

# Rights Agency “Straw man”: Summary of Responses

## **General reception:**

The ‘straw man’ discussion paper provoked a mixed response from the wide array of stakeholders that responded. Some of those responses were supportive of the document and its proposals but a large number of responses were not. The most negative responses were received from Internet Service Providers (ISPs), who voiced their concerns about any potential agency or legislation that might impose obligations upon them to take action against their customers, including suggestions that they should constrict or “shape” the bandwidth of those who are suspected of infringing copyright.

Positive responses received included submissions from rights holders and collecting societies who welcomed a role for the agency as potentially a useful tool in the management of rights online, which would push ISPs to take some responsibility for the traffic on their networks.

There were concerns raised about the truncated consultation period, and clearly there is a very widely held feeling that these issues need to be fully consulted on before any agency is set up. That said, the chance to respond at this early stage was broadly welcomed.

For an initial scoping paper the document had a larger than expected response with 88 submissions in total. The responses came from a range of stakeholders that break down into general groups as indicated below:

<b>Industry Group:</b>		<b>Number</b>	<b>% of total</b>
Rights Holders	-	51 responses	58%
ISP’s	-	8 responses	9%
Intermediary	-	11 responses	13%
Consumer groups	-	3 responses	3%
Other	-	15 responses	17%
<b>Total Number of Respondents</b>	<b>-</b>	<b>88 responses</b>	<b>100%</b>

What follows is an analysis of these responses by question as posed in the straw man paper. There are also statistics illustrating which groups replied to which question, and these may be found underneath each section. The figures are split up by industry group and indicate the number of responses from that sector and what percentage of the group those numbers represent.

### **Awareness raising and education:**

This section explored the ways awareness could be raised and how education could be delivered through a potential agency, while working with the schemes and bodies that already exist.

- Awareness raising initiatives and educational roles were broadly supported, but the ways in which these could be delivered differed depending on which sector of the market the respondents represented.
- Rights holders supported an approach that educated about the effects on the creative industries of piracy, often geared towards the younger generation. *“In the longer term education can be more effective than legislation in addressing the problem of online piracy”* British Broadcasting Corporation (BBC)
- Some rights holders suggested the implementation of education regarding potential penalties for infringing, but this was not a widespread concept.
- ISPs supported a more subtle approach supporting education around the whole industry and targeting the knowledge gaps that exist when people are confused about what content is legitimate content and what is infringing.
- A common theme in many responses was that an agency could act in a co-ordinating role, ensuring an industry wide coherence to initiatives. *“We agree that a Rights Agency could have a useful role in bringing together relevant stakeholders...to develop both ‘key messages’ and –potentially – the means of expressing them”* London Internet Exchange (LINX)
- Concerns were raised however that there is a lot of work already being done in this area by organisations like Federation against Copyright Theft (FACT) and the Intellectual Property Office (IPO) and that there should not be duplication of this work. *“What would the rights agency be doing that a well established organisation such as FACT could not do or, in fact, is already doing”*. Mobile Broadband Group (MBG)
- ISPs suggested that as the benefactors of increased education would largely be rights holders, they should contribute to the bulk of the cost.

### Breakdown of number of responses to education section:

#### **Education and awareness**

67% of Rights Holders responded to this question (34)

75% of ISPs responded (6)

82% of Intermediaries responded (9)

67% of Consumer groups (2)

60% of Other respondents (9)

**68% of all respondents replied to this question (60)**

### **Encouragement of commercial offerings:**

This section explored the issue of how to make content commercially available in the digital age. Ideas such as providing a neutral space for people looking to clear rights and how an agency could act as a 'marriage broker' in such deals were proposed. Standardisation of rights clearance and Digital Rights Management (DRM) labelling were also discussed, as were the potential problems with contravening completion law.

