

Copyright in a digital world

What role for a Digital Rights Agency?



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Ministerial introduction

In the Digital Britain Interim Report we set out our vision of making the UK the world's favoured destination for creative companies to grow and invest. That ambitious vision requires action in many areas, from the work we are doing looking at infrastructure and funding for broadcasting, to the strategic work on the future of copyright being undertaken by the Intellectual Property Office. As one part of this broad ranging approach this paper looks in more detail at how a rights agency can help create an environment in which the creation of digital content is rewarded and innovation is encouraged.

At the moment all creative content providers, whether in music, film, books, broadcasting, newspapers, games and business software or sport are, at one level or another, struggling to adjust to the new digital world. On the one hand the digitisation of content is a massive opportunity because all content can travel across all networks and be accessed and viewed on many platforms. This opens the possibility of many new approaches and new markets.

On the other hand it poses massive challenges. The old business models suited to the analogue environment are not set up to exploit these new markets. Whilst there is a plethora of new offerings only a very few have gained significant traction, and it is not yet obvious where the value that consumers undoubtedly set on creative content can be extracted and therefore who can monetise it. New players are now part of the creative value chain – ISPs, search engines – and may end up being better placed to develop the customer relationship or exploit the advertising potential from driving traffic than those creating and producing the content itself.

In the old analogue and physical world a lot of the value in creative content is protected by restricting where and when it can be accessed. For example, windowing and regional coding in the film industry aims to control who can access content at a given time in a given place and to direct the value of that access to specific parts of the value chain.

But that model is increasingly irrelevant online. Consumers are no longer prepared to be told when and where they can access the content that they want. They do not see why a TV show that is airing in the US should not be available in the UK. They are not willing to wait to see a film at home until several months after it has passed through the cinemas. They don't accept the logic that says that if you have bought a CD you cannot then copy that music onto your iPod. And of course with digital content perfect copies can be made with very little time and at virtually no cost.

This has undermined the willingness of people to pay – they want the content, it's not offered for sale in the way that they want it, but they can get it easily and for free from other sources. A substantial proportion of the population believe that it is acceptable to take copies of content for free from pirated

sources because the combined benefits of quick, available, easy and free make a sufficiently tempting offer to overcome natural disinclination to do something unlawful.

It is very difficult for business to compete on the basis of pay models with 'free' and 'easy', even if that free and easy is also unlawful. We have nevertheless seen innovation in the content industries over recent years. Increasingly it is possible to get legal access to popular content from a variety of sources. But it is against a background of ever growing illicit copying. So there is a real challenge for all who want the content markets to flourish, and to safeguard the viability of investment in creativity in the future, to come together to work out how to move forward. It is not Government's job to mandate how rights are traded or used, but we should look at whether we can facilitate a market space where it would be simpler and easier for commercial and free negotiations to take place. For the consumer, 'inexpensive (or apparently 'free') and easy and legal' can be an effective substitute for 'free, easy but unlawful'. We need to encourage rights owners to develop business and distribution models that meet those consumer needs and fund the creation of future content.

Obviously, as with other countries in Europe, we are mindful of the fact that our copyright system does not exist in a vacuum, and there will be some limit to what we can achieve within the confines of European and international law. But if we are to achieve our vision, we must not shy away from working out where those boundaries are, and making full use of the flexibility we have to help our creative industries evolve to meet the needs of today's market.

And that is the genesis of the rights agency we proposed in the Digital Britain Interim Report. We see it working alongside some specific legislative proposals that we believe will make an impact to reduce the incidence of unlawful peer-to-peer file-sharing and, in so doing, start to share responsibility for changing and challenging wide-scale infringement.

Put at its most ambitious, our vision for a rights agency is to facilitate a major change of approach across the whole value chain as to how content is provided, packaged and sold to consumers. Business models need to develop that are not only sustainable but that provide real opportunities to build the successful businesses of tomorrow.

That is quite an ambition. The paper sets out in more detail the sorts of things we think it might do. But much of that should be for industry to decide since if it is going to work then fundamentally this has to be an industry owned, industry led and industry run body. Its key objectives should be building digital content markets, changing the ways that businesses work, the education of consumers, and prevention and reduction of online piracy. The first two of those are unequivocally for industry to do and Government should stay out of the way. We do have a legitimate role, along with industry, in informing and educating consumers and we will continue to play our part. Industry will need to agree its own mechanisms for tackling civil infringement within the legislative framework.

Finally, in the Interim Report we set out a narrowly drawn legislative proposal to reduce significantly unlawful P2P activity. This should be seen as complementary to a rights agency that delivers a robust self-regulatory framework, including action to prevent and reduce online piracy. This should make a real difference. However, it has to be made to work by the industry participants, and if there isn't evidence of a real commitment from industry to that by the time we legislate then we will have to consider whether the legislation should go further in what it requires, with less opportunity to influence how this can be done in an effective, flexible, pragmatic (and fair) way. That is not our preferred option, and nor should it be seen as a preferred choice by any industry stakeholders. But the Government's objective of significantly reducing the level of online copyright infringement, and in particular unlawful P2P file-sharing (of which we set ourselves a target last year to achieve that reduction within 2 to 3 years), should not be doubted. Without it legitimate business will struggle to survive, let alone grow, and we will deliver on it.

Stephen Carter & David Lammy

The rationale for a digital rights agency

Introduction

This paper is intended to take forward Actions 11, 12 and 13 in the Digital Britain Interim Report and explore the role a rights agency might play in protecting and promoting the legal use of content online. It also looks at the link between the outcome of discussions on a rights agency and how that might impact on the legislation proposed in relation to unlawful peer-to-peer file-sharing. This is a complex issue, but an important one, and we hope that you will offer us your thoughts on the ideas discussed here.

