

2008 - Department for Business Enterprise and Regulatory Reform consultation on options to address illicit p2p filesharing

1. This is JANET(UK)'s response to the Department for Business Education and Regulatory Reform's consultation on legislative options to address illicit P2P file-sharing [1].
2. JANET(UK) [2] (the trading name of The JNT Association Ltd.) is the non-profit company limited by guarantee that operates the JANET network, connecting the UK's universities, colleges and schools together and to the world-wide Internet. This role makes us particularly aware of the growing importance of high-speed home broadband connections throughout education, from researchers who are able to access international experiments at any time of day or night, to school pupils doing their homework and, increasingly, receiving joint support from their parents and schools through networked information systems. In particular DCSF research [3] has found that educational use of Information and Communications Technologies (ICT) outside school can improve both attainment in specific subjects and an increase in self-esteem and confidence in low achievers; our colleagues at Becta have identified increased parental engagement through ICT [4] as further enhancing both children's educational attainment and families' social integration in studies for their Universal Home Access initiative [5]; and the "Harnessing Technology: Next Generation Learning" strategy [6] recently published by the Departments for Children Schools and Families (DCSF) and Innovation Universities and Skills (DIUS) calls for "universal access to powerful learning tools, content and support for family and informal learning".
3. We are therefore particularly concerned that the Government appears inadvertently to be endangering these benefits in an attempt to discourage something that is no more than a civil wrong. Withdrawing or restricting home Internet access to the extent required to prevent unlawful peer-to-peer file-sharing will also prevent access to the rich resources now becoming available for all levels of education, as well as to security updates that are essential to prevent network-connected computers becoming unsafe for those who use them and a threat to others on the Internet. Furthermore restricting Internet access to a household (ISPs cannot distinguish between individual users of the same computer, or in many cases between computers connected to the same home network) will harm the social and educational opportunities of everyone living at that address as punishment for a civil wrong [7] alleged to have been committed by only one of them.
4. We consider that if such a severe educational and social punishment is to be imposed at all, this must only be done after proper testing of the evidence by an independent third party, working to judicial standards. Neither ISPs nor rightsholders are able to accurately verify allegations of copyright breach. At the technical level to which ISPs have access, an unlawful copy of a file is identical to one that has been legitimately purchased or one

that is subject to fair use exemptions; peer-to-peer protocols are used to distribute lawful materials (including the BBC's iPlayer ^[8] and security patches) as well as to breach copyright; encrypted protocols will make it impossible for ISPs to inspect content at all. Rightsholders have demonstrated the fallibility of their systems ^[9] by accusing of copyright file-sharing IP addresses and individuals that were incapable of the alleged action (including addresses that had never been used and individuals who had never owned a computer).

5. The consultation document suggests that using the civil courts to perform the necessary testing of evidence is too costly for the large volume of small claims that rightsholders wish to make. We therefore suggest examining other models, such as small claims courts and the dispute resolution processes ^[10] used for Internet domain names, that provide robust independent testing of civil claims at significantly reduced cost.
6. If these measures are accompanied by an education and awareness programme and commercial models that increase the availability of legitimate downloads (both mentioned in section 8 of the consultation document) we would, in any case, expect a significant reduction in the number of incidents that require technical measures to be considered. Our own experience, in dealing with breaches of the JANET Acceptable Use Policy, including copyright misuse, is that compliance is best achieved by warnings coupled with advice and help to remedy the problem. This has led to the establishment of a culture and management systems that provide a proportionate and effective response to each incident.
7. We therefore believe that a similar approach on the wider UK Internet, combining education and advice to encourage lawful behaviour by the majority of mis-users with an independent review of evidence and approval for any technical measures that may be needed for the minority of repeat offenders, is the best way to reduce copyright misuse without harming the networks' ability to deliver social and educational benefits. We believe it also minimises the possibility of conflict with UK and European Data Protection and Human Rights legislation.

Our responses to the specific consultation questions are as follows:

Q1: We do not consider that either rightsholders or ISPs have the means to ensure that technical sanctions are imposed accurately, in a manner fair to consumers (see paragraph 4 above). A voluntary solution involving only these parties may be suitable for informing and educating consumers, but not for imposing technical sanctions.

Q2: Section 7.10 does not mention the doubts raised by the technical adviser to the court (though apparently dismissed by the court) in the Belgian case of SABAM v S.A. Scarlett ^[11] over the ability of filtering devices to function even at current ISP backbone speeds, nor the risk that incorporating such devices will significantly reduce the reliability of Internet services. We also consider that this section should explicitly recognise the social and educational benefits of home Internet access in its consideration of the proportionality of any response (see paragraph 3 above).

Q3: We believe that the interests of the customer and wider society need to be protected, so would place particular stress on the need for a proportionate response (section 7.17). We consider that the effective punishment represented by withdrawal or restriction of internet access is sufficiently severe that the need for it must be examined independently in advance, not left to an appeal procedure after the event.

Q4: As in paragraph 4 above, we do not consider that the government's proposed measures provide sufficient protection for the consumer.

Q5: We are concerned that a self-regulatory approach alone may result in disproportionate actions by rightsholders and ISPs and that prior independent approval for any technical sanctions in individual cases is essential.

Q6: As in our answer to Q1, we believe that a co-regulatory approach is adequate for information campaigns, but not for the imposition of technical prevention mechanisms

Q7: As in paragraph 5 above, we consider that a model based on small-claims courts or alternative dispute resolution procedures is more likely to be effective in dealing with individual cases.

Q8: We consider that independent oversight both of the Codes of Practice and of their operation is essential.

Q9: We consider that representation of consumer interests is essential. We also consider it important that any process be available to all injured rightsholders, not just selected industry groups.

Q10: We believe that any duty should address the unlawful distribution of content, not a particular technology that may happen to be used for the time being for such distribution. All technologies have both beneficial and harmful uses.

Q11/Q12: We have no view on the allocation of costs, provided these do not prejudice the independent assessment of claims.

Q13:

Q14: We believe that if technical sanctions are to be considered, an approach with the characteristics of A3 is essential to ensure that the rights of consumers and the needs of society are represented. We suggest that this could be based on either small claims procedures or the Nominet UDR process: costs for these are considered to be at least 10 times less than those quoted in the consultation paper for uncontested court cases

Q15:

Q16: We believe that if technical sanctions are to be enforced, the evidence for such sanctions must be reviewed by an independent body. We have suggested above that the existing models of the small claims court or uniform dispute resolution process could provide appropriately robust testing of evidence at significantly lower cost than is currently being incurred by rightsholders.

Q17: We believe that in-line technical filtering has a number of serious problems making it ineffective to address this problem. All of these were identified by the court's technical expert in *SABAM v S.A. Scarlett*. In particular, systems based on content inspection will be rendered completely ineffective as soon as peer-to-peer filesharing systems adopt encrypted communications, and their introduction will have unpredictable effects on the performance and reliability of networks.

Q18: As in our answer to Q17, we believe that the serious limitations of technical filtering were identified by the technical expert in *SABAM v S.A. Scarlett*. We are not aware of any subsequent developments to change his assessment, indeed to the contrary, the adoption of encrypted protocols by filesharing programs is likely to make such technologies even less effective.

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