Consultation on Legislation to Address Illicit Peer-2-Peer (P2P) File Sharing

A response from Andrew Norton

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Overview

My name is Andrew Norton, and I am a freelance p2p researcher. I work with many of the main members of the P2P scene, producing research, and am known to many of the rest. I assist Bittorrent Inc. with unpaid IRC based technical help, and also provide research services for some news sites, including TorrentFreak. I am also the former head of both the US Pirate Party, and Pirate Party International, stepping down from the latter just a few months ago, after helping with the establishment of a Pirate Party in my home country, the UK.

I have also worked in the content industry, in the music industry; and on TV in both the US (for Comedy central) and the UK (with shows for the BBC and Channel 4) I also studied robotics so I have a good grasp of technical aspects. I helped with the initial investigations into Comcast, and their use of Sandvine, and I've also worked on studies investigating fingerprinting systems applied to modern p2p systems and on claims of loss by Content groups.

Summery

When it comes to the proposals, there is only one basic question, **IS IT NEEDED?**

I find there is not only insignificant evidence that such a restriction is needed, it would be significantly harmful to the future development of technology. It is an attempt to restrict the development of technology, worse, to grant increased powers to those who have a business model that favours the old technological methods and equipment. What it does not do in any form, is encourage any business, or industry to evolve and adapt their business to technology.

Such regulation has been attempted before, and a prime example would be the Locomotive Act of 1865. This act required that traction engines would endanger the safety of the public, and thus legislation was introduced to address that apparent danger. This was in the form of severely inconveniencing the adopters of technology, and hoping to dissuade new users. In this acts case, it required a man to walk some distance ahead, with a red flag, to 'warn' other road users. The engines were also limited to an extremely slow speed, 4mph in the country, and 2mph in towns. This limited the use of such engines, as it was no quicker than walking, and usually slower (walking pace is 3-3.5mph). It was not until thirty years later that these laws were repealed, in the 1896 Emancipation Act. One year earlier, the Daimler Motor Company was formed, the UK's first car company, ten years after Gottlieb Daimler invented the Internal Combustion engine. Without the Locomotive act, the internal combustion engine may have been developed in the UK, and the British Motor Industry started earlier. Ultimately, there is little doubt that the act was significantly harmful to both the industrialisation of the UK, to the technological development and spread of motorised vehicles in the UK, and to the economy of the whole of the UK in the latter half of the 19th Century.

Some have speculated[1] that the act was an attempt to prevent the development of the automotive industry, and was led by members of government and highly influential personages with a vested interest in the dominant method of motorised transport of the day – the railways. This despite the actual

1Setright, L. J. K. (2004). *Drive On!: A Social History of the Motor Car*. Granta Books. ISBN 1-86207-698-7.

economic harm the act caused.

Similarly, these proposals are prompted by those with a vested interest in the dominant methods of distribution and dissemination at the present time. They seek to control the extent of the use of a piece of new technology that threatens the viability of their pre-existing business model. The proposals are based in inaccurate and distorted facts, and with exaggeration on the 'harm' the new technologies cause, with complete disregard for the advantages, opportunities, and economic benefits afforded by the new technologies.

In this case, the traction engines are people's internet connections, and their ability to share culture. The red flag is the threat of disconnection or throttling merely on the accusation of another (GATSO's were not common in the 1870's after all). The prospective motor industry, delayed by needless protectionist regulation are the prospective culture industries that will arise. We can only hope that it will not take present day governments 30 years to see the grave errors of their proposals.

I will also make clear now that the consultation talks of P2P in generalities, as a 'bad thing' in general. However, a significant percentage is not infringing any copyright.

There is also one significant point that should be clarified. In many cases the term 'rights holders' are used. There are often multiple rights holders for works. For music there is songwriter and performance copyright, for instance. In most cases, however, when rights holders are stated, it does not mean the original creative minds, the content creators, it means the large corporations that buy and sell copyrights, whose only infusion into he creative process is funding and control. In one famous case, a lawsuit was filed against someone claimed to be sharing music by Avril Lavigne. Avril Lavigne came to the aid of her fan, against the wishes of her label[2]. Rights groups can not survive without artists, but as Radiohead[3] and Nine inch Nails show, artists can not only survive, but prosper without labels.

Responses to the Questions

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

As stated, we do not believe there is either the evidence to suggest such legislation is needed, any evidence that such legislation will do anything other than hamper the digital development of the United Kingdom, rather than encourage innovation, or that any such legislation would be either effective against the targeted sections of British society, or be anything other than a legislation aimed at prolonging industries unable to cope with the advances in technology.