The paper is supported by a “straw man” that describes the sorts of things a rights agency might do, and which asks key questions about each aspect. However, it might be useful if we set out clearly and up-front what we see as the over-arching purpose of a rights agency, and the legislation.

Building the digital rights environment for the future

Our vision as laid out in the Digital Britain Interim Report is ambitious - to make the UK the World's favoured destination for creative companies to grow and to invest. This requires us to get many things right, including fostering a general climate of entrepreneurship, developing the skills and talent of our people, and building the infrastructure – increasingly digital – through which people will enjoy creative products. Underpinning the way our creative industries work however is copyright. If the systems around copyright are not delivering what is needed to support this vision, then other work will be severely undermined.

Much work is of course being done on copyright already, especially with the work recently launched by the Intellectual Property Office to look at how the copyright framework itself might need to change in the future. This work in contrast is not looking at the copyright framework itself, but rather at the systems around copyright that form the business environment for creative industries in the UK. At its most ambitious a digital rights agency could be the catalyst that transforms the systems for recognition, negotiation and protection of rights online, helping many in the creative industries move from a predominantly analogue world to a digital one.

The roles that a digital rights agency could play

So what are the key components that a digital rights agency could include? The first thing to say is that, while it should be seen in close conjunction with the legislation we are proposing on unlawful file-sharing, this is not all, or even primarily, about enforcement. Rather it is about enablement – what we are seeking to do is clear the undergrowth and prepare the ground within which creative content can flourish and grow. That means that the digital rights agency could include, amongst other things:

- A commitment to explain to the public the consequences of unlawful use of copyright material. This is an important task - no matter how much effort goes into trying stop people from engaging in piracy it will only work in the long run if they understand the damage infringement has on the artists and the ongoing availability of the rich content they value.
- Facilitation of negotiation and rights clearance and discussion around standards where the different interests would find that useful. Taking into account competition concerns, there should be plenty for an agency to do in terms of making deals easier, rather than trying to get involved itself – almost certainly neither possible nor wanted by either side
- A place where people could go to resolve disputes quickly and economically, and where consumers will find a champion where needed.
- A forum for dialogue. We sometimes underestimate the value of providing a place where those from a different industrial perspective can meet and gain appreciation of other positions and drivers, and in many ways this will underpin all other activity
- A gateway in to the legal remedies being set out in P2P legislation, and to an informed discussion on other potential ways to deal with persistent infringement, such as road-testing technical measures
- Development of codes of practice around enforcement measures to prevent and reduce online copyright infringement. These would need to be strong enough to be likely to make a real impact on the problem, and could include, for example, such approaches as protocol blocking or bandwidth
- in relation to persistent infringers.

The detail around all of these roles are looked at in more detail in the “straw man” Annex, together with a number of detailed questions on how such roles might work and thoughts about the likely size and cost of operation. We are looking for a full and challenging response from industry, consumers and others.

But we need to be absolutely clear. Although we think that a rights agency of this sort could be a vital step in building an environment in which copyright can be protected and exploited, we are not proposing that Government should set up and run such an agency. This is emphatically not a proposal for a new government regulator. Instead, we are inviting industry to come together to create a body that could tackle those parts of this agenda that are for industry to deal with. In pursuit of that we are happy to work with industry as a convener and a facilitator in this process.

The rights agency and the proposed legislation

As we hope is clear, the rights agency should be about much more than enforcement of rights. That is just one of its aspects, and arguably not the most important in the longer term. However, we do recognise that many of the other roles will depend on there being a sufficient reduction of unlawful activity to allow other aspects to develop. It is also recognised that inevitably a lot of attention will be focused on this part of the agency, and a lot of questions asked about how the agency and the legislation we proposed in Action 13 will fit together.

The digital rights agency and the legislation must be seen as package. As such, the narrowly focused and light-touch legislation we proposed in the Digital Britain Interim Report is couched in those terms because we think a strong successful rights agency of the sort described above would be a better way of ensuring that action is taken to support the creation of legitimate content, and to tackle unlawful copying. The legislation is intended to be an important tool to help rights holders and ISPs to tackle the problem of unlawful file-sharing, but we are aware that this is only part of the solution – and it is a solution to the problem of today, not necessarily tomorrow.

The legislation

The legislative proposal we are putting forward is deliberately narrowly drawn. In the first instance it places two simple obligations on ISPs that will, we hope, address the bulk of casual infringers who use unlawful P2P networks because they are easy to use and free. If we can make it clear that this sort of infringement is neither anonymous nor safe we can expect to see a rapid and substantial drop in this behaviour. The second obligation makes it easier for rights holders to target the very worst offenders and take action against them.

Having been notified that they are behaving unlawfully, people who then carry on persistently and deliberately infringing copyright material should understand that they could find themselves in court, and facing the financial consequences. It is important that this is credible, and that rights holders do take action against those really serious infringers since this will send a lesson to the majority of infringers that there is a real threat of real action if they do persist in their behaviour – it is not anonymous, nor safe.

Underpinning these two obligations there will be a requirement for ISPs, and right holders who want to trigger the ISP obligations, to comply with a code of practice that will set the detailed standards and requirements for compliance. The Code will have to be approved by Ofcom in accordance with the principles that govern all of Ofcom's regulatory activity. In particular this means that the code:

- would have to be capable of being enforced;
- that it should be non-discriminatory and transparent;

- that it should meet certain principles of objective justification and proportionality; and
- that there should be an appropriate appeals mechanism.

A key issue is the extent to which that Code should also be able to require ISPs to take further action against persistent infringers.

