

**DAVENPORT LYONS RESPONSE TO THE BERR CONSULTATION
ON THE LEGITIMATE OPTIONS TO ADDRESS ILICIT P2P FILE SHARING**

Introduction

1. Davenport Lyons (“DL”) is an established central London 40 partner firm of solicitors. Although it services the legal needs of a wide range of foreign and local businesses and individuals, a core part of its practice has always been the development and protection of intellectual property rights. This has developed as a result of years of experience in what might be described as the media and entertainment industries, such as music, film, publishing, computer games and advertising,
2. Over the last couple of years, the Firm has received instructions from major computer game publishers to take action against illicit P2P file sharing of their products. DL has worked closely with Logistep AG, a Swiss company that has developed software that can locate the IP Address of a person who is unlawfully uploading a particular copyright product for the purpose of file sharing. Once that data has been obtained, DL (acting on behalf of each particular client) apply to the High Court pursuant to CPR 31.16 for a *Norwich Pharmacal* Order that the ISP for each internet address provide the name and address of the account holder for each IP address. The Logistep system has been effectively used in Germany for some years and has had the effect of reducing P2P usage by %
3. To date, with the exception of various subsidiaries of Carphone Warehouse, the Respondent ISP’s have not opposed the applications so that the High Court has made? Orders requiring ISP’s to provide the account details of? ISP addresses. The copyright holders then agree to pay each ISP an administration charge for the provision of the details of the account holders. DL then writes a letter of claim to the account holder requiring them to cease and desist from the unlawful file sharing of the copyright work and to pay compensation for the loss suffered by the right holder.
4. In respect of those infringers who do not react positively to the letter or provide a persuasive reason why they did not commit the infringing act, then DL’s clients make a decision as to who should be sued for the copyright infringement. To date, DL has issued? Claims and are on the point of issuing

a further 100 claims before Christmas. This course of action has two purposes. The first is to recover compensation for the losses suffered by the rights holders but also to act as a warning to other potential infringers that it is likely that they will be “caught” and could have to pay compensation far in excess of the cost of the work that they have pirated. DI has already obtained several judgments, including the well-publicised Barwinska case in which the Patents County Court awarded Topware International £? Damages and £ in legal costs. BERR comment upon the high cost of the civil actions previously taken by the music business. That is undoubtedly a factor but DL has developed a costs model that mitigates the high cost of taking legal action that has discouraged rights holders taking action before. However, one significant factor has been the high administrative costs charged by ISP’s for providing data.

5. Given DL’s experience, we considered it helpful to provide BERR with a response to the consultative document. This response is that of DL-the opinions and proposals put forward are the firm’s and do not necessarily represent the views of any of the clients whom we represent.
6. Very little mention is made in the consultative document of the computer games industry but the losses that it has suffered as a result of P2P piracy has been substantial and, given the nature of the product, there is very little that can be done to make the product available in different media.

Responses to the BERR Questionnaire

1. Any solution that has the endorsement of both ISP’s, rights holders and their trade bodies is likely to be more effective than a solution imposed by Government that does not have widespread support. However, we consider that the issue is too important to be merely voluntary and that a legislative code that has broad support would be preferable.
2. We consider that the consultative document has addressed all the relevant issues;

3. We recognise the importance of data protection, the protection of consumer liberty and the lawful exploitation of copyright works. However, these concepts should not be used as a shield for the infringement of copyright. Any solution(s) should always recognise that English law recognises that a claimant must prove his case on the balance of probabilities and that there should be a right of appeal. We also consider that prevention is as important as cure.
4. We do not consider that the approach by itself will be sufficient and is more appropriate for the music content industries than the film and computer games industries. Education is vital. It is likely that a majority of illegal file sharers do not realise that what they are doing is the equivalent of going into a shop, stealing a CD, DVD or computer game and then copying it perhaps hundreds of times to their friends. There should be an advertising campaign aimed at driving the point home. The point about different commercial models is well made but far more appropriate to the music business than the film and games industries. However, we do consider that there are problems with the overall regime approached. It would appear that it would still be the responsibility of the rights holder to bring to the attention of the ISP the IP addresses of the infringers with the cost that this involves but with no prospect of compensation from the infringer for the loss suffered. We consider that the sanctions proposed in France are flawed because they deprive the citizen of an important right of communication and information rather than penalising him for the improper use of the medium. The only proper sanction is the use of civil proceedings by either the rights holder or the ISP against infringers for compensation and injunctions restraining further infringement.
5. For the reasons given above, we do not consider that the self or co-regulatory approach by itself is likely to work. It requires the co-operation of too many parties, is cumbersome and does not compensate infringers for the losses suffered. There is also the risk of ISP's breaking ranks and seeking to obtain a competitive advantage over those providers adhering to the code of conduct.
6. See 5 above.

7. For the reasons given above, we do not consider that the voluntary approach will work. We consider that there should be a new legal framework and preventative measure taken. Within this new framework, a Code of Practice governing the operation of the new rules by all parties should be in place and perhaps, Ofcom could have a role in policing such a code.
8. See above.
9. We are against the self-regulatory approach. The courts should protect the rights of all parties with added protection to consumers provided by the Code of Practice.
10. See below.
11. N/A. The question highlights the problem. What would be the position of an independent film producer who is not a participant in the co-regulatory scheme because he cannot afford the subscription but suddenly finds himself the victim of intense P2P piracy?
12. N/A
13. We welcome any steps taken by ISP's to reduce infringement and the MOU is a welcome first step, but that is all.
14. We support a mixture of options A1 and A4. Although DL has found a cost effective method of obtaining *Norwich Pharmacal* orders, it would obviously be cheaper and much quicker if the ISP was under a statutory obligation to provide rights holders with the details of account holders who have infringed. It would still be incumbent on the rights holder to provide satisfactory chain of title and prima facie evidence. The legislative framework would give the ISP the requisite justification to disclose personal data under Section 35 DPA. The framework or Code of Conduct should also govern the administrative costs for the provision of the data that could be charged by the ISP and the time in which the data must be provided.

We also would welcome proper consideration to be given to the filtering option upon the basis that prevention is better than cure. We have not considered whether Government could legislate for filtering within the context of European legislation against monitoring. However, we would have thought that filtering is something with which the ISP community would readily agree.

Filtering is something that has won the support from Congress in the USA. Indeed Congress has recently passed the Higher Education Act requiring educational institutions to implement filtering solutions to prevent their systems being used for unlawful use, including illegal P2P. The evidence from the USA is that the use of filtering has a dramatic effect on the unlawful use of University networks. We annex hereto as DL1 statements produced by a company called Red Lambda, which is a subsidiary of an IT group based in Florida called V2R Group showing the dramatic effect their product, "Integrity" has had on the incidence of P2P piracy on the networks of two US universities, with the additional benefits of increased bandwidth availability for legitimate use. Certainly the Government should consider exploring the US model of requiring large networks such as Universities to introduce filtering.

15. Option A1 requires the Government to introduce legislation to require ISP's to provide data to rights holders without the requirement of a court order. This would have the effect of reducing the overall cost burden. Consumers would have the same protection as at present but with the addition of a Code of Conduct to which both ISP's and Rights holders would have to adhere. Option A2 does have costs consequences in relation to the introduction of filtering systems. This is something that benefits all parties and so, in principle, the cost should be shared.

16. N/A.

Davenport Lyons October 2008