However, were such idiotic legislation be passed, then the only person that should have the ability to 'trigger the obligation' should be the rights holder themselves, or their legal representative. Rights agencies deal in generalities and unless they had direct (and immediate) access to any and all contractual agreements the holder of the copyright owner, then false accusations, potentially leading to sanctions and massively increased costs for groups legitimately using copyrighted material. This is not

2 http://www.savethemusicfan.com/press.html

3 http://www.nme.com/news/radiohead/40444

unheard of.

In the summer of 2008, a track by Scottish band Travis was distributed on a music blog. The IFPI contacted the blog's owner, and also the host of the blog, demanding that the track be taken down, as it was infringing copyright. However, the copyright owner of the track, Fran Healy, had been encouraging people to share the track. When we contacted Travis for more details, they confirmed that the IFPI was in the wrong, and that any such demands in regards to the track and it's sharing should be ignored, and he was free to share with the world. Under these proposals, the IFPI would have their (completely false) accusation acted upon. Instances such as these are not entirely uncommon, and expose a fatal flaw with the proposal – that of over-zealous protection.

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?

Were any such proposal made (despite it being a bad idea, see above), than any such accusation should be made with as short a time as possible. The inherent frailty of computer technology, and the rapid turnover of data requires it in order for any sort of defence to be presented. We therefore suggest a period of no more than seven calender days. From the time of the alleged infraction. Currently it can be months or even years before cases are presented. During this time, hardware can die or be upgraded, hard drives can have data deleted, or be upgraded, or systems can have major crashes. All of these can destroy any evidence that the alleged infringer had no knowledge of the accused action. As the time period increases, so too does the chances of such catastrophes happening.

There should also be a process by which such accusations can be contested. There have been many well-documented occasions where false accusations have been levied. In fact, in the US, there have been as many cases where the RIAA has dropped cases with prejudice (meaning the accused was completely exonerated) as those where the RIAA's litigation has prevailed. These cases, *Atlantic v. Andersen* and *Capitol v. Foster* are often ignored when reporting on US P2P litigation, focusing instead on Capitol v. Thomas and SONY BMG Music v. Tenenbaum both of which occurred later.

This may result in the cost of protecting copyrights rising. However, copyright is a civil matter, and it should not be the business of the government to subsidise or increase the profitability of certain sectors of business, through the persecution of the general populace, nor should it try and legislate the restriction of technology in order to protect a business model that progress is making obsolete.

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?

Without a doubt ANY allegation of infringement, under this proposal, or under current legislation for enforcing copyright, should include

- The name of the infringed work
- The name and contact information of the copyright owner, or their agent
- The name of the company, if any, that was hired to perform the investigation
- The method for lodging a complaint
- A statement under penalty of perjury that any and all claims are accurate.

In addition, several items in the list provided are of dubious requirement, specifically “information about copyright and why it's important”. From reading the documentations, from discussion with various elected officials, and from experience with the industries, it is abundantly clear that many people do not clearly understand the history of copyright, or it's actual purpose; that of providing an incentive both to create, and to recompense the initial investment. It is NOT intended as a cash cow to perennially milk the public, or hold the nation's culture hostage.

Further, any lists of 'content' should include in preference content where there will be little-to-no worries of copyright infringement. This could be links to works in the public domain, such as Project Gutenburg, or music released under Creative Commons, as with sites like Jamendo. This also avoids the potential conflict of interest where an accusation and penalty being levied against the public, is also being used as a free advertisement for the same company, mandated by law.

Finally, Information on securing wireless networks would be difficult, complex, and ultimately futile. The methods vary not only by manufacturer, but also by model. Adding encryption to wireless connections is also often complex, and difficult for the less technologically oriented. Then, once the encryption is enabled on the networking hub, any and all equipment that may connect to that would also have to be set up. Not all network hardware supports all methods of encryption, further complicating things; everything from game consoles, and cell phones, to laptops, network media players, even cameras. Attempting to provide all the information needed would be impossible for all households, and extremely difficult for even a large percentage. Finally, it's ultimately futile, as often wireless security can be bypassed. Wired Equivalent Privacy (WEP) has been considered insecure for years, while WPA can now be cracked in around a minute[4]. It will only be a matter of time before WPA2 will also be similarly bypassed with ease.

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?