One option would be to **allow** the code to include measures that ISPs should take to restrict the network access of repeat infringers. The legislation could provide examples of such measures (e.g. protocol blocking, bandwidth capping) but leave it open to an industry body – the rights agency, subject to approval from Ofcom – to specify what, when and how. These actions would not be limited to tackling unlawful peer to peer activity, but rather geared towards finding effective ways of reducing the overall levels of online copyright infringement over time, allowing for changing behaviours and technologies. Should there be no agreement between industry on the utilisation of such measures it would be for the regulator – Ofcom – to choose whether to impose such measures, judging their appropriateness and need within the policy principles within which they work.

Another, less attractive, option would be to specify in the legislation what types of action the code should include and the basis on which they should be applied by ISPs. This would be necessary if there were little prospect of an effective rights agency, but carries with it the risk that we legislate today to solve the problems of today, leaving the problems of tomorrow without a solution. It also risks us choosing the wrong actions – or actions that work on some types of piracy or some networks but not on others.

Conclusion

Our vision is for the legislation proposed and the rights agency to form an integrated approach to content online, and we need to ensure that taken together they create an environment where investment in creativity online is rewarded, and deliver a practical solution to online infringement. This would provide a comprehensive framework that helps legitimate and attractive digital content to flourish while ensuring it is not fatally undermined by people taking creative products for free and without permission, either through peer-to-peer file-sharing or other threats that may emerge in the future.

We have set out here a model which allows industry to keep control of how this environment is created. This model depends on a strong rights agency that can and does require specific actions of its members. We do not wish to be more prescriptive in legislation - that would not be the best outcome for anyone – including rights holders. We recognise that we would run a real risk of legislating to require specific actions that may turn out in practice to be ineffective and to address only the short term problems, without the ability to flex to deal with new situations as they arise. However, if we are not convinced that industry is willing or able to deliver an effective rights agency we will need to think about alternative ways to approach the issue.

But the case for an effective rights agency is not about fear of something worse. There are strong reasons for both rights holders and intermediaries to engage constructively with the agency. For rights holders it is clear that others find dealing with digital rights challenging, chilling investment opportunities and innovation. It is their business to market their material, online as well as in physical format, and in their interest to make it as simple as possible for others to pay them.

They also need a route and a mechanism towards protecting their rights – we do not dispute the challenge they currently face from unlawful activity. Any reliance on a legislative only solution poses great risks for rights holders. However clear the Government's commitment to tackling piracy we cannot, through legislation, provide anything like the whole answer to this complex area and the answer that we do find might prove to be short lived, even counter-productive if we are forced to be prescriptive, and that pushes infringement towards more difficult to detect methods.

For ISPs, increasingly the future will involve monetising what travels over their networks, and not just providing the networks. The Digital Rights Agency could facilitate the engagement they need with content owners to help towards the partnerships and strictly commercial negotiations that will underpin them. As exploitation of copyright content brings benefits to all parties it also makes prevention of piracy a shared imperative.

What happens next?

This paper is intended to start the discussion about how such a rights agency might work. We intend to hold a public discussion forum to address these questions, but in the interests of rapid progress we would also very much welcome comments from interested parties at any time.

Please send comments to DBR@ipo.gov.uk preferably by the **30th March 2009** (we understand this is a very short response period, but stakeholders will appreciate the need to make rapid progress on this issue). While we will ensure that we take views from a wide range of interests, we may focus initially at first on those parties who show an interest at this stage.

This paper is not intended to form the consultation on the specific legislative proposals outlined under Action 13 of the Interim Digital Britain Report. We intend to issue a formal consultation on the Action 13 proposals shortly. Responses to this paper will help shape that consultation.

Annex A: a straw man and key questions

This discussion paper takes the form of a straw man and builds on the proposals contained in the Digital Britain Interim Report (DBIR) and looks at the role that a rights agency might play in addressing some of those issues. It looks at particular aspects of a rights agency, outlines how they might work, and then suggests the key questions that need to be considered. Inevitably some of the answers will be dependent on what decisions are subsequently taken, including those on structure and how the regulatory aspects will work, but we hope that this paper will be a starting point for that discussion.

1. It is important that the proposals for an agency are seen as interlinked with the legislative proposals on P2P, with both forming part of an integrated solution. The role and strength of any agency could have a significant impact on how far-reaching the legislation on P2P needs to be when finally settled. If the agency creates a strong self-regulatory model with real commitment from rights holders to make content more accessible and real obligations on ISPs to take action to prevent piracy then a relatively light touch legislative approach might be all that is needed. But if the agency looks like a co-operative model but without the strength to draft and enforce compliance with codes to deliver a significant reduction in piracy then the P2P legislation might need to be specific on many points that we might otherwise be able to leave to the agency.

2. The DBIR set out two actions in relation to a proposed rights agency which may play some part in addressing these issues:

Action 11 *By the time the final Digital Britain report is published the Government will have explored with interested parties the potential for a Rights Agency to bring industry together to agree how to provide incentives for legal use of copyright material; work together to prevent unlawful use by consumers which infringes civil copyright law; and enable technical copyright-support solutions that work for both consumers and content creators. The Government also welcomes other suggestions on how these objectives should be achieved.*

And

Action 12 *Before the full Digital Britain Report is published we will explore with both distributors and rights-holders their willingness to fund, through a modest and proportionate contribution, such a new approach to civil enforcement of copyright within the legal frameworks applying to electronic commerce, copyright, data protection and privacy to facilitate and co-ordinate an industry response to this challenge. It will be important to ensure that this approach covers the need for innovative legitimate services to meet consumer demand, and education and information activity to educate consumers in fair and appropriate uses of copyrighted material as well as enforcement and prevention work.*

Why civil and not criminal issues?

