Consumer Focus briefing:

Digital Economy Act vote

Autumn Conference 2011

5pm, Monday 19th September

Consumer Focus is the statutory consumer watchdog. We are working on copyright exceptions, licensing and enforcement since October 2008, taking forward the work of our predecessor body the National Consumer Council (NCC). We want to build competitive markets where consumer demand is effectively met through innovative products and services. We want to see a copyright system that supports this by balancing the interest of consumers, copyright owners, investors and creators. In turn, copyright enforcement has to be proportionate and address the causes, not just the symptoms, of copyright infringement by focusing on increasing the legal markets in copyrighted content.

Following the 'Emergency Motion: Freedom, Creativity and the Internet', passed at the Spring Conference 2010, Policy Paper 101 gives conference two options for vote:

Option A - calls for a repeal of sections 3-18 of the Digital Economy Act, which allow technical measures to be taken against households and the blocking of websites.

Option B - calls for a repeal of sections 17-18 of the Digital Economy Act, which allow the blocking of websites.

Sections 3 to 16 – Filesharing: Consumer Focus opposes the graduated response, a process whereby 'technical measures' are taken against households following notifications by copyright owners.

- The 'speculative invoicing' campaign by ACS:Law has shown that the evidence advanced by copyright owners needs to be tested in court, and that consumers need to be presumed innocent.
- Taking technical measures, such as throttling or disconnection, against entire households as punishment for alleged civil copyright infringement is counterproductive and disproportionate.
- The graduated response was dreamed up when the internet was a 'nice to have', now that it is an essential service it would be entirely disproportionate to effectively disconnect households from society and the economy.
- The Digital Economy Act impact assessment is based almost entirely on 'evidence' provided by the trade associations who lobbied for the act and the likely economic benefits are overstated.
- By establishing subscriber liability for any infringement on an internet connection, implementation of sections 3 to 16 threatens the future of open WiFi networks and the viability internet access provision by public and private intermediaries, eg libraries and internet cafes.

Sections 17 and 18 – Website blocking: Consumer Focus opposes these provisions because the kind of retrospective and pre-emptive censorship they enable are wrong in principle and unworkable.

- Sections 17 and 18 go beyond the blocking injunctions that can be obtained under section 97a of the Copyright, Designs and Patents Act 1988, as has recently been the case with Newzbin.
- They would allow copyright owners to obtain injunctions against websites 'from which a substantial amount of material has been, is being or is likely to be obtained in infringement of copyright'.
- Such injunctions are unworkable in practice and can easily be abused by copyright owners in commercial licensing negotiations, chilling innovative new services who can't afford a High Court battle.

Sections 3 to 16 – Why the filesharing provisions are unworkable

Concerns raised by Consumer Focus and others led to significant amendments to the Digital Economy Bill in the House of Lords, but ultimately sections 3 to 16 are deeply flawed. In his recent *Review of IP and Growth*, Prof Hargreaves said of the Digital Economy Act:

> 'In the case of IP policy and specifically copyright policy, however, there is no doubt that the persuasive powers of celebrities and important UK creative companies have distorted policy outcomes. The passage of the Digital Economy Act 2010 exemplifies the environment in which copyright policy is made. Lord Puttnam, a major figure in the UK creative industries, commented at the time: "We have been subjected to an extraordinary degree of lobbying... The lobbying process that has gone into this Bill has been quite destructive and has done none of us very much help at all".'

The Bill was rushed into law after the election had been called and the House of Commons was not allowed to scrutinise the Bill. Prof Hargreaves recommendations will now finally initiate the reforms necessary to allow innovative online and mobile service to harness digital technology and obtain cost effective and timely copyright licences. By contrast the Act focuses on enforcement and threats, rather than taking the nuanced approach necessary to building flourishing legal markets in copyrighted content.

- **The 'lobbynomics' impact assessment -** The impact assessment for sections 3 to 16 is largely based on research undertaken by or for the trade associations who lobbied for the Act. A survey conducted by the law firm Wiggin, which represents the same trade associations, is the basis for the claim that the Act would lead to a 70 percent reduction in copyright infringement. According to Wiggin the figure is based on the threat of technical measures. Wiggin asserted that their survey findings 'show that letter-sending alone will not be enough and that much more needs to be done if there is to be a real reduction in unlawful file-sharing,' just when the Digital Britain Report concluded that disconnection should not be included as a possible punishment in the Bill.[1] On the basis of figures supplied by trade associations the impact assessment estimates that the music, film and software industry looses £400 million annually due to displaced sales. It is asserted that a 50 percent reduction in copyright infringement would translate into a £200 increase in sales annually. The assertion that every second download is a lost sale is a myth, and the impact assessment does not factor in the implementation or running cost. Prof Hargreaves' reviewed a wide range of surveys but 'failed to find a single UK survey that is demonstrably statistically robust'. He lambasted the reliance on 'evidence' which is published to support the arguments of lobbyists, ie 'lobbynomics', and urged evidence based copyright policy making.