It should be noted that while the the constitution document mentions “the template used by the BPI in the MOU trial”. This is not provided and thus it is impossible to accurately answer the question. Instead, Assumptions are made based on best information.

Again, we believe that such a proposal is not needed. Evidence on the balance of the probabilities is already the standard for a copyright infringement case in the UK. However, in such a court case, the alleged infringer has the ability to both defend themselves from their accusers, and provide evidence to dispute the claims and assertions. This proposal is an attempt to both streamline their process, and remove the current 'obstruction' that it is hard to have evidence to this standard in the present setting.

By removing the ability to contest, and streamlining the cases as proposed, there can be no 'balance of probabilities'. Indeed, since there is only one side there is no balance at all, and thus the evidence level is 'plausible'. When you have an evidence barrier that low, and dealing with groups that have frequently and persistently either flouted laws, or made baseless accusations, then the general public is in serious danger from inaccurate, or completely fabricated.

4 http://www.networkworld.com/news/2009/082709-new-attack-cracks-common-wi-fi.html

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)?

The expense of the proposals are heavy on the ISP. Thus a limit on notices would be required, else a real-time automated system could permanently flood ISPs beyond their ability to deal, vastly increasing the cost and effectively killing broadband in the UK. In addition, a false or inaccurate notice should restrict the party making the allegation. In the Guardian in July 2008, columnist and scifi writer Cory Doctorow proposed[5] a 3-strikes system for allegations; make 3 erroneous ones and you're off the net. This was after a study by the University of Washington revealed that huge numbers of infringement notices are sent out with only the flimsiest of data behind it. In the study example, IP addresses belonging to university network printers were announced to bit-torrent trackers, for various torrents – music, movies, and software. In each of the two separate study periods, hundreds of copyright infringement notices were received by the university claiming the printer was sharing copyrighted material. The sole evidence of this being the IP on a bit-torrent tracker. Crucially, the biggest bit-torrent trackers automatically generate random IP addresses and include them in requests for peers. Since there is no minimum evidential requirement to make an accusation of infringement, and that automated systems would be used, an accusation based on tracker response only is likely. This has a great chance of targeting the innocent and punishing them for something they did not commit.

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

That would be better, but still not ideal. The ideal solution would be to set a volume of Zero, and require that due judicial process be used, rather than trying to circumvent British justice, just because it is inconvenient.

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 specific 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?

No. under no circumstances should the costs be placed anywhere but on the rights holders utilizing the system. The system is to the benefit of one party only, the rights holder. The ISP is utilizing significant manpower, and garnering a negative relationship with the alleged offender. This is a cost to the ISP. In addition there will be additional network equipment which will decrease the reliability of the network, while also increasing the running costs. While the ISP may, in the long run, garner benefits from reduced usage of bandwidth, it will be at the expense of their high-package customers, and with a general negative public opinion. The only party gaining any sort of benefit would be the rights holders, in the form of some supposed increase in sales, despite there being a lack of consistent data that sales have been negatively affected by current copyright infringement (see above). As such, as the only party to gain any benefit, and the party that is clamouring for this action, they should be the ones to fund it. Ultimately, they will find that any increase in sales they might gain, will be less than the costs of the system, to say nothing of the

5 http://www.guardian.co.uk/technology/2008/jul/01/internet.copyright

negative public opinion these proposals engender.

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?

As we are not lawyers, we have no knowledge of potential legal difficulties. However, we can see significant technological issues, as we have explained elsewhere.

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 (e.g. 1st letter on 1st infringement, second letter on 10th, third on 20th)

The evidence refereed to in the question is open to debate. It is based upon surveys, and 'detections'. Survey responses should be taken with a pinch of salt at best. After many years of running adverts that (incorrectly) portray downloading as a criminal act[6]. In direct confrontation, human nature will tend towards hearing what the questioner wants to hear, and towards some aspect of contrition for their acts. However, there's no evidence to link survey responses with actual human behaviour, certainly nothing requiring that answers to a survey be 100% truthful.

The evidence for 'reduction' via detection is both simpler to understand, and more difficult. What is commonly refereed to as p2p, is mostly “in the open”. Bit-torrent clients display the IP address of all peers they are communicating with in the open. As such, the detection is simple, as is the identification. Now, on the receipt of multiple letters, some will turn to alternate methods that are less detectable, but also have other drawbacks. Usually this is in the form of some sort of monthly payment. Two examples would be Virtual Private Networks (VPNs) and Usenet.