The DBIR suggests that a Rights Agency could take action to address the issues around civil infringement of copyright online. This excludes issues relating to criminal enforcement of copyright abuse which is covered extensively by the work of other organisations. It also explicitly excludes other issues with online content such as undesirable or illegal content.

What might the RA do?

Consumer education and information

3. In the longer term education of consumers about the damage that is done by unlawful activity, threatening the health of our creative industries, will be critical. Of course rights holders already put resource into this area, but there may be advantages to a system which minimises repetition and provides a co-ordinated approach with messages reinforcing each other. As with any initiative hoping to change behaviour, it has to be accepted that mere admonition is unlikely to be particularly effective, but it might be that a suite of approaches could be adopted, either instead of or on top of existing initiatives. If the threat is as significant as rights holders fear then significant resource should be made available.

4. It is of course primarily in the long term interest of rights holders to engender behaviour change, and accordingly it may be seen as right that they should bear the majority of the costs required to bring that change about. It must be remembered however that it is also possible that some of these initiatives could be of benefit to others, perhaps by increasing uptake of legal services offered by intermediaries, and so there may be a case for the cost to be shared more widely.

Key questions

- How could a body representing interests across the digital content value chain help to change mainstream attitudes to copyright? Is there a need for a body to have a coordinating role, for example bringing together rights holders and others in the supply chain to work together on consumer education campaigns?
- What role is there for additional or linked awareness campaigns? – bearing in mind that it is a costly activity and may have impact on existing campaigns run by rights holders nuanced for their particular target audiences.
- If work is done in this area, how should this link with the educational and awareness work of other government bodies or educational authorities? If work is already taking place in these other contexts what added value can a rights agency deliver?

Educational work

The majority of work in this area is currently carried out by industry associations in the music, software and audiovisual sectors with several campaigns currently either being planned or in progress. It is understood that the letter writing notification proposed in the DBIR under Action 13 may form a highly effective mechanism for these bodies to directly target the consumers in question.

The Intellectual Property Office is currently engaged in work with Aardman and the Science Museum to promote understanding of all forms of IP including copyright. The IPO also carries out other work in this area, preparing materials for school use etc.

The OFT has programmes to help adult learners develop consumer skills, this covers online issues.

FACT

As an example, the Federation Against Copyright Theft (FACT) is an organisation of around 70 people with funding from the Motion Picture Association of America (MPA). Fact is a Limited company and also draws some funding from accreditation fees. Companies can get FACT accreditation by fulfilling certain criteria (detailed on their website) and paying a £1,5k fee (plus vat). FACT currently has about 170 accredited companies, so its fee income from this source is approximately £250k per annum.

FACT's work is mainly supporting the investigation and prosecution of criminal piracy, but it also carries out education and awareness work, both alone and in conjunction with other industry bodies.

Encouragement of commercial offerings

5. One of the ongoing complaints of businesses trying to develop legitimate digital content offerings is the large number of rights holders that they have to negotiate with, some of which seem (from the perspective of the would-be licensee) to have unrealistic expectations or are reluctant to enter into innovative commercial agreements. It is also the case that potential distributors can be ignorant of the range of rights that have to be secured. So, for example, ISPs may reach distribution deals with record companies, only to discover that they also need to negotiate with music publishers. This can lead to recriminations on both sides. At a minimum, some support for companies entering into this process could be useful.

6. A rights agency may be able to play a significant role here, firstly as a neutral space where different rights holders in the value chain and those who are seeking to make a deal can meet. There are obvious concerns here

about ensuring that this does not amount to anti-competitive practice. However, assuming that this can be managed then it could help to facilitate new legal offerings.

Key questions

- What is the potential for providing a market place for developing collective licensing agreements or marriage brokering between organisations who want to develop consumer propositions and those who have the content?
- How might this function be set up to comply with competition law?
- Could the agency play a standardisation role in areas such as rights clearance, and DRM labelling, whilst ensuring that standardisation agreements and participation in the setting of standards are in line with competition law?

Rights clearance in other organisations

The resources need to carry out rights clearance are extensive. Take, for example, the BBC's on demand catch-up service, iPlayer, which was launched on 25th December 2007. The popularity of the service can be gauged by the current daily average of 1.5 million streams and downloads requested via the iPlayer.

The negotiations for the rights agreements for the BBC to run iPlayer were extremely complex. They began in 2002. Over the subsequent 5 years some 70 new agreements were reached with rights holders bodies entailing thousands of hours of rights management activity.

Rights clearance for a film can also be complicated and slow. Filmmakers report the costs of this for a single film might be of the order of £300k. Clearly then this is a resource intensive problem, and the size and cost of an agency that attempts to deal with this on a large scale should not be underestimated.

7. The points made about needing to ensure compliance with competition law are important ones. The impact of a unitary body carrying out rights clearance activities has the potential to distort the market, since an agency involved in such work would have knowledge of the negotiating positions of all parties, and as such it may be inevitable that prices become regularised, removing the competition and churn that drives new business models.

Competition Law Risks

Agreements between competitors may potentially raise competition law concerns, specifically under Chapter I of the Competition Act 1998 and/or Article 81. These provisions catch and (unless an exemption applies) prohibit agreements and concerted practices which have as their object or effect the prevention, restriction or distortion of competition to an appreciable extent. Any agreements - and the agency itself - must be designed so as not to breach the prohibitions set out in these provisions.

However, not all agreements are prohibited by competition law; an agreement will not be caught if it does not restrict competition or does not do so in an appreciable manner (for instance, where the parties to the agreement have very low market shares). Moreover, agreements caught by competition law may benefit from an exemption where, in broad terms, the agreement results in efficiencies and consumer benefits, the restrictions are indispensable to the obtaining of these benefits and there is no foreclosure effect on the market.

