest.

This intervention by a public authority is intended to ensure due consideration of the public interest where otherwise it might not be given adequate weight by industry alone. With the earlier proposals for a Rights Agency, the Government might have been expected to introduce specific safeguards in the agency's constitution for public interest considerations including, perhaps, a requirement for participation by consumer interest groups as well as internet and content industry players. With the new proposals silent on the creation of any quasi-statutory or other body (simply referring to the intervention of "*any person*"[18]), there is a risk that this area may be under-represented.

[17] Memorandum of Understanding on an approach to reduce unlawful file-sharing announced between key stakeholders from the ISP industry, the content industries, OFCOM and HM Government on 24 July 2008 available at http://www.bpi.co.uk/our-work/protecting-uk-music/article/joint-memorandum-of-understanding-on-an-approach-to-reduce-unlawful-file-sharing.aspx

[18] Clause 6(2) Digital Economy Bill supra

For the creation of the "initial obligations" code, Clause 8 of the Bill spells out the criteria for its contents and includes qualitative requirements such as justifiable, non-discriminatory, proportionate and transparent, as well as practical matters such as resolution of disputes and determination of appeals, but these are minimum safeguards and it remains to be seen whether they provide a sufficiently robust framework.

While public interest considerations are important for the compilation of the "initial obligations" code that relates primarily to the collection and processing of citizens' personal data, these issues are even more vital for the "technical obligations" code that will be compiled by Ofcom (without any express requirement for a contribution from industry) under clause 12 of the Bill. This code will provide a framework to administer the proposed "technical measures" for limiting the internet access of persistent infringers. Public interest requirements for its contents are set out in clause 13 of the Bill; they are similar in scope to the provisions of clause 8 with the addition of a designated right of appeal to the First-tier Tribunal on matters of fact, law and reasonableness.[19] Again, without the requirement for participation by human rights or consumer groups in compiling the code, it remains to be seen whether these provisions are robust enough to meet the public interest needs in such a sensitive area.

Regulatory options

At this point it's useful to look more closely at what a self regulatory body actually is and to review the options facing the Government in devising a regulatory structure appropriate to the needs of the situation. Fortuitously, Ofcom undertook this task in a 2008 project that resulted in a formal statement published in December 2008[20]. It builds on work done previously for the European Commission by the Rand organisation[21] and demonstrates a spectrum—or sliding scale—of government intervention depending on the perceived attraction of the policy goals to the industry concerned: essentially and unsurprisingly, the greater the incentives for industry to meet the declared objectives, the lower the level of government intervention is required to enforce their attainment.

Ofcom spelled out four levels of intervention[22]:

No regulation. Markets are able to deliver required outcomes. Citizens and consumers are empowered to take full advantage of the products and services and to avoid harm.

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[19] The First-Tier Tribunal is a generic tribunal established by Parliament under the Tribunals, Courts and Enforcement Act 2007 to hear appeals against decisions of the Government where the tribunal has been given jurisdiction.

[20] Ofcom Statement on Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-Regulation available at http://www.ofcom.org.uk/consult/condocs/coregulation/statement/

[21] Jonathan Cave, Chris Marsden, Steve Simmons. Options for and Effectiveness of Self- and Co-Regulation published by the RAND Corporation for the European Commission (2008) available at http://www.rand.org/pubs/technical_reports/2008/RAND_TR566.pdf

[22] Page 7 Figure 1 Ofcom Statement on Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-Regulation supra

Statutory regulation. Objectives and rules of engagement are defined by legislation, government or regulator, including the processes and specific requirements on companies, with enforcement carried out by public authorities.

Self-regulation. Industry collectively administers a solution to address citizen or consumer issues, or other regulatory objectives, without formal oversight from government or regulator. There are no explicit ex ante legal backstops in relation to rules agreed by the scheme (although general obligations may still apply to providers in this area).

Co-regulation. Schemes that involve elements of self- and statutory regulation, with public authorities and industry collectively administering a solution to an identified issue. The split of responsibilities may vary, but typically government or regulators have legal backstop powers to secure desired objectives.

Inevitably there are advantages and disadvantages with each option. In broad terms:

Statutory regulation produces legislative certainty (if well drafted, of course), is backed by the state's enforcement framework (and thus requires no additional enforcement mechanisms) and explicitly anticipates the public interest. It's appropriate for use where industry solutions are not likely to be effective, such as where a market is dominated by one player or the structure of the industry doesn't allow a coordinated industry response (e.g. if there are a large number of small players). Its disadvantages are the inflexibility of written law, the slow pace of the legislative process, the risk of disproportionate enforcement mechanisms (sledgehammers for nuts) and the failure to employ industry expertise (or gain industry buy-in) to deliver the desired goals.

No regulation is appropriate where the desired outcome can be expected to emerge from the market without further encouragement or where regulatory intervention would not be likely to assist. For example, in a competitive market with no dominant player distorting the picture, it's possible to deduce that all traders have an incentive to meet consumer needs (on choice, price, etc) since failure to do so would have an adverse impact on their trading prospects. All the traders have a strong incentive to follow good practice.

In the internet world, the absence of regulation has also been identified with the innovative, fast-paced, continually developing nature of the internet and its supporting technologies: a central point of Jonathan Zittrain's arguments in *The Future of the Internet—And How to Stop It*[23] is that unfettered activity and free-flowing technologies encourage the development of continuing fast-paced developments, whereas the corollary of over-regulated and restricted technologies have a dulling effect on technical advancements. Zittrain identifies a trade-off of more flexibility (ie less regulation of the trader) for less security (ie less protection for the citizen) and claims that, in the main, this trade-off has worked well for the internet world and the predicted disasters from unregulated behaviour have largely failed to materialise–or, where they have appeared, the unregulated nature of the industry has facilitated prompt and effective responses.[24]

Self-regulation allows for flexible, targeted action that benefits from industry expertise (e.g. technical knowhow) to find an efficient and potentially innovative

[23] Jonathan Zittrain. The Future of the Internet — And How to Stop It. 2008. http://yalepress.yale.edu/book.asp?isbn=9780300124873

[24] Page 9 ibid

solution. At times, one can presume that governments simply don't know the best (technical) solution to achieve a particular objective. In 1996 when the London Metropolitan Police were considering action against ISPs for allowing child abuse and other criminal images to be displayed on their services, it's unlikely that they or their government masters understood the technicalities of notice-and-takedown as a potential solution.[25] In addition, and very significantly, self-regulation can promote a sense of ownership and responsibility from the industry participants. If industry players have devised and implemented a proposed solution, they will be more likely to make it work (effectively and efficiently) than one imposed on them from above. Furthermore, if industry has a positive incentive to make its solution work, the desire will be all the stronger. Negative incentives have their place (e.g. sanctions for failing to comply) but positive incentives, where industry's interests are aligned with the public interest, will be embraced more willingly and inevitably require less enforcement.