Using a VPN for your bit-torrenting, for instance, will show the IP of the VPN machine to all peers. It's a relay in effect, and as far as any detection system is aware, the notices have worked, and the recipient is no longer using P2P. In reality they are using another IP address, and carrying on. Switching protocol to an undetectable one, such as Usenet (also known as newsgroups) also gives the impression that the notices have worked, while the target of the notices carries on. With usenet, the end user does not do any uploading, so there is nothing to detect.

In short, any evidence that letters work is dubious at best.

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?

Absolutely NOT.
The entire consultation, and set of proposals stems from the claim that large rights holders are losing money due to P2P. The public are not losing anything, and neither are the ISPs. The proposals, as stated

6 “Piracy... it's a crime” adverts from the Industry Trust for IP Protection.

earlier, only benefit the large rights holders, and as such it is them that should face the costs for it. That they do not wish to is because they, like everyone else that has studied this topic extensively, know that any financial gain they might make as a result, is far less than the costs of any action. That is because the actual losses (as opposed to claimed losses) is vastly smaller than the cost to bring civil actions. In effect,it would be like sending a first class letter, demanding a bill of five pence.

Further, to propose using public money to fund an agency, that would file civil suits against taxpayers, for the benefit of private companies, many of which are not based in the UK, would be a disgusting waste of taxpayers money. It is in effect a government subsidy of a profitable industry. Such a suggestion – giving government money to promote profitable businesses with no benefit to the taxpayer – is a suggestion that fails even the most basic standards of integrity and responsible government.

There is one major factor to consider, and that is when looking at long-term sales figures (published by the industries themselves), the so-called 'creative industries' do not show any impact in sales figures due to P2P.

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

No. The majority of the proposals are unworkable, either for technological or other reasons,

Blocking (site, IP, URL). Does not work. Attempted in the Netherlands to block The Pirate Bay. Circumvented the next day. Also a violation of EU law.[7]

Protocol Blocking. In 2007 Comcast attempted to block the bit-torrent protocol, using equipment from a company called Sandvine[8]. While it was partially effective at blocking bit-torrent, it would not work against a VPN, or a multitude of other methods. In addition, there are significant uses for every protocol beyond copyright infringement. Many sites and groups use common P2P protocols (including bit-torrent) to distribute data efficiently, including the BBC[9] and thousands of artists[10]. In addition, new protocols, and extensions to existing ones, will circumvent them.

Port blocking. Utterly ineffective. Most p2p software allows you to chose which port you use.

Bandwidth Capping/shaping. The Digital Britain report expressed the wish that the UK be a world leader. Consumer internet connections already perform significantly below advertised speed, and that the single biggest complaint people have with their internet connections is the lack of speed.[11] Exacerbating it, will not help propel the UK forward, and will just discourage people instead.

Content identification and filtering. These systems only work where a) the data is know and matches a database entry, and b) the data is sent sequentially. The majority of P2P traffic uses protocols that send

7 http://torrentfreak.com/danish-pirate-bay-block-breaks-eu-law-080213/
8 http://torrentfreak.com/comcast-throttles-bittorrent-traffic-seeding-impossible/
9 http://torrentfreak.com/bbc-gets-ready-for-bittorrent-distribution-090409/
10 http://torrentfreak.com/isohunt-adds-10000-free-and-legal-albums-080621/
11 OFCOM: UK broadband speeds 2009 Consumers' experience of fixed-line broadband performance http://www.ofcom.org.uk/research/telecoms/reports/broadband_speeds/broadband_speeds/broadbandspeeds.pdf

data out-of-order. This makes fingerprint systems nearly useless[12]. In the event that could be made to work, simply encapsulating the file in an encrypted archive file, with the decryption key published with it will prevent the system from working. The BBC response to the Digital Britain consultation also showed a potential problem. Illustration 1 is reproduced from the last page of their submission. As has been highlighted, when searching for Doctor Who, files with other names can be found. Misnamed or mislabelled files are not uncommon on P2P, and could make content identification difficult.