Any agreements between competitors will also need to be closely assessed to ensure that they comply with the merger regime. For instance, this will be relevant for the purposes of an agreement to develop consumer propositions where, for example, undertakings set up a new full function joint venture company.

Funding - if the agency is to be funded by the introduction of a modest contribution as proposed in the DBR, competition rules also need to be considered to ensure that the rates are reasonable and that the monies are distributed fairly.

Standardisation - standardisation agreements may have the effect of restricting competition where they impact upon the parties' freedom to develop alternative standards or products. Equally, participation in the setting of standards should be unrestricted and transparent.

Voluntary rights registration and rights fund

8. Closely associated with clearing rights is the idea of setting up a voluntary registry of rights. This could help streamline identification of rights holders and negotiations, and could lead towards setting wholesale prices for rights.

9. A voluntary registry could also help with any solution to the problem of “orphan works” - items of content that are within the term of copyright but where it is not evident who the rights holders are - resulting in those who might want to commercialise such content being reluctant to take the risk for fear of being sued by rights owners emerging at a later date. Setting up a “Rights Fund” within the agency could help form part of the solution to this issue, although it is not currently possible within existing law and would need primary legislation and possibly European legislation in order to provide a workable solution. This is an idea that will need to be considered very carefully and probably in slower time than the setting up of the rights agency. Nevertheless, the existence of the agency could be a facilitator to making progress here to the mutual benefit of rights holders and those wishing to use their material.

Legal considerations around registration of copyright

While a voluntary register of copyright may perform a useful role in easing identification of rights holders, it is important that any such register does not become *de facto* mandatory for rights holders in order to enjoy the benefit of their rights.

The Berne Convention is explicit that registration cannot exist as a pre-requisite of protection.

There are also issues around registration of visual works, such as photographs, which do not lend themselves well to categorisation or labelling. There is concern amongst the photographic community that a requirement to register their work would add considerable burden to artists, with no resultant increase in the protection they receive. Recent legislation in the US has attracted some criticism on these grounds.

Key questions

- Would such a voluntary registry be useful as a tool for clearing rights?
- How should it operate in such a way that it does not become mandatory by default?
- Could it be relatively light touch?

- If set up, would the rights agency be the best place for it?

Guarantor of quality – a kite mark for digital content

10. There are already a huge number of content offerings, and in addition to the difference between lawful and unlawful there is massive variance in the quality of products on offer, with many stories of downloaded content bringing unwanted viruses with them, and P2P being utilised for more nefarious purposes than illicit copying. A guarantee of quality and provenance may be valuable, particularly for those less experienced online or for vulnerable groups. Digital content that is voluntarily registered could be assigned a kite mark that establishes that it comes from a reputable source, and is legally being made available.

Key questions

- How much value would there be in such a kite mark?
- How it would it set standards, and who would audit them?
- In a global environment what is to stop fraudulent use of such a mark?

Self- regulatory enforcement role

11. The rights agency will be an industry owned and led body, not a new body with regulatory powers. However, it is clear that it will need to work closely with Ofcom as the regulator of the P2P legislative obligations. ISPs will be subject to the code to be developed and approved by Ofcom as part of the P2P legislation. They will not be required to join the rights agency, but they may consider that they should do so if they wish to have any influence over codes etc that may be developed by the rights agency and adopted and endorsed by Ofcom as the regulator.

12. Notifications as envisaged under the P2P legislation will inevitably lead to appeals from those who consider themselves wrongly identified. It will be important that there is a clear route for consumers to travel if they have a complaint, and while this may initially be dealt with by the ISP itself a further means of redress for unsatisfied customers could be provided either by Ofcom or potentially by the rights agency.

13. We have set out our perception of the need for a balance between the ability of the rights agency to police its own members in taking practical steps directly to prevent or reduce online copyright infringement. The role we envisage for the rights agency in this would be around the agreeing, enforcement of, and management of appeals in regard to, a code of practice designed to prevent and reduce online copyright infringement. The code itself would have to be approved by Ofcom and Annex B sets out in more detail what Ofcom would be looking to take into account in approving such a code.

Key questions

- How could an independent industry body achieve sufficient authority to agree such a code and undertake the functions suggested?
- How should such an industry body work with Ofcom as the regulator?
- How likely is it that an industry body could achieve the agreement and consensus required to draft a code of this sort?

Acting as an information hub.

While the IPO already does some work in this vein for criminal copyright infringement, there are legal issues that would need to be taken into account before any agency took on such a role for civil issues. As the majority of the infringements in question will be the action of individuals, any scheme to collect or handle data on infringements would have to meet the requirements of the Data Protection Act.

Formation of an industry self-regulatory body

The formation of an industry self-regulatory body may potentially raise competition law concerns since it is likely to involve cooperation between competitors in the industry. Such cooperation may spill over into areas which raise competition law concerns under Chapter I of the Competition Act 1998 and/or Article 81 EC (both of which prohibit anti-competitive agreements) such as price fixing, the exchange of sensitive, confidential information and the raising of barriers to entry (if membership is compulsory and results in increased costs for members).

However, it may be possible to address these concerns by the way in which any agency is structured or operated. For example, if the agency is to take the form of an industry self-regulatory body, there should be clear systems in place to avoid the exchange of confidential information between members, membership should be open to all market participants and the membership criteria/requirements should not be unduly restrictive.

It is also necessary to consider the wider implications that the agency, and any proposals made by it, will have on behaviour in the market, and the consequences for consumers.