Co-regulation combines the benefits of self-regulation with some regulatory oversight and provides backstop powers for a public authority to intervene to protect the public interest or to re-focus efforts on the desired outcomes. It allows government to utilise the experience and technical expertise of industry to devise a solution, while enabling its regulatory body to stay closely involved to monitor progress and retain powers to intervene where needed.

The choice of regulatory structure depends on the circumstances of the particular case and a judgement on where to draw the line on the spectrum of government intervention. Ofcom sees this as an issue of weighing up the incentives for industry to meet the desired policy objectives. In its statement[26] Ofcom examines how to judge these incentives: how to assess whether industry's aim to maximise profits and returns is aligned with the protection of the public interest and offers guidance[27] in prompting questions to determine whether self-regulation is likely to be successful:

- Do the industry participants have a collective interest in solving the problem?
- Does the industry solution correspond to the best interests of citizens and consumers?
- Would individual companies have an incentive not to participate in any agreed scheme?
- Are individual companies likely to cheat or free-ride on an industry solution?
- Can clear and straightforward objectives be established by industry?

Ofcom identifies[28] the criteria for assessing the likely success of new self or co-regulatory schemes:

- Public awareness
- Transparency
- Significant industry participation
- Adequate resources

[25] See below under Internet Watch Foundation

[26] Ofcom Statement on Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-Regulation supra

[27] Page 16 figure 3 ibid

[28] Page 22 figure 4 ibid

- Clarity of processes
- Ability to enforce codes of practice
- Audits of performance
- Systems of redress in place
- Involvement of independent members
- Regular review of objectives
- Non-collusive behaviour

To the extent that the answers to these questions, with the specified criteria used, imply that there are low incentives for industry to deliver the desired policy objectives, self-regulation is unlikely to succeed and co-regulation (or some greater level of state intervention) may be a preferred solution. Ultimately, the lack of incentives may lead to a decision to impose full statutory regulation. It's useful to look at some case studies of successful—and not so successful—examples of where self and co-regulatory schemes have been used.

Internet Watch Foundation (IWF)

The IWF is sometimes held out as a good example of how a self regulatory body can work successfully[29]. It was created in 1996-7 by the UK ISP industry to act as an industry hotline for receiving reports of child sexual abuse images, investigating their source and notifying the host ISP (if located in the UK) to request them to take down the offending images from their services. All members of the Internet Service Providers Association (ISPA) are required to comply with its code of practice as part of their ISPA membership obligations. It has achieved considerable success, with sources of domestic UK content of such images being reduced from 18% of known content in 1977 to less than 1% in 2008[30]. The IWF works "*in partnership*"[31] with the online industry, law enforcement agencies, government and the public, but remains an independent self regulatory body of the ISP industry—funded by public grants and membership fees (it currently has more than 90 member companies).

> "*There is no doubt that the success of the IWF is founded on the strength of bringing public bodies together with the private sector to form an incredibly dynamic partnership to tackle the distribution of child sexual abuse content online. The UK has a unique approach to tackling this content, with such extraordinary support from the online sector making a very real difference in disrupting the proliferation of child sexual abuse content on the internet*."
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> Peter Robbins OBE, Chief Executive, IWF January 2008.[32]

[29] Page 9 para 2.11 ibid
[30] Internet Watch Foundation annual report 2008 available at http://www.iwf.org.uk/documents/20091214_iwf_annual_report_2008_pdf_version.pdf
[31] Internet Watch Foundation Mission and Vision available at http://www.iwf.org.uk/public/page.114.htm
[32] Internet Watch Foundation website available at http://www.iwf.org.uk/media/page.86.htm

The creation of the IWF was prompted by a circular letter sent in August 1996 by the Metropolitan Police to a number of ISPs in the UK demanding that they remove child sexual abuse images from their services or face prosecution for publishing criminally illegal material. In the early days of the public internet, with little governmental understanding of internet technology, the UK Government was relieved to see the ISP industry (through ISPA) take up the issue and propose a solution. During the autumn of 1996 ISPA devised a code of practice for the operation of a notice-and-takedown procedure, sought informal backing from Government (and the police) and imposed the code on its members with the sole sanction of expulsion from ISPA membership for failure to comply. This code became the basis of the IWF framework.

The remit of the IWF has evolved over time, with the addition of responsibility for notification of extreme pornography and racist hate speech. It has also developed a database of websites where child abuse content can be found ("the CAIC list" - Child Abuse Images and Content list), so that ISPs and search engines may voluntarily block access to such sites. The CAIC list is intended as a deterrent factor, to help deter the inadvertent or casual visitor, but is not as an investigative or policing tool and will do little to put off determined child predators (who typically use peer-to-peer filesharing technologies not covered by the CAIC blocking list). This somewhat piecemeal, but pragmatic approach has attracted criticism that the IWF could do more in the battle against offensive internet content—but equally it faces the free-speech critics who object to any censorship on the internet.

By concentrating on child sexual abuse images, which are criminally illegal in almost all jurisdictions worldwide, the IWF has gained general acceptance both in the UK and internationally and has forged links with similar enforcement organisations around the world. It might not have enjoyed the same level of success if it had added other content genres, perhaps equally offensive but without the same universal badge of criminality (e.g. religious hatred). This underlines the motivational force behind the creation of the IWF: it was set up to assist ISPs in combating abuse of their systems for the dissemination of criminal content by users, which put the ISPs at risk of prosecution. It was not created for the primary notion of protecting consumers or serving the public interest; these were merely by-products. This may explain the reluctance of the IWF to expand its scope to other content which, while offensive to many, does not cause its membership to be threatened with criminal sanctions.