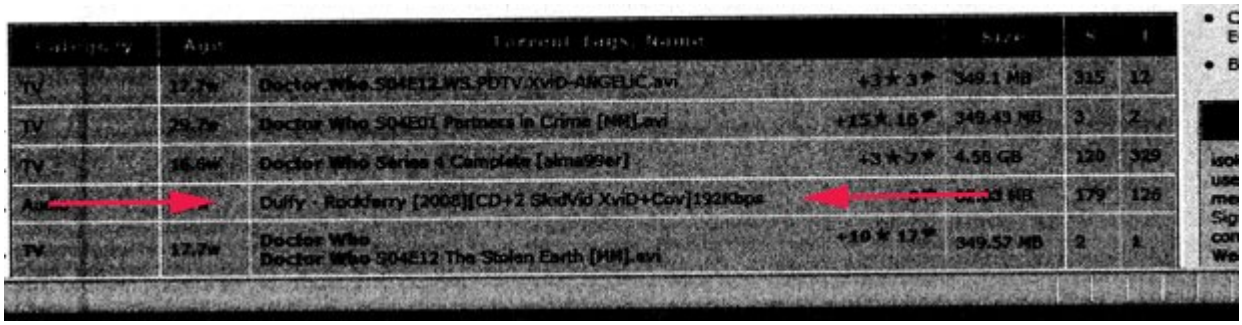

Illustration 1: A search on ISOhunt for "Doctor Who"

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?

The next time any study claiming P2P causes a loss for Rights owners, presents any evidence to back their claims – good or bad – it would be the first. To date no major study has fully published it's data and methodology along with its claims. Without the source data, any claims made by the study should be regarded as deeply suspicious. If a study has claims backed up by robust data, then the publication of the data and methodology allows for easy peer review and verification. If the data does not match the claims, or if the methodology is flawed, then publishing that with the claims will undermine the 'study'. A prime example is the MPAA LEK study, published in May 2006[13]. The study made headlines for it's claims that the US film industry was losing over $6Billion a year. However, in January 2008, the MPAA had to release a correction, stating that one figure in the study, published at 44%, was actually 15%[14]. It had used the larger, erroneous figure to 'prod' US educational institutes to follow MPAA suggestions. Had the MPAA released the source data, and methodology, this mistake would have been spotted within a day, rather than 16months. The question that then needs to be asked is if this 'evidence' is produced, and after 12 months proposals are selected based on that evidence, then 4 months after that, the evidence is found to be inaccurate; what happens then?

Then, we have the problem that no report of loss, produced by two separate groups, comes close to matching each other in claims, even when claiming the same things over the same time period, sometimes there is significant deviation.

In 2006, the Industry Trust for IP Awareness (ITFIPA) published a statistic on their website, that in 2005 "It's estimated that £108.5 million is lost annually in unpaid VAT alone." However, the MPAA

12 http://torrentfreak.com/copysense-sleek-predator-or-white-elephant-080926/
13 http://www.mpaa.org/press_releases/2006_05_03lek.pdf
14 http://articles.latimes.com/2008/jan/23/business/fi-download23

report mentioned above gave the total tax loss as $176 million. Even taking a high average exchange rate for 2005, of $1.775 per pound, the ITFIPA claim of VAT losses, is 10% greater than the MPAA's estimate of total tax loss.[15]

In short, unless a way is found to accurately measure lost sales (which can't be done) and some way to accurately match each ACTUAL lost sale than any attempt at associating the two has no basis in fact. There may be a 'common sense' argument that says “if people get it for free, they won't pay”, but at the same time, there is an equal common sense argument that people have been “trying before buying” for years. DVD box sets of TV series is perhaps the strongest argument for this. People buy these, usually despite having already seen, and had the chance to make a free copy for themselves.

There is the additional evidence, that sales have stayed steady, or increased for most forms of media over the last ten years. Ten years being, of course, the period since the release of Napster, which brought peer-2-peer into the mainstream. According to figures released by the BPI and The Official UK Charts Company, album sales for 2008 are at the same level as 2000. Both are around 20% greater than 1997, prior to P2P. Similarly the sales of singles have shown a significant drop in physical sales (which were themselves an approximation) but a vast and rapid growth in digital sales. Digital singles sales in 2007 eclipsed physical singles sales in 1997, and 2008 was around 40% better still.

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Albums	109.33	121.45	121.53	134.26	144.91	149.18	159.28	163.41	158.99	151.9	131.8	123.3
Singles	77.61	73.79	71	55.7	51.2	43.9	30.9	26.5	21.4	13.8	8.6	4.9
Combined sales	186.94	195.24	192.53	189.96	196.11	193.08	190.18	189.91	180.39	165.7	140.4	128.2

Table 1: Physical music sales (Millions)

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Albums										2.8	6.3	10.3
Singles								5.8	26.4	53.1	78	110.3
Combined sales	0	0	0	0	0	0	0	5.8	26.4	55.9	84.3	120.6

Table 2: Digital music sales (Millions)

When these figures are combined, as in Table 3, you get an interesting outcome. An increase in the number of sales of music, over a time period when P2P usage has gone from a few thousand at most, to the much touted 6 Million. If there is a link between P2P usage and music sales, then the evidence, the raw numbers provided by the very people crying poverty, shows that far from being at a loss, their sales figures have increased dramatically.