- **The cost of implementation and running costs -** Ofcom says it will have spent £6 million on implementing sections 3 to 16 by the end of this financial year. The Hadopi law in France is believed to have cost £10 million to implement. However, unlike France, Ofcom intends to reclaim the set up cost from the copyright owners who use the notification system in the first year. To date we have no commitment from the music and film industry, which complain that litigation in court is too expensive, that they are willing to use and pay for the Digital Economy Act. Copyright owners who want to use the scheme will have to also pay 75 percent of the annual running costs for Ofcom, the appeals body and internet service providers (ISPs), estimated at between £9.5 and £20 million annually. A more effective way of streamlining the judicial process and reducing the cost of copyright enforcement would be the introduction of a small claims track to the Patents County Court (soon to be renamed the IP County Court), as recommended by Justice Jackson in his *Review of Civil Litigation Cost*, which has been re-affirmed by Prof Hargreaves.

- **Threat to public and private intermediaries, and WiFi networks -** The impact assessment does not acknowledge the cost to public and private intermediaries from implementing the Act. Sections 3 to 16 were drafted to apply to private households, but during the passage of the Bill the then Government announced that it would apply also to public and private intermediaries, as well as WiFi networks. In the judicial review the High Court acknowledged that there is a risk of a chilling effect on internet access from implementing the notification process. To mitigate such an effect it is 'expected that the Code will deal explicitly with the position of such subscribers as libraries and internet cafés so that the regulation works fairly and reasonably'. But to date Ofcom has not made such provisions. Many intermediaries receive internet access from commercial ISPs and therefore risk being notified as subscribers. This would make them liable for any infringement on their connection.

Applying sections 3 to 16 to intermediaries is near impossible. When the Bill was rushed through parliament the then Government refused to exclude public and private intermediaries. Instead a provision was added so that subscribers would have to show that they have taken 'reasonable steps' to prevent others from infringing. This is a particular threat to the viability of public WiFi networks, eg in hotels and airports, use of which has doubled to 4.9 million users in the 12 months since the Act became law. There are no assurances that open WiFi networks will not be forced to add password protection and registration. In New Zealand, where the Copyright (Infringing File Sharing) Amendment Act has recently come into force, the New Zealand Federation Against Copyright Theft (NZFACT) has advised that 'it's important that wireless internet connection, router and computer all have sufficient password protection in place.'

- **Presumption of guilt on the bases of untested evidence -** Beyond proving that they took reasonable steps, the Act provides that subscribers need to show that they did not commit the alleged infringement when appealing notifications. The Initial Obligations Code will provide that subscribers who have been notified three times in one year that copyright owners suspect copyright infringement on their connection are placed on a 'copyright infringement list'. Subscribers will be blacklisted on the basis of accusations only, and once the technical measures come into force those on the copyright infringement list can be made subject to technical measures. The experience of subscribers who have been accused by ACS:Law shows how difficult it is for consumers to disprove allegations of copyright infringement. The Act reverses the burden of proof that would be applied by a court in instances of alleged copyright infringement, despite IP addresses being unproven as evidence. The Digital Economy Bill was drafted on the basis of assurances by the BPI that a conviction had been secured for copyright infringement through peer-to-peer filesharing in the High Court on the basis of an IP address.[2] However, it later emerged that the *Polydor Limited v Brown* conviction was obtained after an admission of guilt.

- **Threatening, rather than notifying consumers -** Studies indicate that many users of peer-to-peer filesharing networks are in their teens, and parents should be assisted in achieving behavioural change. Consumer Focus believes that there is merit in notifying subscribers, who will often be the parents in a busy household, or the designated bill payer for an internet connection in shared accommodation. However, sections 3 to 16 are not necessary for an educational notification campaign, as was operational under a 2008 MOU between ISPs and copyright owners. The scheme was found to reduce repeat copyright infringement by 55 percent without the threat of being blacklisted or disconnection. Notification under the Act always entails being placed on the 'copyright infringement list' and the risk of technical measures further down the line. The MOU was terminated by copyright owners, who then went on to lobby for the graduated response. In reality the Act is a disproportionate regulatory intervention where ISPs were willing to drive behavioural change through voluntary measures without legislative intervention.

- **Disproportionate punishment for a civil offence -** Consumer Focus has always opposed technical measures as a punishment for civil copyright infringement in principle. The social and economic impact on a household would far out way the actual economic damage caused by civil copyright infringement. According to the Office of National Statistics over 12 million people, or 31 percent of internet users, have sold goods or services online in the past 12 months, and 32 million, or 66 percent, have purchased good and services online. 55 percent had used it for online banking, 42 percent used it to seek health-related information, 36 percent used it for the purpose of learning and education, and 30 percent used the internet to look for a job or send a job application. At the first G8 Internet Forum this year world leaders recognised that the internet is an essential and irreplaceable tool for public service and economic growth, and in the UK public services are now delivered 'digital by default'. Disconnecting a household from the internet deprives all members of the household from access to essential public and private services, for which in some cases no off-line equivalent exists anymore. Since the Act was rushed into law it has emerged that even in the case of sexual offences, total bans on the use of the internet for criminals have been overturned because they were judged to be disproportionate to the point of being draconian, as well as not 'necessary' for the protection of the rights of others.

For further information on Consumer Focus' copyright work please contact Saskia Walzel at saskia.walzel@consumerfocus.org.uk or 020 7799 7977

[1] Nate Anderson, **Stern letters from ISPs not enough to stop P2P use after all**, ArsTechnica, July 2010
[2] **How can the BPI tell what broadband accounts are being used unlawfully?** BPI