The IWF is not accountable to any public body. It claims a "partnership" with its stakeholders[33] and has frequently been recognised—and applauded—by government and other public bodies for the work it does[34]. It is solely answerable to its membership, largely demonstrated through their continuing payment of subscription fees. It has no external appeal structure and there is no precedent for an aggrieved party applying to the courts for a review of an IWF decision. Notwithstanding these vulnerabilities, it is seen as a success. It has brought considerable public relations benefits to the ISP industry; its activities have avoided any further governmental intervention in this area; and its flexible approach (such as expanding its scope to include the compilation of the CAIC list) has allowed it to adapt in a changing environment.

The IWF's strengths seem to be based on the alignment of the interests of its members (in protecting ISPs and other internet intermediaries from prosecution for

[33] Internet Watch Foundation Mission and Vision supra

[34] Internet Watch Foundation website available at http://www.iwf.org.uk/media/page.86.htm#Government

the activities of their users) with the public interest (as interpreted by government and the child protection lobby, if not the free-speech lobby) in providing a filter for illegal content that puts children at risk. It has also benefited, both at its inception and its later development, from industry expertise. It was unlikely, particularly in 1996, that government would have devised an efficient solution of notice-and-takedown without industry help. Having been devised and implemented by industry, it has generated a sense of ownership by industry which, in turn, has nurtured responsibility for the project's effectiveness and a commitment to its continued operation.

Advertising Standards Authority (ASA)

As an example of a body that evolved into co-regulation, the ASA was originally set up as a self regulatory body and retains many self regulatory features. It was founded in 1962 by the advertising industry as an independent body to adjudicate complaints from the public and regulate the content of advertisements, sales promotions and direct marketing by reference to standards set out in codes of practice agreed by the industry. It was essentially self regulatory since it depended on the voluntary commitment and support of the industry. The Government had set up a committee (the Molony Committee[35]) to review the most appropriate form of regulation, which rejected a US-style Federal Trade Commission in favour of voluntary controls. *"We are satisfied that the wider problem of advertising ought to be, and can be, tackled by effectively applied voluntary controls."* reported the Committee[36].

As time progressed, the ASA has evolved into a co-regulatory framework. In 1988 its operations were given statutory recognition by the Control of Misleading Advertisements Regulations[37] and the Communications Act 2003 established a co-regulatory partnership with Ofcom for the regulation of TV and radio advertisements.[38] These statutory authorities gave the ASA some back-up. Instead of relying solely on the voluntary commitment of the industry to remove offending advertisements at the ASA's behest (which most advertisers will do), it allowed the ASA to refer persistent offenders or those who refuse to cooperate to the Office of Fair Trading (for general media) or Ofcom (for TV and radio). This backstop enforcement is a determining characteristic of co-regulation. For the main part, the regulatory bodies let the ASA manage its affairs without interference, but will step in when required to bring statutory force to bear when voluntary compliance appears to fail.

One of the key factors in the ASA's success is undoubtedly longevity. Being in operation for over 40 years, it has established respect and gravitas. It has created and refined good operating systems, based on accepted principles (to ensure that advertisements are "*legal, decent, honest and truthful*")[39] which it applies to all

[35] The Molony Committee Final Report of the Committee on Consumer Protection Cmnd. 1781, July 1962 available at http://www.jstor.org/pss/1092847
[36] Page 75 ibid
[37] The Control of Misleading Advertisements Regulations 1988, Statutory Instrument 1988 No. 915 available at http://www.opsi.gov.uk/si/si1988/uksi_19880915_en_1.htm
[38] Broadcasting—The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004, Statutory Instrument 2004 No. 1975
[39] See Advertising Standards Authority website available at http://www.asa.org.uk

media; most advertisers and media owners follow its determinations without objection. This convention of compliance means that few matters are referred to the higher authorities. Its 2008-09 annual report[40] refers to 12,938 complaints being received; it referred one advertiser to the OFT and none to Ofcom. ASA adjudications are open to judicial review, on an application by either the advertiser or the complainant. Since its inception there have been 17 judicial reviews of ASA rulings, of which only one was overturned (in 1989).[41]

The ASA provides a single point of contact for complaints from the public and for advertisers to seek guidance on the content of proposed advertisements. It puts no financial burden on the taxpayer, with its funding coming from levies on advertising contracts concluded within the industry. It has moved with the times, reflecting changing social attitudes (which might have been more difficult within a less flexible, statutory framework) and retains a self regulatory outlook by continuing reference to advertising practices agreed by the industry itself. At its 40th birthday celebrations, Consumer Minister Melanie Johnson congratulated the ASA and the industry on their achievements over the last four decades:

> "*The success of self-regulation is due to the hard work of many, including the ASA. But self-regulation could not work without the active participation and commitment of the advertising and publishing industries. The system also has a high level of recognition from the public and is important to consumer confidence in advertising.*"[42]

With its clarity of purpose and long-standing industry acceptance, it is clear that the incentives for industry to support the ASA, comply with its determinations and accept the self regulatory regime (albeit backed by co-regulatory backstop powers), outweigh the disincentives. There is clear alignment between the industry's interests to trade on a level playing field within a recognised framework and the public interest of being able to complain about advertisements that aren't "*legal, decent, honest and truthful*". Where there is any breakdown in this alignment, the co-regulatory backstop powers are in place to deliver a solution.

Internet Content Rating Association (ICRA)

ICRA was founded in 1999 as a self regulatory body, with no direct governmental involvement, to promote labelling (rating) of websites and filtering of sites by browsers with reference to that labelling. The motivation for its creation was the success of labelling in the computer games industry during the mid 1990s and, with a view to translating that success to the public internet, its foundation attracted 20 large multinational members in its first year.[43]

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[40] Advertising Standards Authority annual report 2008-09 available at http://www.asa.org.uk

[41] R v Advertising Standards Authority ex parte The Insurance Service plc (1989) 2 Administrative Law Reports 77 (Divisional Court).