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Albums	109.33	121.45	121.53	134.26	144.91	149.18	159.28	163.41	158.99	154.1	138.1	133.6
Singles	77.61	73.79	71	55.7	51.2	43.9	30.9	32.3	47.9	66.9	86.6	115.1
Combined sales	186.94	195.24	192.53	189.96	196.11	193.08	190.18	195.71	206.89	221	224.7	248.7

Table 3: Combined physical and digital music sales (Millions)

15 http://web.archive.org/web/20070528051659/piracyisnotacrime.com/stats-vat.php

Nor is this a fluke. In the summer of 2009, Kaj Sotala of the Finnish Pirate Party did a similar investigation[16] into their sales figures, except back to 1980 as shown here., provided by the Finland branch of the IFPI.

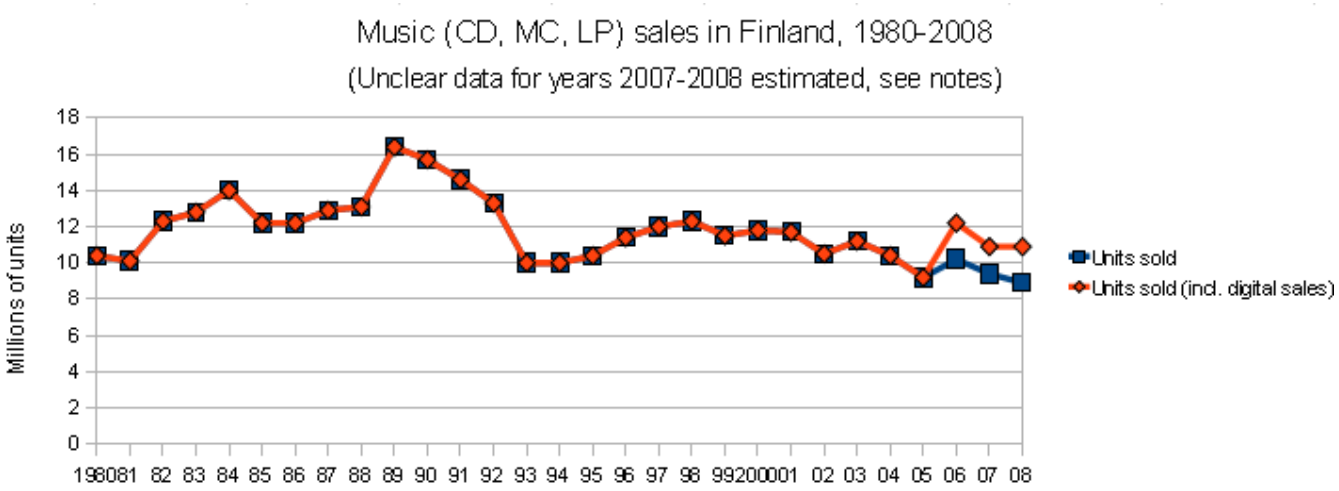

Illustration 2:

The gap between blue and red shows the number of digital sales. Figures for digital sales were difficult to obtain. The dip in 05 may be due to physical sales lost to uncounted digital sales, but still, it is not significantly out of line with earlier periods such as 1993, or 1981, both time periods without P2P to blame.

On the basis of this evidence, provided by the very people claiming the need, and the loss, there is no need for this, or any other proposal. If companies are seeing losses, then it is through bad businesses deals, and not Peer-to-Peer, and the last thing the British public wants or needs, for the government to prop up another industry because of it's inability to run profitably. Similar trends can be seen in the movie business, and software businesses, both have continued to enjoy record years in recent times.

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?

No, we do not agree. There is stated again that there is an urgent problem. Based on the sales figures of the industries it should be clear to anyone that there is no problem, and that any perceived problem is the figment of a lobbyist. Thus, first of all, the primary thing that needs to be satisfied, by OFCOM or whoever, is some basis in fact for any such proposal to begin with. This has not been done, but OFCOM, and indeed the BIS, should have done this before it was proposed. That Lord Mandelson chose to announce this proposal, without doing this, shows his inability to either investigate the realities of the situation, or to manage his department effectively.

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?

No. As previously stated no such code is required, as no such procedure is required.