Tackling persistent civil infringement – a test-bed for technical measures

14. Much useful work has been undertaken by the MOU group on the technical and legal feasibility of technical measures (see Annex C). A large

measure of agreement was reached on the technical issues, less so on the legal ones. A rights agency could continue to act as a neutral and independent body where discussions can take place, and where solutions can be tested against the claims of their proponents. It would be important for consumer representatives as well as technical solution providers to be involved in such tests, since it is not just their technical efficacy but their proportionality, fairness and respect for privacy that need to be established. If technical measures can be agreed that meet the requirements of both consumers and the industry partners there is a much higher chance of them being introduced without wide-spread criticism and resistance.

15. There could also be a useful role in terms of standardisation and facilitating interoperability where this can be done legitimately. For example in the area of digital rights management a rights agency could be a body which facilitates agreement about the essential information that consumers should have in order to make informed choices.

16. A further option would be for the agency to agree technical approaches to reducing repeated infringement and how and when to apply them, both within the P2P area and wider, bearing in mind that P2P may not be the primary threat in the future. We are aware that this is an issue that is of great importance to both rights holders and ISPs and provokes strong views. Although reaching an industry wide consensus on technical approaches to dealing with repeat infringement is never going to be easy, it is important to think about it in the context of the proposed legislation.

Key questions

- Is there a role in technical standard setting, identifying, road testing and promoting technical solutions to address abuse?
- Is there a role for the agency in agreeing binding (on agency members) codes of practice on taking technical measures to deal with repeat infringement?

Dispute resolution

17. With respect to P2P file-sharing cases, and entitlement to use of the kite mark, it is expected that negotiations between interested parties will resolve most issues, and lead to agreements on how content can be exploited.

18. However, there will inevitably be cases where there is a disagreement over how terms have been interpreted, or where consumers consider that they have been misled by an offering, and are looking for compensation. Of course, it will be open to either party to resolve the issue either through bilateral arbitration or through recourse to the courts, but there may be merit in including within a rights agency an alternative dispute resolution procedure to deal in particular with technical, small and/or straightforward cases.

19. We would not envisage assigning the rights agency binding legal powers – that would significantly change the nature of the body – but there may be benefits to both sides in settling disagreements quickly and without fuss or disproportionate expense.

Key questions

- How much value would there be in such a process for consumers, rights holders and others?
- It is important that this does not duplicate the work of the Copyright Tribunal – in the light of that what extra could this process do – and what should it avoid?
- How would such a body be constituted, and how binding should its decisions be?

Representation

20. We have talked in general terms about rights holders, but of course they are not a homogenous group. While they have a common interest in the security of their Intellectual Property, there are differences in how they are represented, the structure of the industries, and the extent to which they are currently affected by infringement online. Music has had long experience of fighting this battle, while the games industry already thinks in digital rather than analogue terms, but book publishing is only recently seeing a significant uptake in eBooks. The nature of the problem for software is slightly less geared around mass consumer infringement but is no less damaging for that.

21. The way in which the different sectors are represented in the rights agency will need some thought. It is essential that it is inclusive, but it could be chaotic if all those with an interest insisted on being there. There is also a danger of late-comers wanting to unpick what has been agreed – or alternatively things being agreed that would make it more difficult for other sectors to see benefit from joining.

Key questions

- How can we ensure that a rights agency is properly representative – should membership be open to whoever is prepared to pay the fee, or should it be structured so that was (say) one place at the table for games, one for music etc?
- Should membership be open to trade bodies, individual companies – or both?
- How will decisions be arrived at – does there need to be equal weighting for ISPs and other intermediaries? What happens if there is deadlock? How binding are decisions – what about late entrants and their requirements?

- The agency will need credibility with consumers – it must not be seen as an industry conspiracy to do things to, and against the interests of, consumers. How should they be represented – and should they have a vote?

What might an agency look like?

22. The agency's structure, legislative underpinning and cost would be dependent on its agreed aims and functions. There are a range of options for the agency. At one end of the scale it could be a very light touch organisation, acting in a similar way to the Advertising Standards Authority (i.e. an industry self-regulatory body) establishing codes and managing compliance with those codes by its members. Such a light touch agency could probably be delivered relatively cheaply, with a small staff of perhaps 10 people for around £500k per annum, and would not require legislation.

23. At the other end of the scale, the agency could be a substantial self regulatory body, working under the authority of the regulator to draft codes of practice, possibly with a function in the rights clearance field. That would require substantially more funding, perhaps a staff of around 50, realistically leading to a minimum budget of £2.5 m.

24. Although, as discussed, it is impossible to suggest how an agency might look until it is decided what role it should play, for illustrative purposes a few options are set out in Annex D.

Costs

25. It must of course be emphasised here that these costs are just estimates, and with no clear remit for an agency at this time, they are subject to substantial adjustment as work progresses. It is also worth noting that the above costs are purely those estimated as necessary to create and maintain an agency in terms of staffing, building costs etc. The estimates do not include cost of any educational campaigns, cost of legal work, or costs of rights clearance and other support activities. As such the real cost to industry is not something that can be easily estimated at this time.

Key questions

- What level of funding would be proportionate to the problem?
- What is the minimum size of an agency that would be able to act effectively in this sphere?

How could it be funded?

26. The rights agency will be funded by industry contributions. However, our clear starting point is that costs would need to be shared between the different parts of industry. This applies both to the costs of running any agency but also to the costs of any action taken by, or required of its members by, the agency. This approach is about finding a shared solution to a problem and it would be neither feasible nor fair to load all the costs onto one set of participants.

Key questions

- How should contributions be divided between the participants?
- Are there any other funding options that you would advocate? How would such an option compare with the ones explored above?