[42] Consumer Minister Melanie Johnson speaking at an industry summit to mark the 40th anniversary of the ASA available at www.bcap.org.uk/asa/about/history/

[43] Marsden, Christopher T., Simmons, Steve, Brown, Ian, Woods, Lorna, Peake, Adam, Robinson, Neil, Hoorens, Stijn and Klautzer, Lisa, Options for and Effectiveness of Internet

After this initial success, ICRA struggled to make a wide impact or any significant market penetration. Unlike the computer games world, the internet industry failed to adopt a standard technology around which labelling could develop, and the costs of implementing ICRA's systems and lack of operability with other rating technologies led to widespread market rejection.[44] It has achieved some success in continental Europe where, for example, in 2007 about 25% of German adult sites used ICRA labelling as part of their age verification screening. Nonetheless, in 2007 ICRA was absorbed into the Family Online Safety Institute (FOSI) and ceased to operate as an independent organisation. Its work still continues under FOSI where it focuses on advocacy for labelling technologies.

The lack of market adoption of ICRA's labelling technology can be attributed to a lack of incentives for websites to use it. In itself, labelling of pages and sites is not an efficient process. Without an established industry standard or interoperability with other technologies, it wasn't a compelling notion and there was little pressure from governments to adopt it. Of ICRA's initial supporters, some large players such as AOL whose brand and reputation depended on online safety and security chose to develop their own parental controls technology to do the work that might otherwise have encouraged a wider adoption of ICRA's labelling technology.

In contrast to the IWF and the ASA, ICRA's self regulatory approach did not attract widespread market support. In the absence of compelling incentives for market adoption, widely accepted technical standards or any real government pressure, ICRA's potential impact was limited.

Assessing the likely success of self or co-regulation

Can we draw any conclusions about the conditions for success from these examples of self and co-regulatory bodies? Taking Ofcom's statement on self- and co-regulation[45], its conclusions emphasise that success depends on the perceived incentives of industry players to make it work. They surmise that, unless the industry as a whole sees clear advantages in complying, either by generating positive returns or avoiding negative liabilities, they will be reluctant to embrace the policy objectives. The necessary perception must be clear, the advantage readily obtainable without disproportionate cost or effort and the incentive pertinent to the whole industry rather than merely one or two (even if big) players.

To assess the impact of incentives, it's important to dig a little deeper. Some incentives are self-evident: if a modest level of investment by industry will avoid unwanted governmental interference, the incentive is clear. The picture, however, is frequently more complex. The existence of governmental pressure is clearly important, but industry will inevitably try to assess the level and nature of the pressure. Some government initiatives are given more priority than others; some will be backed by heavy political weight for urgent and visible action, others may be

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Self- and Co-Regulation Phase 2: Case Study Report (January 15, 2008). Prepared for European Commission DG Information Society & Media. Available at SSRN: http://ssrn.com/abstract=1281374

[44] Page 74 ibid

[45] Ofcom Statement on Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-Regulation supra

allowed to simmer gently on the back-burner, others may be lost in the long grass. Sometimes government will be imposing negative pressure (to prohibit or restrict an activity that industry would otherwise favour) and sometimes it will be positive encouragement—or the lack thereof—to adopt a particular practice. If ICRA's labelling efforts had received stronger government recognition, with a suggestion that legislation might follow if industry failed to take it up, it may have improved the chances of success.

It's not difficult to work out that a real and immediate threat of government intervention (or action by other public authorities, such as the police in the case of the IWF) will prompt more urgent industry action than mere intimation of general policy objectives in a white paper (as with Digital Britain). In the absence of economic or market incentives, industry may be tempted to adopt a wait-and-see approach to assess the true nature of government pressure before taking any determined (and likely costly) steps. This effect became apparent in the stalling of progress on the creation of a code of practice on filesharing issues by ISPs and content owners following the signing of the Memorandum of Understanding in the summer of 2008[46]; the Government's own initiative in the run up to the publication of the Digital Britain report may well have caused work to stop. It hasn't yet been resumed as both sides have adopted a wait-and-see attitude during the lengthy consultative process, and valuable time has been lost.

In examining the level of incentives, we need to assess the level of support across the industry as a whole. If a few players, even large multinationals as in the case of ICRA, signal their commitment but fail to attract significant support from others in the market, the venture may fail. To have an impact at a policy level, an industry must be seen to be working in communion. Citizens and consumers must experience similar treatment across the market as a whole. If there is lukewarm adoption or back-sliding by a significant proportion of the market, self-regulation will be seen to have failed. Success needs more than merely majority support; it needs almost unanimous acceptance as good market practice. The results must be apparent across the market as a whole.

Clarity of purpose is another key factor. Keeping the policy objectives clear and readily attainable will surely attract more success. The ASA has been careful to promote a clear and straightforward set of values ("*legal, decent, honest and truthful*") which it uses to judge advertisements; although there are detailed and evolving codes of advertising practice, these key values have remained clear and constant, which in turn has enhanced the standing and effectiveness of the ASA itself. The IWF's primary focus on child sexual abuse images has maintained a clear and focused purpose. These images are criminally illegal in almost all jurisdictions worldwide, so there is almost universal support for the IWF's efforts to censor them. They might not have enjoyed the same level of support for censoring equally offensive but less criminal images, such as race or religious hatred, where the arguments against censorship (or those in favour of freedom of expression) might have greater weight. Perhaps the IWF's success reflects their insistence to maintain a clear focus on objectives that attract the widest level of acceptance. Their careful and measured advances beyond the original brief suggest that the organisation is aware of the risks of advancing too far without unanimous support from its stakeholders.