- Most respondents agreed that more legally available content would lead to less piracy, however it was not accepted universally that government had a part to play in this. Often it was suggested that government should stay out of commercial dealings as this would let the strongest models prevail. A point made by British Telecom (BT) in their response "*...business models are best developed by commercial negotiation between relevant parties. This enables the largest number of potential models to vie for success with consumers in the market*"
- Industry must look at new business models to increase revenue from digital product, this could be supported by government in various ways such as suggested by the Music Managers Forum "*Provide tax breaks for innovative new music technology companies to encourage the creation of Britain as a hub for such enterprises*"
- There was very little support for standardisation in right clearance. There are serious concerns that this would stray into anti-competition law territory and was dangerous for the government to explore. It was suggested however that an agency could produce guidance explaining the complex systems in place for clearing rights. "*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*" (Consumer Focus)
- Many respondents reflected similar views to this, stating that the current system worked and did not need government interference, but education was required for new entrants into the market to understand the complex rights clearing procedures.
- There was some support for an agency to act as a "Hub" for the exchange of ideas but it was cautioned that this could also lead to anti-competitive practices.
- Respondents pointed out that a one size fits all approach will not work as different sections of the industry are very different to one another.
- There was some support for an agency to help bridge the gap between rights holders and ISPs but this was outweighed significantly by the negative responses.

### Breakdown of number of responses to commercial offerings section:

65% of Rights Holders responded to this question (33)

88% of ISPs responded (7)

73% of Intermediaries responded (8)

67% of Consumer groups (2)

53% of Other respondents (8)

**65% of all respondents replied to this question (58)**

### **Voluntary rights registration:**

In this section the potential for setting up a voluntary rights register was explored. Would this be a useful tool for helping clearance or would a register potentially contravene international agreements such as the Berne Convention?

- Voluntary registration of rights was not widely supported. The main reasons given were that it would be very costly to implement and would have little benefit.
- A lot of respondents were worried that there would be a danger that a two tiered rights copyright system would result if this was implemented *“A Rights Agency should not introduce any form of register for copyright protected works as this will lead to a two-tier protection or – worse – and implied formality criterion”* Design and Artists Copyright Society (DACS)
- There were a lot of fears around voluntary rights registration contravening the Berne Convention if it became de facto compulsory. Meaning that rights holders would be severely disadvantaged if they were to not register their rights. *“...may fairly quickly become a de facto mandatory requirement to enjoy protection and in that sense violate the Berne Convention”* (Hewlett Packard)
- Overall there was very little support but those that were in favour thought that voluntary rights registration could help in dealing with orphaned works.
- The Arts Council did however comment *“In principle, the Arts Council agrees that voluntary registry of rights could help to increase transparency and certainty about the ownership of rights”*.

### Breakdown of number of responses to voluntary rights registration section:

51% of Rights Holders responded to this question (26)

13% of ISPs responded (1)

55% of Intermediaries responded (6)

33% of Consumer groups (1)

40% of Other respondents (6)

**45% of all respondents replied to this question (40)**

### **Kite marking of content:**

This section addressed the possibility of a kite mark to be used as an indicator of legitimacy for digital content. Would it be easy to set up and police, and what would be the value of having such a mark?

- There was a mixed response to the idea of kite marking.
- There were some responses in support of the concept, but many said that the idea had some merit but needed a lot more research into how it would work before they officially supported it. *“A kite mark may be worthy of further discussion if it were to function like a digital watermark”* (Yahoo)
- Work would need to be done on cost and effectiveness of a kitemark and it would have to be accepted universally.
- Roughly the same amount of respondents thought the idea was not feasible as supported it. Negative responses gave a variety of reasons which are included below:
  - Too costly for impact it will have.
  - Difficult to police.
  - Will be easy to forge and circumvent regardless of work put into protect it.
  - Will put more pressure on developing markets.
- On the whole this was not a concept that provoked a positive response.

### Breakdown of number of responses to development of a digital kitemark section:

47% of Rights Holders responded to this question (24)

63% of ISPs responded (5)

45% of Intermediaries responded (5)

33% of Consumer groups (1)

40% of Other respondents (6)

**47% of all respondents replied to this question (41)**

### **Self regulatory enforcement role:**

This section looked at the potential for any agency to act as an industry self regulator. It explored the potential for Ofcom to act as the regulator and also how a regulatory code could initially be developed and accepted by previously polarised stakeholders.