For comparison – Cost of Civil Actions

To bring a civil claim for infringement of copyright is a complicated process, during which it is necessary to establish:

- (a) the work which is the subject of the claim is a work in which copyright subsists;
- (b) the claimant is the owner of the copyright or a licensee of the owner;
- (c) the identity of the defendant (the fact that a particular internet address has been used will probably not be enough to do this given the possibility of wireless connections to that address);
- (d) that the defendant has done something that amounts to an infringement of copyright (the act falls within section 16(1) of the Copyright Designs and Patents Act 1988, the act is done without licence (s.16(2)) and no exception applies.)

To identify an infringer might well require examination of computers. There are considerable difficulties in identifying downloaders where, for example, illegal downloading has occurred at an internet café or other area where there is public access. In the P2P area for example, infringement is established on the basis of identifying the IP address of uploaders, not downloaders.

As a result of this the cost of bringing action can run into thousands of pounds very quickly, with estimates in the region of £6k-£10k having been quoted at various times by rights holders.

How do we move forwards with this work?

27. This paper is intended to start the discussion about how such a rights agency might work. We intend to hold a public discussion forum to address these questions, but in the interests of rapid progress we would also very much welcome comments from interested parties at any time. Please send comments to DBR@ipo.gov.uk preferably by **30th March 2009** (we understand this is a very short response period, but stakeholders will appreciate the need to make rapid progress on this issue). While we will ensure that we take views from a wide range of interests, we may focus initially at first on those parties who show an interest at this stage.

28. This paper is not intended to form the consultation on the specific legislative proposals outlined under Action 13 of the Interim Digital Britain Report. We intend to issue a formal consultation on the Action 13 proposals shortly. Responses to this paper will help shape that consultation.

29. The final Digital Britain report in the spring will set out the Government's way forward on the closely related issues of the rights agency and P2P legislation.

Annex B: Preventing and reducing online copyright infringement: the obligations

1 This paper sets out a basic proposal for legislation that would place specific obligations on ISPs within a framework that requires a code to establish the detail of how those obligations are to work. The code would also have the scope to go further and require further action from ISPs in relation to repeat infringers. All aspects of the code would have to be approved by Ofcom in accordance with their normal principles of proportionality, objective justification etc.

2 Notification obligation

2.1 The specific obligation in terms of notification will sit on ISPs. Any ISP will be obliged to notify an account holder, upon receipt of appropriate evidence (standards to be set by the code) from a rights holder of copyright infringement on that account, of the existence of such evidence.

2.2 A request in respect of a specific infringement may only be made by the rights holder of that material or someone authorised to act on their behalf. There may need to be a time limit as to how long after an infringement occurs a request may be made.

2.3 The ISP will have to send a notification to the account holder setting out the details of the alleged infringement. The notification will also have to provide:

- advice and guidance on securing wireless networks;
- a statement that it the notification is sent pursuant to the legislation;
- advice on how/where to access legitimate content;
- information about copyright and why it is important; and
- anything else specified by the code.

2.4 The standard of evidence required from rights holders should be as high as can be reasonably demanded. The template used by the BPI in the MOU trial should serve as a model for this as it has proved satisfactory to all the ISPs in the trial and has not provoked any particular concerns by consumers affected.

3 Serious Infringer Obligation

3.1 The second obligation is to maintain data relating to the notifications sent to their customers on behalf of each rights holder or their designated agent. To be absolutely clear - there is no intention to require ISPs to monitor the activity of their customers. Rather, they will collate information on the number of times they have been requested to send notifications to each customer by each rights holder or their representative.

3.2 In practical terms this means that an ISP would need to know, and be able on an anonymous basis to relate to any individual rights holder, the

account holders against whom there has been the highest number of notifications at any given point.

3.3 The ISP would need to be able to alert the rights holder, upon request, of the next time they received an infringement notification in respect of one of these serious infringers. The rights holder could then use that infringement event as the basis to go to court to get an order for the release of the personal details of the account holder in order to take legal action. The rights holder would then be able to present evidence in relation to all the notified infringements by that account holder in any subsequent litigation.

4 Code of practice

4.1 Finally, Ofcom would have the power, for the purposes of facilitating the protection of copyright online, to require both ISPs, and rights holders who wish to trigger action under this proposal, to comply with a code.

4.2 As with section 121 of the Communications Act 2003, Ofcom would have the power to approve a code agreed by another person that contains provision for the reduction or prevention of online copyright infringement and that, in the opinion of Ofcom, meets the requirements of a code as set out below and which it would be appropriate to approve.

4.3 Again borrowing from section 121 of the 2003 Act, Ofcom should not approve such a code unless they are satisfied that:

- (a) that there is a person who, under the code, has the function of administering and enforcing it; and
- (b) that that person is sufficiently independent of both ISPs and rights holders;
- (c) that adequate arrangements are in force for funding the activities of that person in relation to the code;
- (d) that the provisions of the code are objectively justifiable in relation to the activities to which it relates;
- (e) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;
- (f) that those provisions are proportionate to what they are intended to achieve; and
- (g) that, in relation to what those provisions are intended to achieve, they are transparent.

4.4 Ofcom should not approve any part of a code that imposes an obligation on an ISP that would contravene the e-Commerce Directive or any other relevant statute – e.g. data protection, privacy, the European Convention on Human Rights etc.

4.5 Provisions in this code must:

- a) Provide for a fair and transparent appeals process for consumers;
- b) Establish the standards of evidence required to trigger a notification under this proposal;
- c) Set out what has to be covered in the notification and other relevant details about the process of notification including the handling of repeat

- notifications and, if necessary, the number of notifications that any rights holder can request to be made;
- d) Apportion costs of any action, including notification, covered by the code between the relevant parties;
 - e) Provide for a dispute resolution mechanism between rights holders and ISPs; and
 - f) set out the process for the identification of 'egregious' infringers (i.e. how data is to be kept and in what form and when rights holders should have access to it. [N.B. the data referred to here is not personal data – it is an aggregation of the data provided by the rights holders.]