[46] Memorandum of Understanding on an approach to reduce unlawful file-sharing announced between key stakeholders from the ISP industry, the content industries, OFCOM and HM Government on 24 July 2008 supra

As we have seen in the creation of the IWF hotline, technical complexity may also play a role. If a purpose can readily be achieved without much ado, there must be a temptation for government to deal with it through direct intervention with legislation to create statutory obligations that will be enforced through the state's general enforcement mechanisms. On the other hand, if a policy depends on a complex technical solution, it's more difficult to police through general enforcement mechanisms. It may need industry's technical experts to devise and implement not only the solution, but also the enforcement mechanisms. This approach, if encouraged with a sense of industry commitment and responsibility, will also have an important benefit of generating ownership and buy-in by the industry players. If they constructed it, they may be more encouraged to ensure it works as intended. Whereas if it "wasn't invented here" or was "imposed from above", the solution may attract diffidence or downright obstruction.

Perhaps to be truly effective, the initiative must generate a feeling of shared responsibility and commitment, a collective buy-in by industry to deliver on the promise? If government is relying, at least in part, on the role of industry to deliver a public policy objective, the prospect of success will surely be greater if the industry players feel a level of commitment—not just coercion—to achieving that objective. Certainly the experience of the IWF would indicate that this is important and has contributed to its success; the growth in its membership from a handful of original supporters to over 90 members[47] signals a collective buy-in that is continuing a decade after its creation. Similarly, this key ingredient may have been missing in the case of ICRA, where a few (albeit large) players led the initial project but failed to attract a widespread following.

The internet world is relatively young, with strong personal networks among those who work within it. It is plausible to believe that, for a market-wide initiative to be successful, it needs the buy-in of some key individuals or companies to ensure its success. If one or two thought-leaders express reservations, it might kill the endeavour or put a chill on its progress. The power of operational heel-dragging shouldn't be overlooked. If industry decides, collectively, to find reasons for delay or obstacles to progress, it may create an insurmountable barrier to successful self-regulation. If too many players fail to engage, the game may be lost—regardless of enforcement efforts.

Self-regulation in the case of Digital Britain

Can we use these lessons to judge the likely success of the self regulatory mechanisms proposed in the Digital Britain proposals? Mindful that Ofcom has recently reviewed the conditions of success for self-regulation within the last 12 months[48], we can assume that the Government had these in the forefront of its collective mind in making the proposals and drafting the Digital Economy Bill.

The first barrier to overcome, of course, is that the self regulatory elements of the Digital Britain proposals anticipate the involvement of not one, but two industries. They are not simply a series of measures to be adopted by the internet industry; they

[47] Internet Watch Foundation annual report 2008 supra

[48] Ofcom Statement on Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-Regulation supra

will require close cooperation between the internet world (or at least the ISP industry) and the content industry. It's one thing to assess the likelihood of participation and engagement by one industry, but it's quite another matter to assess the combined incentives of two industries with competing businesses and opposing interests.

It is difficult to see much alignment in the interests of the internet industry and the content industry in this area. While most ISPs will acknowledge that taking another person's copyrighted material without permission is wrong, they will struggle to agree that the preferred enforcement measure is to interfere with the internet connection of their subscribers. Without some compensatory element or reciprocal benefit, it cannot be in the ISPs' economic interests to exert "technical measures"—or ultimately account suspension—against their subscribers simply for the benefit of the content industry. It's true that the emergence of attractively priced, lawful alternatives to internet piracy will gradually align the interests of ISPs and content owners provided that ISPs can share in the bounty, but this has yet to happen on a meaningful scale and, crucially, is not a pre-condition or visible component of the Digital Economy Bill. Reaction to the Bill from the ISP industry is worth noting:

> *"ISPA members are extremely concerned that the Bill, far from strengthening the nation's communications infrastructure, will penalise the success of the internet industry and undermine the backbone of the digital economy. Rather than focusing blindly on enforcement, the government should be asking rights holders to reform the licensing framework so that legal content can be distributed online to consumers in a way that they are clearly demanding."*
>
> Nicholas Lansman, General Secretary, Internet Service Providers Association[49]

Until there is a clear prospect of viable commercial alternatives to unlawful filesharing, the interests of ISPs and content owners relating to the Digital Britain proposals are likely be at odds with each other. At present, they are not readily compatible; they are certainly not aligned. Without such alignment, it is difficult to see how they can act as "an industry as a whole" in working together to deliver the specified policy objectives set in Digital Britain. It is certainly difficult to see how they will agree a code of practice for copyright infringement reports within six months after the Digital Economy Act comes into force[50].

Has the Government missed a valuable opportunity here? There is nothing in the Digital Economy Bill to make it easier for intermediaries to build business models for the lawful distribution of content. A review of the licensing framework, with its complex relationships between content owners and their licensing representatives (particularly the collecting societies), might have added a much needed incentive for ISPs and other intermediaries to embrace the copyright enforcement proposals—with the likely result of making a substantial contribution to the growth of the UK's digital economy, which was the main objective of Digital Britain. This chance seems to have been missed. As the Bill stands, there is no pressure on the content industry to negotiate more flexible terms in licensing arrangements or to make life easier for lawful distributors of content. For a sustainable solution to reduce copyright infringement, it has long been acknowledged that there needs to be an attractively

[49] ISPA press release 20 November 2009. Legislation to Address Illicit Peer-to-Peer (P2P) File-Sharing - ISPA Response available at http://www.ispa.org.uk/press_office/page_725.html
[50] Clause 7(2) Digital Economy Bill supra

priced, legal alternative to filesharing[51] and the Digital Britain initiative could have been an ideal catalyst to bring this about.

Further, with the diverse nature and interests of the content industry, it looks unlikely that any major change in the licensing framework is going to happen without government intervention. When we look at the content industry, we see several industries wrapped into this overall description. It's unclear whether there are effective working relationships between, say, the music world and the movie industry. Are there structures to allow them to function in communion and speak with a single voice in their dealings with the ISPs? Similarly, examples from recent press comments[52] would suggest that the music industry, having been in the centre of the debate on internet piracy for years, still does not speak with a single voice on this topic. Artists seem to have different views to the record labels; established artists (who perhaps have more to lose from loss of sales of CDs) may have different views to up-and-coming artists (who are desperate for any distribution, even at the hand of pirates, to launch their careers); artists who focus on live appearances and touring may be less concerned about internet piracy than others who rely on CD sales; some artists seemingly prefer to embrace the internet, with its warts and all, rather than risk alienating their fan base with copyright enforcement action. All in all, it seems there is no single voice within the content industry itself on the preferred approach to internet piracy—and certainly no single body that can work efficiently with the internet industry on a sustainable solution to filesharing.