- Respondents expressed polarised views on this issue dependant on what part of the industry they were responding from.
- Rights holders are very much in favour of Ofcom being given backstop legislative powers and being able to enforce a code of practice that is pre agreed by an agency.
- This would suggest a more co-regulatory approach with Ofcom having the final say if the code is not adhered too. *“It is unrealistic to expect that the proposed Rights Agency could create a “strong self-regulatory model” to reduce copyright infringement and theft, without some form of statutory intervention.”* (British Film Institute)
- ISPs are opposed to any role for an agency in drawing up a code of practice. *“Orange disagrees with the principle that the Rights Agency, whose membership is not obligatory, should prepare codes of practice to be then endorsed and enforced by Ofcom”.* (Orange)
- The overall feeling is that self regulatory enforcement will not work simply because of the polarised views within the industry. A voluntary code without legislative backstops will be no different to the current situation. “
- Many independent and intermediary respondents believe that if ISPs cannot be brought to the table, the code of practice will be weighted too far in favour of rights holders and if they are brought to the table the gulf between parties is so wide that consensus will not be achieved. *“...we believe, in order for this body to have the required authority, ISP membership is not a ‘nice to have’ but a necessity.”* (Alliance Against IP Theft)
- In summary, most respondents were of the opinion that although the aims were laudable, there are many barriers to be overcome before these proposals can effectively work in practice.

### Breakdown of number of responses to self regulatory enforcement role section:

59% of Rights Holders responded to this question (30)

100% of ISPs responded (8)

45% of Intermediaries responded (5)

67% of Consumer groups (2)

53% of Other respondents (8)

**60% of all respondents replied to this question (53)**

## **Development of codes of practice around technical measures to address persistent infringers:**

This section looked at what could be done to further the good work done by stakeholders in the Memorandum of Understanding group which studied the feasibility of technical measures. Is there a role for an agency in technical standard setting and agreeing binding codes of practice?

- There were polarised views on this issue. Rights holders were generally in favour of this idea, ISPs were not.
- Most who responded positively suggested that an agency could act as a test bed for ideas and a forum for exchanging thoughts on what could be done. *“the Rights Agency could become a centre of expertise in the effectiveness of different measures against piracy. It could also advise rights holders of the technical measures they need to take in order to identify potential infringers”* (Freemantle Media)
- Some respondents however went a lot further and said it was essential that a code was developed and imposed on ISPs with legislation underpinning it.
- ISPs are very much against these ideas and strongly defend their position saying that they will not agree to technical measures imposed upon them by an agency. *“These type of measures would be unfair, illegal, impractical and would not be cost effective – they would violate consumers’ rights, result in false accusations and unfounded sanctions and have limited effect given the ease of avoid detection or circumventing the obstacles put up”* (Talk Talk)
- ISPs also noted that the strawman did not mention any obligations that would be imposed on rights holders, only ISPs.
- This issue was well responded to but has no consensus on a best way to proceed as the different areas are either very opposed or very much in favour of technical measures as a way to reduce piracy.

### Breakdown of number of responses to codes of practice surrounding technical measures section:

65% of Rights Holders responded to this question (33)

88% of ISPs responded (7)

82% of Intermediaries responded (9)

0% of Consumer groups (0)

47% of Other respondents (7)

**64% of all respondents replied to this question (56)**

## **Dispute Resolution:**

This section explored the potential for an agency to act in dispute resolution procedures, specifically in small and straightforward cases. The section looked at how such a body could be constituted and how binding its decisions should be.

