ISPA Comments on the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2011

Notification Number: 2011/0418/UK - SERV60

I am contacting you on behalf of the Internet Services Providers' Association[1] (ISPA), the trade association for companies involved in the provision of Internet Services in the UK, to comment on concerns we have with the draft measure notified by the UK Government on August 8 2011.

As an industry association representing ISPs in the UK that will be affected by the costs Statutory Instrument, we would like to flag up issues with this draft technical measure. We hope that the Commission will find our comments useful and take them into account when reviewing the measure under the Technical Standards Directive procedure.

This draft measure has amended the draft measure notified to you previously (2010/0633/UK – SERV60) but the central aspect - that costs are imposed on UK ISPs, and ultimately on users of their internet access services, to subsidise the enforcement activities of the copyright industry – remains in place. We suggest that this may give rise to concerns about distortion of competition and of the single market which the Commission should consider and raise with the UK Government.

The relevant provisions of the primary UK legislation under which the draft instrument is made, the Digital Economy Act (DEA), has been provided as background to this notification but was not itself notified as a draft technical measure. The Commission will be aware that this non-notification is the subject of a current Judicial Review in the UK courts, in which various issues of compatibility with EU law have been raised by BT and TalkTalk.

One change from the previously notified draft technical measure has been made to deal with a judgment of the UK High Court on 21 April 2011 in the Judicial Review case referred to above. This change removes requirements which were included in the first draft measure for ISPs to contribute towards the costs of the NRA (Ofcom) and to the set-up costs of appeals, because the judgment held that such requirements would not be compatible with the Authorisation Directive.

The other significant change from the previous notification is that this draft technical measure requires subscribers to pay a fee in order to challenge the validity of allegations of copyright infringement activity made against them.

We have previously outlined our concerns with the UK Government's intended approach to costs in response to its consultation on cost apportionment[2] and to the regulator, Ofcom, on its consultation on the draft Initial Obligations Code[3]. We would wish the Commission to also take points made in them into account when assessing the present notification.

We outline below ISPA's overall concerns and then elaborate further on our concerns on the aspects of costs for "subscriber appeals" and compatibility with the Authorisation Directive.

[1] ISPA membership includes small, medium and large Internet Service Providers (ISPs), cable companies, web design, hosting companies and filtering vendors. ISPA currently has over 200 members, representing more than 95% of the UK Internet access market by volume.

[2] http://www.ispa.org.uk/files/myoomvevmf.pdf

[3] http://www.ispa.org.uk/files/uzbwsnonui.doc

Overall Concerns

We agree with comments submitted to the Commission during the standstill period of the first notification that there are concerns that:

- the measure is unfair and creates market distortions by imposing costs which are entirely for the benefit of copyright holders[4] onto providers and users of internet access services.

These costs should rightly be borne by copyright holders, and "beneficiary pays" and standard cost causation principles should have been applied by the the UK Government to eliminate, or at the least minimise, the unfairness and market distorting potential of the draft technical measure.

- the UK Government has failed to consider the option of rights holders contributing 100% of the costs.

- the Commission will be unable to adequately assess the effects of this draft measure because, effectively, it has been notified in isolation from the other technical measures of which it forms an integral part.

It is too late in the sense that the DEA, which provides for a cost regime to apply to all UK ISPs, has already been adopted. It is premature in the sense that an Initial Obligations Code[5] made under the DEA, which will particularise the application of this draft technical measure, e.g. the cost methodology underpinning it and will select certain ISPs to bear the costs, has yet to be notified.

There are questions, for example, of the impacts on both internet providers and users of Wi-Fi services - both public (libraries, educational establishments and local authorities) and commercial (leisure industry, travel industry) providers alike have raised concerns of being subjected to such measures. In the case of commercial Wi-Fi in the UK in particular, providers may be ex-UK based and many users will be of ex-UK origin and from other EU Member States.

- the accompanying impact assessment fails to provide a robust set of expected costs

The costs imposed will be arbitrary in respect of any particular ISP because they will not be based on recovery of actual costs but against the hypothetical costs of a notional "efficient" ISP undertaking the technical measures imposed under the DEA. This will further compound the market distorting effects of the draft technical measure.

- the draft measure is incompatible with the Authorisation Directive
- the imposition of a blanket £20.00 "appeal fee" on any subscriber seeking to contest a CIR and, or inclusion on a CIL from the very beginning of the DEA regime may present an obstacle to achieving adequate fairness, due process and natural justice.

"Appeals" fee

The redrafted order contains a new section that requires subscribers to pay £20 for the appeal fee against a copyright infringement report. ISPA shares the concerns of consumer groups and others that this charge would be unfair on our members' customers.