Returning to the key components of successful self regulatory structures, we should examine the public policy considerations and ask whether the proposed solution is aligned with the best interests of citizens and consumers. It is easy to argue that any government action to uphold the rule of law (in this case, copyright law) is in the wider interests of the citizen in a law-abiding democracy, but many consumers (being subscribers of internet connections from ISPs) will be sceptical about thinking that limiting or suspending their connections is the best solution for safeguarding the future of the content industry. This scepticism will be made worse if press reports reveal that innocent account holders are facing enforcement action for the actions of others beyond their control, as in the case of internet cafés or Wi-Fi account holders who give wireless internet access to unknown users. Will the public interest be well served if Starbucks coffee chops no longer offer a free Wi-Fi hotspot to their customers for fear of liability for copyright infringement? Citizens may justifiably conclude that there are other routes for attaining the desired public policy objectives that might have a less draconian impact on individuals.

Are the policy objectives behind the proposals clear and straightforward? There is widespread argument about the illegality of copyright infringement. Many people argue in favour of a right to share their media assets with family and friends—the private copying right—and this notion has gained considerable support throughout Europe. Regardless of the merits of the competing arguments, no one can claim that the policy objectives behind copyright infringement are clear and straightforward.

Taking another perceived component of successful self-regulation, we should examine the level of government pressure behind these proposals. With some

[51] Enders Analysis. Digital Piracy: Better Than Free. 2003-12 available at http://www.endersanalysis.com/publications.aspx?q=%22better+than+free%22

[52] The Times. 16 September 2009. Lily Allen: my message for big stars who back piracy... available at http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article6836024.ece

announcements, see Lord Mandelson's comments above[53], the government is signalling its determination to combat unlawful filesharing. With others, such as the statement by BIS that it does not intend to "*place the rights agency on a statutory basis for the purposes of addressing unlawful P2P filesharing*", it sends a less clear signal. Why wouldn't it establish a statutory body to manage the enforcement of these rights? Why hasn't it set out a clear enforcement framework in the Bill, rather than leave key elements to be agreed through industry collaboration (and thereby alarming the civil liberties lobby?[54] If the battle against unlawful filesharing is a key feature of the UK's digital future, then surely it would merit the creation of a clear and effective mechanism? Why insist on industry participation when it could simply legislate? Why invoke self-regulation at all?

Why use self-regulation for Digital Britain?

One potential answer to these questions may lie in the fundamental attraction of self-regulation: if the Government could get both the internet and content industries to work together on this initiative, generate some shared responsibility for its objectives and secure their commitment to its success, the results might be more attainable. We should remember that one of the key strategies behind Digital Britain was to create "an effective online download and streaming market of scale"[55] by, first and foremost, informing the public about the unlawful nature of copyright infringement and, only secondly, by concomitant enforcement action against persistent offenders for copyright infringement. This first objective would require cooperation between the ISPs and the content owners, and might reasonably offer a genuine shared interest for both—which perhaps might generate the necessary incentives required for the mechanism of self-regulation to succeed. But the Government seems to have forgotten this key factor that might bring alignment to the interests of these competing industries.

Notwithstanding the proclamations of Digital Britain about positive encouragement to develop the UK's digital media market, or the ambitions in the BIS consultation document to educate the public and raise awareness[56], the Digital Economy Bill is silent on the key issues of encouraging the growth of attractively-priced, legitimate alternatives to unlawful filesharing or any positive educational initiatives to lure the public away from illicit activities towards the generation of "an effective online download market of scale". The reasons behind choosing a self regulatory route would become much more understandable if the Government had carried through its original aims of encouraging the growth of the digital economy in Britain. It could have generated clear incentives for both industries involved to work together, either informally or under a structured self- (or co-) regulatory environment.

In the event, perhaps distracted by the effective lobbying of the content industry, it seems the Government has forgotten this vital piece of the puzzle. It has failed to include a key feature of its own strategy in the implementation of this policy. As things stand now, there is little commercial incentive for the ISP industry to get

[53] Lord Mandelson. C&binet Forum speech supra

[54] Liberty. Briefing paper on Digital Economy Bill supra at Section 10

[55] Chapter 4 para 15 Digital Britain final report supra

[56] BIS consultation on legislation to address illicit peer-to-peer file-sharing supra at para 4.26

behind the proposals (as there is no perceived benefit for them) and no pressure for the content industry to engage (as they merely have to wait for six months until Ofcom is required to step in and deliver all they desire). The key ingredients of successful self-regulation are missing. As a result, it is very difficult to see how this Bill will help create an effective online download market of scale or spur growth in the digital and communications industries to make Britain a leader in the global digital economy.

Epilogue

The Digital Economy Bill's copyright infringement proposals will inevitably rely on a degree of trust between government and the industry players. Regardless of the chosen enforcement structure, the ISP industry will be required to construct a workable framework to implement the proposals in an efficient, cost-effective and adaptable manner. Without such a framework, the objectives are likely to be lost in inertia, administrative bureaucracy and public opposition. Typically, regardless of their expected low level of enthusiasm for the task, the ISPs could be relied on to deliver a workable solution. This trust lies at the heart of the social contract between government and the governed. For its part, government is expected to be transparent, reasonable, proportionate in its measures and acting in the public interest. It is trusted not to be arbitrary or capricious. This trust has been earned over centuries, but must be reaffirmed constantly.

Clause 17 of the Bill proposes to introduce an extraordinary power, exercisable by the Secretary of State "*if it appears [to him or her] appropriate to do so having regard to technical developments that have occurred or are likely to occur*", to amend the Copyright, Designs and Patents Act 1988 for the purpose of "*preventing or reducing the infringement of copyright by means of the internet*." The power may be exercised by administrative order, rather than by full legislation that would be required to go through the Parliamentary process. In essence, it is an arbitrary power. Despite assurances from the Government that it would not be used arbitrarily, the introduction of this measure would have a devastating effect on the level of trust between government and the internet industry. It would mean that, notwithstanding the extensive consultation process of Digital Britain, through its interim report, then final report, followed by the various BIS consultations, followed in turn by the deliberations on the Digital Economy Bill in both Houses of Parliament, the Government of the day could—by an administrative order without any public consultation or debate whatsoever—impose unspecified, unrestricted measures on the internet industry. It could sweep away the entire copyright enforcement structure proposed by the Digital Economy Bill and replace it by anything it chooses. This would be as far removed from the concept of self- or co-regulation as you could imagine. It would be government by administrative dictat; clause 17 is an affront to modern democracy and should be removed.

