

Avoiding the digital dither

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The UK government intends a major crack down on digital piracy in order to save millions of pounds.

The problem is serious. Unlawful access to digital content is estimated by the owners of the relevant copyright and other intellectual property rights (rights owners) to have cost £180 million for the UK music industry in 2008 and £152 million for the UK's TV and film industry in 2007. There are no figures for games but it is assumed losses are of at least a similar scale.

The "Digital Britain" White Paper published in the UK in June includes proposals to combat digital piracy consisting of the illicit use of Peer-to Peer (P2P) file-sharing. The government's aim is to achieve a 70-80per cent reduction in this form of piracy.

Other countries have suggested different solutions, most notably the "three Strikes and you're out" approach favoured by France and Ireland, although in both cases these solutions have run into difficulty.

The UK's proposals would not extend directly to the Island and there is probably little evidence as to the scale of illicit file sharing by Manx users. However, it would not be satisfactory for the Island to be seen to be tolerant of digital piracy and these proposals should therefore be given serious consideration.

In essence, the UK Government proposes that Office of Communications (OFCOM) - the corresponding Manx regulator is the Communications Commission although with somewhat different powers - should impose on Internet Service Providers (ISPs) two basic obligations:-

- To notify alleged infringers of rights (subject to reasonable levels of proof from rights holders) that their conduct is unlawful (the notification obligation); and
- To collect anonymised information on serious repeat infringers to be made available to rights holders together with personal details on receipt of a court order (the serious repeat offender obligation).

OFCOM would also be given "backstop" powers to specify other conditions to be imposed on ISPs including the taking of various steps to block or restrict access to the internet by serious repeat offenders.

ISPs and rights holders would also be required to comply with a code of practice approved by OFCOM.

These proposals are in addition to the rights provided under the UK's Copyright, Designs and Patents Act 1988 extended in 2003 to permit injunctions against ISPs (although it is believed the corresponding Manx legislation has not yet been so extended) and the risk of liability ISPs already face if they fail to take steps to prevent the posting of material they have been notified infringes the rights of third parties.

The proposals note that the cost of complying with the notification and the serious repeat offender obligations together with the regulatory cost will be significant particularly for smaller ISPs. For this reason the proposals have so far met with a lukewarm response from ISPs whilst on the other hand many rights holders have criticised the proposals as not going far enough and have accused the UK government of "digital dither". The period for responding to these proposals ends on September 15.

The Manx environment is significantly different from that prevailing in UK, particularly in terms of the smaller size of ISPs and their ability to absorb the cost of compliance, and the fact that many rights holders are located off Island. It is important, therefore, that the progress of these proposals is monitored and the desirability of similar proposals in the Island and their likely impact and effectiveness carefully evaluated. It would indeed be unsatisfactory for an accusation of "digital dither" to be levelled at the Isle of Man.

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