16 http://neuron2neuron.blogspot.com/2009/05/finnish-pirate-party-study.html

Since the section in the blue box envisioning how the process could work is included with these questions, I would assume it would be referred to in these questions, as it is not, it will be refereed to directly after these questions.

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?

The requirement not to violate statutes makes the whole proposal unworkable. Many, including the German Data protection commissioner said in January 2008 that IP addresses are personal information. Taken with provision f) it seems to set up a deadlock, as rights holders are not going to have personal information, but the whole process relies on them having an IP address, which is counted as that.

In addition to remedies and redress, as stated in provision a, severe sanctions should also be included for any company that makes an inaccurate report. In addition, the code should require that any and all methods for detection and evidence-gathering be pre-approved and certified. This should include a publicly released methodology of action, and the approval should be peer-reviewed by independent academics. If there will be a government mandated bypass of due judicial procedure, then all actions undertaken should be transparent and verified. Trade secrets and 'hidden evidence' would bring even more aspects of the Star Chamber than there already are.

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?

Certainly. Ofcom should only be allowed to utilise this role when, and ONLY when, a direct causal link is proven between P2P and alleged losses and financial harm to the rights-owning industry. Until that link has been established, there is no reason for the whole procedure at all.

In the event of this link having been proven, Ofcom should also produce detailed quarterly, or at the very least bi-annual statistics, showing how many rights holders utilised these procedures against each ISP, and the total outcomes of such. It should at the same time re-evaluate the necessity for the procedure, based on that data and any previous instances.

In essence, should a link be proven, the procedures should only be in effect as long as it's proving to be effective. Should it prove to be ineffective, then it should be terminated.

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?

I see no need for it to be reduced. The only possible reason for the reduction of the time-line, would be to reduce the time for examination of the data. As industry sales figures show, sales are at either the same level, or greater than ten years ago, so there is clearly no need to rush. The only other possible reason for an accelerated time-line, would be to push “Dateline zero” to before an upcoming General

Election, where any negotiated deals (or quid-pro-quo's for that matter) may be nullified with an election loss.

There is, as had been repeatedly pointed out, no data at all that points to the necessity of the procedure, let alone the essentialness of it or that a speedy introduction is essential.

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

No. As with everything else proposed in this document, it's necessity is unsupported by the facts. No Quangos, agencies, working groups or otherwise are needed. The only appropriate structure is none, as that is the only structure that is supported by the evidence.

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.

Were there any attempt to exempt small businesses, it would entirely undermine supposed point of the process, and any sense of justice. If there is a breach of the law, it shouldn't matter if it is a household, a small company, a large company, a multinational or a government office, it either applies equally to everyone, or to no-one at all. That is the cornerstone of British justice.

Such unfair targeting of residential consumers makes a mockery of any sort of justice, and would show the process to be nothing more than a means of control over the general public.

Point 4.58 is also woefully inaccurate in its claim, and it is my professional opinion that whoever submitted that information is clueless and ignorant. A 1Mbit connection means that including overhead line use, approximately one megabyte of data is downloaded every ten seconds. A 350MiB file (such as a xvid encoded 42minute US TV show) would take around 58 minutes. A 700MiB file (such as an xvid-encoded movie) would thus take 1hr 56minutes.

On the theory of 350MiB every hour, that would provide a rough maximum download bandwidth usage of 250GigaBytes over the course of a 30-day month. If the BIS has been informed that this is a 'restricted' amount of data, that have been severely misinformed (again).

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

I do. There is a case for exclusion of the entire population of the United Kingdom for technical reasons – the technology to do what is envisions is not available, and what technology there is doesn't work in the way rights groups and technology supplies have promised.
There is also a case for exclusion on proportionality. On September 22nd, British Telecom gave a figure that this proposal would cost approximately £1 million per day. At the same time, the claimed losses (based on an assumption made atop an estimate, lets not forget) are £547,000 a day. To spend 1M, to save 547k, is not proportionate, is not cost effective, and would not even be accepted as a good idea by a primary school student.