Oxford Internet Institute

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Addendum

This addendum provides a briefing on the sections of the Digital Economy Bill that propose measures to deal with unlawful filesharing, together with recommendations for amendments.

The Digital Economy Bill and Copyright Infringement

Executive summary

As a key component of *Digital Britain*[57], HM Government set out to make the UK "one of the world's main creative capitals" by seeking to "protect the creative industries to preserve innovation in content". To achieve this, the Government laid out two strategies with the aim of creating "an effective online download market of scale": first, by informing the public about the unlawful nature of copyright infringement and secondly by applying sanctions against those who persist with unlawful filesharing. There are several concerns with the draft legislation in the Digital Economy Bill ("the Bill")[58] introduced to achieve these objectives:

- There are no meaningful provisions for informing the public of the unlawful nature of copyright infringement or (save for provisions on orphan works[59] and extended licensing schemes[60]) encouraging the growth of viable, attractively priced lawful alternatives.
- There is no justification for forcing the ISP industry to protect the economic interests of the content industry or to bear the costs involved. There are no incentives for ISPs to engage in the proposed self-regulatory framework.
- The difficulties in identifying the alleged infringers may have unjust (and unforeseen) consequences.
- The extent of the proposed sanctions against offending consumers may be disproportionate, without adequate judicial protection (including an appropriate right of appeal) and potentially impeding access to fundamental rights via an internet connection.
- Persistent filesharers are unlikely to be deterred by the proposed measures and will be tempted to adopt technical workarounds to foil the objectives.

Digital Economy Bill

The Bill introduces a three-tier framework to combat unlawful filesharing. First, clauses 4 to 8 require an ISP to send a notification to an account holder (subscriber),

[57] Digital Britain final report http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf
[58] Digital Economy Bill [HL] 2009-10 http://services.parliament.uk/bills/2009-10/digitaleconomy/documents.html
[59] Section 116A supra
[60] Section 116B supra

triggered by the receipt of a "copyright infringement report" sent to the ISP by a content owner, indicating that his or her account has been reported as having been used for an apparent infringement of copyright. Content owners are able to use online tracking devices to identify when an IP address is used to transmit one of their media assets without authorisation, but cannot link that IP address to an individual account holder without the help of data held by an ISP (which can tell which IP address was being used by a particular access account at a particular time).

The Government hopes that the mere sending of notices to account holders will deter copyright infringement and reduce unlawful filesharing in the UK. If not, and Ofcom is required under clause 9 of the Bill to prepare periodic reports on the continuing level of internet piracy, HM Government will have the power (under clause 11 of Bill) to introduce the second tier of enforcement and require ISPs to impose "technical measures", which will be spelled out in a code to be devised by Ofcom, to limit the subscriber's internet access (e.g. by restricting bandwidth, blocking internet ports or ultimately suspending the subscriber's internet access account).

Thirdly, clause 17 of the Bill proposes an extraordinary power for the Secretary of State to amend the Copyright, Designs and Patents Act 1988. The power may be exercised by statutory instrument.

Identification of infringers (clause 4)

Under clause 4 /124A(4) of the Bill, an ISP who receives a copyright infringement report from a content owner must notify the subscriber (account holder of the particular account) of the alleged infringement. There are potential difficulties in identifying the infringer:

- An internet subscription account typically allows the subscriber to have a master account and a number of sub-accounts (e.g. for family members or others in the household). The assumption that a master account holder is responsible for the activities of a sub-account holder may not always be valid, eg in the case of several adults in multiple occupation in a household.
- Multi-user PCs in internet cafés, libraries and other public buildings may contractually prohibit infringing activity, but it may not be possible to prevent it or to identify the offender.
- Where a household uses a wireless router for Wi-Fi access throughout the house, it is not uncommon for neighbours within the router's range to gain access to the connection (known as "overspill")—and therefore have access to the subscriber's account without his or her knowledge.
- Many commercial ventures (e.g. pubs, Starbucks coffee shops and British Airways passenger lounges) offer free Wi-Fi access to their visitors. It's likely that they would cease this free service rather than face potential liabilities for copyright infringement. This would be a significant loss to the public.

Recommendation*: Since it would be unjust for innocent third parties to be held accountable for the actions of others over whom they have no control, the legislation should acknowledge that the recipient of a copyright infringement notice may be innocent of the alleged infringement and will have an appropriate defence to any proceedings brought against him/her.*

Collecting, storing and delivering data about infringers (clause 4)

Clause 4/124A(6)(c) allows a content owner to apply to a court to learn the subscriber's identity from the ISP and may bring proceedings against the subscriber for copyright infringement. There are potential difficulties with this:

- The ISPs will need to collect and store information, including personal data, relating to the subscriber for an unspecified period; this will incur costs and an additional burden on ISPs' customer service operations.
- This process is likely to spawn multiple court applications (perhaps in their thousands) by content owners seeking disclosure by the ISP of subscribers' identities[61]. It was originally thought that these orders were intended to be exceptional, only granted at the discretion of the court[62], so it remains to be seen whether the courts will tolerate bulk applications without examining the circumstances and human rights considerations of each case.
- Following disclosure of the subscriber's identity, we can expect a high volume of copyright infringement proceedings to be launched by content owners. Again, it remains to be seen how the courts will deal with bulk applications based on generic evidence. If volumes rise too high, they might swamp the courts' lists.