- The majority of respondents replied that a separate body for this was not needed as the copyright tribunal was already doing the work. *“If the agency is to have powers in this area, it is vital that they do not duplicate the work of the Copyright Tribunal”*. (UK Film Council)
- Some respondents supported the idea of an arbitration body in disputes but only if it was fair and membership was representative of the industry.
- There were relatively few responses to this point, with most of those who did respond stating that an agency could have some part to play in dispute resolution if it was formed, but an agency should not be formed simply to cater for this issue. *“...there is already sufficient legislation in place to make the creation of another tier of dispute resolution unnecessary”*. (LexisNexis)
- There were also a few concerns voiced as to the impartiality of an agency in acting as an arbiter given its potential make up. *“Can an agency, reliant only on industry funding, provide impartial dispute resolution?”* (Edward Barrow)

### Breakdown of number of responses to dispute resolution section:

33% of Rights Holders responded to this question (17)

25% of ISPs responded (2)

55% of Intermediaries responded (6)

67% of Consumer groups (2)

13% of Other respondents (2)

**33% of all respondents replied to this question (29)**

## **Representation:**

This section looked at how an agency should be made up and how it could represent all the different sections of the industry. Weighting of voting and who should be included were also discussed.

- Once again there were polarised views on this point. Some respondents felt that membership should wide with as many different sectors of industry involved as possible. Fewer respondents favoured a limited membership.
- This point generally elicited response that “we should be included” and “membership should suit our needs”.
- There was some consensus that membership should tend to be inclusive as opposed being exclusive. *“...the digital rights agency should encourage the participation of stakeholders across all content industries, including content businesses, ISPs, rights holders, hardware providers, trade associations, collecting societies and consumers”* Entertainment & Leisure Software Publishers Association (ELSPA)
- Many rights holders did say that ISPs should be at the table. *“Alongside comprehensive representative from bodies representing creators and other rightsholders, a Rights Agency should also aim to include a similar level of support from content distributors. Previous attempts in the UK and other countries to address issues around unlawful P2P distribution have often run into difficulties due to their inability to secure the involvement of all ISPs”* Authors Licensing and Copyright Society (ALCS)
- Rights holders did however often state that there should be legislation to ensure that ISPs abided by the decisions of the agency if they were a part of it and legislation should back that up.
- Many respondents indicated that this is a question that can only be answered once the remit of an agency was decided. Representation in the agency could be very different depending on what the agency sets out to achieve.

### Breakdown of number of responses to representation section:

51% of Rights Holders responded to this question (26)

50% of ISPs responded (4)

55% of Intermediaries responded (6)

100% of Consumer groups (3)

13% of Other respondents (2)

**50% of all respondents replied to this question (44)**

## **Funding:**

This section looked at all the potential funding options and how contributions could be divided between the various stakeholders involved.

- A very mixed response again on this issue. Few respondents expressed willingness to fund the agency unless it is made within the boundaries which suit them best.
- ISPs will not gain any financial reward for engaging with an agency and so are very opposed to being asked to contribute to costs. *“We see no credible, legitimate or rational reason why ISPs should be obliged to pay for any of these activities – rights holders (‘RHs’) should pay all the costs ISPs incur in full as well as all the costs for the Rights Agency. The RHs benefit from these actions, ISPs do not”* (Talk Talk)
- Consumer groups stated that the costs of any agency should not be passed on to the consumer and should be absorbed some other way. *“The Open Rights Group do not believe that users will bear the costs for content owners and service providers to police their own behaviour”.* (Open Rights Group)
- A few respondents did say that the government should fully fund the agency but a few interesting ideas surrounding using new funding streams created by the new digital market place were voiced also.

### Breakdown of number of responses to funding section:

51% of Rights Holders responded to this question (26)

50% of ISPs responded (4)

55% of Intermediaries responded (6)

67% of Consumer groups (2)

27% of Other respondents (4)

**48% of all respondents replied to this question (42)**

## **Summary:**

- Overall the paper generated a larger response than predicted, especially given the short time available for response. This is an indicator that the subject of digital copyright is forefront in the minds of the industry and consumers alike.
- There was a lack of consensus across the different stakeholder groups, with obvious polarisation in responses provided by different areas of the industry.
- The most contentious issues seem to be those around imposition of obligations on ISPs, and with regard to both voluntary codes and technical enforcement measures.
- The responses received to this initial discussion paper were very detailed and thought provoking. We would like to take this opportunity to thank all respondents for their useful and considered responses to this initial discussion paper.