Examination of the Proposed Process

As stated in the answer to Q14, an examination of the proposed process on pages 19 and 20 of the consultation

With the exception of steps 2 and 3, such a process is already being used today, and has been used for approximately two years, by the law firms Davenport Lyons, and now by ACS:law. There are significant problems with this process. The major one is that consumers are not able to contest a Norwich Pharmacal order. Many do not know they have been swept up in the dragnet of ACS (now Davenport has withdrawn from participating in litigation) until after the order has been granted, and the first letters arrive through their door from ACS

The problem is that there is no reason why a rights holder, or their legal counsel, should send a 'warning' to the alleged infringer once they have the NP granted. This has been the tactic used by DL and ACS. A letter demanding a sum of money arrives instead (usually in the 500-600 region, with a demand to pay up, or legal action will be taken. No details are provided just a statement that unless the money is paid within a timeframe (usually a few weeks) legal proceedings will begin. Many have paid up, as the cost of defending the litigation is much greater, even if they have not done it. If a letter is sent back denying, then another letter demanding payment is sent. This cycles continues. If the letter is ignored, then the lawyers tend to go away.

They have gone away very fast when people have turned around and complained, however. They have been confronted by both Watchdog[17] and Which?[18] Over their conduct and procedures.

These cases are clearly known to the BIS, as the last paragraph is page 35 is a clear reference to these cases. However, the details of the case are not provided and thus it is presented substantially out of context. The case is that of a Ms Barwinska, who apparently did not show up. As such it was a default judgement, and no further inference can be drawn, since no case for either side was presented.

That such a method is being proposed, that leaves the public open to bare-faced extortion like this shows either a deep lack of knowledge of the entire subject, or naked contempt for the general public.

Conclusions

In reading and writing the responses to this consultation, I sometimes felt that I was John Cleese trying to return a dead parrot. Throughout this consultation the impression given is that this proposal is going ahead, regardless, and nothing that anyone can say, that no matter how many times the facts are pointed out, that the proposal is urgently needed (he's just pining for the fjords!)

Sales figures for the so-called 'creative industries' are publicly available, and it is staggering that not even basic research has been done by the Bis into these. As has been shown earlier, sales figures, published by the very groups claiming the losses show either no decrease in sales, or an increase over the last ten years. With that basic information, it is hard to see how some kind of link can be made between sales remaining constant, or increasing, and how P2P is causing a loss. With sales steady,

17 http://www.bbc.co.uk/blogs/watchdog/2008/12/davenport_lyons_threatening_le.html
18 http://www.which.co.uk/news/2008/12/which-challenges-bullying-letters-163975.jsp

income would thus also be steady, and so any loss would come from greater costs. In other words, internally, through bad financial management.

There are also several real problem areas in the evidence base, such as the statistic that fewer than 15% of recordings make a profit. Why that is of any concern or relevance is unknown. The chance for return on a business investment (which a sound recording is) depends on the quality of the business; how well it researches it's target market, promotion, product quality. Etc. If you have one good product, and 5 bad ones, then regardless of your field of business, only around 15% of your product will make a profit. Further, “According to Dun & Bradstreet reports, "Businesses with fewer than 20 employees have only a 37% chance of surviving four years (of business) and only a 9% chance of surviving 10 years.“[19] When put in comparison with that metric, a 15% chance of success is normal for the business world.

There is another reason for the low profit rate, and that's down to way things are financed. Courtney Love described with great simplicity how bands on record deals are 'funded'[20], once read you may understand that 15% figure even more.

However, at the same time, that business model was developed in the middle of the last century. Businesses must grow, adapt and embrace new technologies rather than try and stick to old business models and methods. That was part of the reason for the failure of Rover. Cheap, basic and questionably assembled vehicles might have been acceptable in the 1970s, but for the 21st Century it would not do. Consumers expect more, expect companies to keep up with the general pace of technology (or exceed it if possible) and leave in the dust companies that start failing to do this.

Ten years ago, I sat down with a record company executive, and showed them Napster, and MP3s. “This will be the future,” I said, but was ignored. That record company is now all but out of business. Wasn't the only record company to ignore the possibilities, but it sticks in my mind for being told I was 'wasting the CEO's time with that'. The arrogance of the status quo, the illusion that everything is ok, just have to spend a little more, brought down the banking industries worldwide. The copyright industry is in a similar mess.

There is also new information which contradicts that presented in option 2 on page 46. While the DES08 survey suggested that 70% might consider refraining from using P2P, the brand new DES09 survey says differently, giving the figure at 33%. This clearly puts a large hole in any plans to use this survey as a basis for action (not a good idea in itself, as the study size was far too small)

As we feed this corrected and updated data into option 2, we see even less reason for this circumvention of judicial process.

This concludes the consultation response.

19 #7 http://www.moyak.com/papers/small-business-statistics.html
20 http://www.salon.com/tech/feature/2000/06/14/love/index.html