Recommendations: *There should be a specified time limit on the duration of the retention of this data. The costs of collection, storage and delivery of by ISPs should be borne by the content owners who submit the copyright infringement reports. The Secretary of State should be required to have regard to the potential high volume of court applications, both for disclosure orders and infringement proceedings, before proceeding to the second-tier enforcement of "technical measures".*

"Initial obligations" code (clauses 6-8)

The Government has proposed a self-regulatory approach by inviting the ISP and content industries to work together to devise a code of practice, for approval by Ofcom, to regulate the receipt of copyright infringement reports, the despatch of copyright infringement notices, the keeping of information by ISPs about their subscribers, the time limits for keeping such information, the sharing of costs and the provision of infringement data to content owners (see clause 8). Under clause 7(1) of the Bill, Ofcom is required to issue its own code for these issues if it hasn't approved an industry code within six months after the relevant provisions come into effect.

- As noted by Ofcom[63], the critical element for success of a self-regulatory structure depends on the incentives of industry players to make it work. In this case, there are few perceived incentives for the ISP industry (as there is no perceived benefit for them).

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[61] A Norwich Pharmacal order requires a respondent to disclose certain documents or information to the applicant. The respondent must be a party who is involved or mixed up in a wrongdoing, whether innocently or not, and is unlikely to be a party to the potential proceedings. Practical Law Company http://dispute.practicallaw.com/5-205-5031

[62] Jonathan Bellamy http://www.39essex.co.uk/documents/Norwich_Pharmacal_Presentation_Paper_PNLA.pdf

63 Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation—Statement. Ofcom http://www.ofcom.org.uk/consult/condocs/coregulation/statement/

- If the code is determined by Ofcom rather than industry, there are scant provisions for public interest considerations[64] and no opportunity for consultation by consumer or human rights groups.
- Civil liberties groups[65] have noted that such important issues, which will have a direct impact on the citizen, should not be left to an industry code of practice and should be replaced by a clear statutory framework set out in the Bill and debated by Parliament.

Recommendations*: Noting the Digital Britain report's promise to create "an effective online download and streaming market of scale"[66], the lack of incentives for ISPs to engage in this initiative is a major omission and should be rectified by a review of the licensing framework for the lawful distribution of content. In the absence of an effective self-regulatory framework, the details of the enforcement mechanism should be set out in the Bill and debated by Parliament.*

Secretary of State's power to direct Ofcom to impose technical obligations on ISPs (clauses 10-11)

Clause 10/124G permits the Secretary of State to direct Ofcom to assess whether "technical measures" should be introduced; these measures are intended to limit the speed or other capacity of the internet service to a subscriber, or to prevent the subscriber from gaining access to particular material or to suspend the service or limit it in another way (see clause 10/124G(3)). At the next stage, clause 11/124H permits the Secretary of State to direct Ofcom to impose obligations on ISPs to introduce technical measures and to publish a "technical obligations code" for regulating these obligations. Public interest requirements for the code's contents are set out in clause 13 of the Bill; they are similar in scope to the provisions of clause 8 with the addition of a designated right of appeal to the First-tier Tribunal[67] on matters of fact, law and reasonableness.

- The Secretary of State's powers under clauses 10/124G and 11/124H are largely unrestricted, with no stated criteria on which they must be based, and accordingly could be used for purposes unrelated to unlawful filesharing.
- These powers create an administrative, rather than a judicial process, unrestrained by the normal due process safeguards of criminal or civil procedures. There is no right of appeal by ISPs, content owners or anyone else against the Secretary of State's decision to invoke these powers.
- The extent of "technical measures" is not stated. Examples of the intended effects are given (see clause 10/124G(3)) without details of the actual measures, which have yet to be determined and have unknown effectiveness or impact. It is possible they may block access to lawful sites or services (e.g. sharing of lawful content such as the subscriber's family photos). Without more clarity, it is not possible to assess whether persistent filesharers will be able to devise technical workarounds to foil the objectives.

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[64] Clause 8/124E(1) to (4)

[65] Liberty http://www.liberty-human-rights.org.uk/pdfs/policy-09/digital-economy-bill-house-of-lords-second-reading-briefing.pdf

[66] Para 15 Chapter 4 Digital Britain final report supra

[67] The First-Tier Tribunal is a generic tribunal established by Parliament under the Tribunals, Courts and Enforcement Act 2007 to hear appeals against decisions of the Government where the tribunal has been given jurisdiction.

- The code will be determined by Ofcom rather than industry. There are scant provisions for public interest considerations (see clause 13/124J(1)to (3)) and no opportunity for consultation by consumer or human rights groups.
- These powers appear to conflict with the recently amended Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, which now states: "3a. Measures taken by Member States regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law. Any of these measures regarding end-users' access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed."[68]

Recommendations. *The Secretary of State's powers in clauses 10 and 11 should be limited (i) with due regard for human rights law (ii) only for use in preventing or reducing copyright infringement, (iii) only to be implemented by statutory instrument (and hence published and drafted to Parliamentary standards), (iv) only exercisable on the recommendation of Ofcom and (v) to be subject to Parliamentary scrutiny. The imposition of "technical measures" should be defined more clearly and should be made expressly proportionate to the wrong envisaged (i.e. only interfering with citizens' rights using the least intrusive method). The imposition of "technical measures" should only be directed at subscribers who have been found to have infringed copyright by a court or competent tribunal, at a full hearing on the merits, from which an appeal lies to a superior court.*

Reserved power to amend copyright provisions

Clause 17 of the Bill proposes an extraordinary power exercisable by the Secretary of State to amend the Copyright, Designs and Patents Act 1988 "for the purpose of preventing or reducing the infringement of copyright by means of the internet, if it appears to the Secretary of State appropriate to do so having regard to technical developments that have occurred or are likely to occur".

[68] DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (PE-CONS 3677/2009 – C7-0273/2009 – 2007/0247(COD))

- This power is unprecedented, largely unlimited and opens the way for arbitrary measures. It could be used to sweep away the copyright enforcement measures proposed in the Bill, which emerged from extensive public consultation through the Digital Britain process.
- The existence of such a power creates uncertainty for industry and the public, and might discourage innovation in technology or new business models. Its wide scope could be used for matters far beyond unlawful filesharing.

Recommendation. *Clause 17 should be removed in its entirety.*