4.6 Provisions in the code may also:

- require ISPs to restrict the network access of an account holder by:
 - constraining the amount of data that they can access in a period of time;
 - constraining the speed at which they can access data;
 - restricting access to specific traffic protocols;
 - suspending access to the internet until they have taken appropriate action (for example completing a questionnaire designed to educate on the importance of copyright); and
 - other technical tools that might be appropriate and proportionate as a mechanism for preventing or reducing online copyright infringement.

4.7 In considering whether provisions of this sort in the code meet the tests of proportionality and objective justification set out above Ofcom must take into account the actions of rights holders in seeking to ensure that infringement is discouraged. Such actions might include activities to educate and inform consumers on the importance of copyright, and ensuring that relevant content is available to consumers in appropriate legitimate ways. Ofcom would also have to consider the reliability of the evidence provided of infringement by the account holder.

4.8 Ofcom will have the power at any time to approve modifications to the code or to withdraw its approval of the code if it no longer satisfies the requirements set out.

4.9 Ofcom will have an obligation to consult in considering whether or not to approve any part of the Code submitted to them for approval.

4.10 Ofcom will also need the power to make charges of those who are subject to the code to cover the cost of their activities in regard to this process.

4.11 If there is no code that Ofcom can approve, they will have a duty, by order, to impose a Code, meeting the requirements set out above, having first consulted with all relevant parties, including consumers. Ofcom will also, as in Section 122 of the Communications Act 2003, have to have the power to establish an independent body to operate and enforce the code under these circumstances and to raise charges from those subject to the code to cover the costs both of Ofcom and of the independent body.

4.12 Any order of this sort would require the agreement of the Secretary of State and a negative resolution of Parliament.

4.13 Ofcom should have the power to fine ISPs for failure to comply with the code. Where a rights holder fails to comply with the code, the code would be void in respect of that rights holder's requests to ISPs to take action to prevent or reduce online copyright infringement. Where ISPs have taken action as a result of a request from a rights holder who is in breach of the code then Ofcom should have the power to fine the rights holder.

Annex C: The Memorandum of Understanding (MOU) on P2P and scanning the future

1. In July 2008 the Government came together with key players in the music and film industries and the main UK ISPs to sign an MOU with the objective of achieving a significant reduction in illicit peer-to-peer file sharing. That MOU set out 5 key principles focussed around the necessity of working together across industry to find a solution to this issue; the importance of educating consumers on the necessity of remunerating creators for creative content; the importance of making content available to consumers in attractive legal commercial packages; the need to notify ISP customers when their accounts are identified in infringing P2P activity; and discussion of ways of dealing with repeat infringers.

2. The MOU produced useful work in this area, with the help of Ofcom, and the process and outputs of that work have been material in helping the Government to reach a decision to legislate to implement a notifications process. This decision deals with one element of what the MOU was trying to achieve. But the other principles in the MOU are not susceptible to resolution through legislation and the Government believes they would benefit from continued industry dialogue.

3. In addition, the MOU dialogue was confined to a relatively small number of original signatories and now it is important to broaden the discussion out to include a wider spectrum of rights holders, not only from within the film and music sectors but also from other sectors such as publishing, computer games, sports, software and broadcasting, and a wider range of ISPs – there are several hundred smaller ISPs not included in the MOU – and other intermediaries with an interest in this work, such as mobile network operators, search engines and technology suppliers. Consumer organisations also need to be part of the dialogue.

4. This underlines that this is not just about music and film and not just about P2P. P2P is certainly the issue that is causing most problems for the content industries at the moment, and is likely to be so for some time to come. Those questioned in this area are focusing on P2P and are not aware currently of any different threat on the horizon. It is also reasonable to assume that most of the core characteristics of P2P, its DNA as it were, will be at the heart of any new online threat. These defining characteristics may be summarised as follows;

- Free of cost to the casual user, hard to compete with commercially.
- Many-to-many communication, with no obvious central coordinator.
- Easy to access and use, attractive to a wide range of users.
- Difficult to detect end-users without arguably disproportionate intrusion.

5. Other forms of civil infringement – stream-ripping, sharing hard drives etc – are also problems, but because these are generally carried out at a one-to-one level it is not until P2P technology is utilised that this becomes endemic and seriously damaging.

6. However, it would be unwise to assume that what is the primary problem today will continue to be so tomorrow. A valuable role for the rights agency could be to scan the horizon for new unlawful threats to copyright online, and to bring together experts on how such threats might be fairly and effectively ameliorated.

Annex D: Possible models of agency and estimated costs

Option	Legislation needed	Cost
<p>No agency at all. While we can see many areas in which a new Agency of some sort could contribute, it might be most appropriate to support and expand work already being done in other areas.</p>	None.	Potentially none.
<p>A light touch co-ordinating and facilitating body owned, funded and run by industry. Such a body could run by one or two staff at minimal cost but would depend on quality input from the membership.</p>	<p>This would depend on any 'enforcement' role that the agency is to play. If it acts like the ASA, as a purely industry self-regulatory body, establishing codes and managing compliance by members with those codes then there is no requirement for legislation.</p>	<p>The 'light-touch' version could probably be delivered for less than £500k pa, although it would of course require expenditure by its members in order to work. It would also depend on the level of self-regulation adopted.</p>
<p>A dedicated team focussing on key roles, for example agreeing the Code of Practice for the P2P legislation, developing a unified communications campaign or devising legally acceptable ways of tackling repeat offenders for members to adopt if desired.</p>	See above.	<p>Depending on the size of team, and whether it is located in an existing organisation or independently, costs could be in the region of £1-2m pa, or considerably more depending on the activities undertaken.</p>