[4] The UK Government has suggested in relation to the initial Cost measure that there is some form of benefit to ISPs in terms of dealing with "sterile traffic". We do not know the basis for that suggestion and we do not agree with it.

[5] The Initial Obligations Code will particularise the costs that ISPs will incur for dealing with Copyright Infringement Reports (CIR) from rights holders; the resulting notifications they will have to make to their customers; and for compiling Copyright Infringement Lists (CIL)

- ISPA has long argued that the identification of an individual user through an IP address is deficient as it can only help identify the account subscriber and not the alleged infringer.[6] In the UK, this deficiency has been demonstrated with recent high profile campaigns by law firms in the UK working on behalf of copyright holders[7]. Other member states have also voiced their concern with its validity.[8] Holding the subscriber accountable has created, implicitly but not explicitly, a new wrong in English law. The appeals body should, therefore, be designed to facilitate, and not limit, access to justice in respect of this new, implicit wrong. The fee requirement on subscribers is not conducive to supporting this.
- ISPA is unaware of any precedent where a defendant has to pay a separate fee to bring a defence before a court or tribunal. Other tribunals, such as employment, do not require a fee to be paid.
- ISPA is concerned that the impact assessment has not been fully thought through. The order includes a £20 appeals fee, yet the impact assessment only mentions a £10 fee.
- The UK Government's justification for introduction of the appeal fee is to deter 'vexatious' appeals. However, the approach it has adopted will impact on genuine appellants unfairly. We recommend that to begin with, no appeal fee should be charged until time has been given to understand the nature of appeals, both genuine and 'vexatious'.

Authorisation Directive

We believe that obligations in the draft national measure are incompatible with the Authorisation Directive, which seeks to harmonise and simplify the rules and conditions for authorising electronic communications networks and services in order to facilitate their provision throughout the Community.

The DEA imposes requirements on ISPs to carry out the following activities and to bear 25% of the costs of doing so:

- notify subscribers who are the subject of copyright infringement reports (CIRs)
- match IP addresses allegedly used to infringe copyright. ISPs to contact their subscribers in order to make such notifications
- create and maintain records of such subscribers in the form of copyright infringing lists (CILs)
- provide rights-holders with CILs in response to their request.

These requirements are clearly conditions which impact upon the provision of electronic communications services by ISPs but they are not conditions which are included in any paragraph in the exhaustive list of permissible conditions at Part A of the Annex to the Authorisation Directive. None of these permissible conditions deals with the possibility of imposing charges and costs on ISPs as part of a general regime of copyright enforcement on behalf of, and for the sole benefit of, rights holders.

ISPA does not consider that Paragraph 9 of the Annex, which permits conditions to be attached to the general authorisation, are "restrictions in relation to the transmission of illegal content, in accordance with [the E-Commerce Directive]" to be applicable to the notified measure. In our view, the obligations and costs imposed on ISPs by the draft measure are not restrictions in relation to the transmission of illegal content in accordance with the E-Commerce Directive. None of the conditions imposed (to match a subscriber's identity to an IP address allegedly used for

[6] See, for example, page 8, http://law.unh.edu/assets/pdf/release-mavis-case-expert-report.pdf, and http://dmca.cs.washington.edu/uwcse_dmca_tr.pdf, http://ia600403.us.archive.org/4/items/gov.uscourts.ilcd.51489/gov.uscourts.ilcd.51489.15.0.pdf
[7] http://www.bailii.org/ew/cases/EWPCC/2010/17.html; http://news.bbc.co.uk/1/hi/technology/8129261.stm
[8] http://merlin.obs.coe.int/iris/2011/6/article15.en.html, http://www.out-law.com/page-9264

copyright infringement, to send notifications to subscribers or to create and maintain CIL records) are restrictions on the transmission of illegal content, and they are not restrictions in relation to the transmission of illegal content.

Equally, ISPA does not agree with the UK Government's suggestion that paragraph 2 of the Annex and Article 12 applies to "save" the notified measure if it is accepted that the Authorisation Directive does apply. Article 12 of the Directive deals with which "administrative charges" are permitted. In our view, it is to be interpreted as permitting as "administrative charges" only those costs which are solely directed at the costs of establishing the regulatory regime in general. The draft technical measure, however, deals with a specific regime for the running of a copyright notification system and is, therefore, outside of Article 12.

The development, growth and uptake of Information Society Services is of enormous significance for consumers, businesses, and citizens in the UK and other Member States. Internet access services are particularly significant within this and technical measures which will increase costs for their providers and actual and potential users of such services are especially challenging in today's economic climate.

We hope our comments will be useful to the Commission in making a thorough assessment of the implications of the notified measure for the development and growth of the Single Market under the Technical Standards Directive procedure.