



CMA says Digital Economy Bill could be death knell for public access to WiFi

23 March 2010: CMA, part of BCS, The Chartered Institute for IT, is concerned that the Digital Economy Bill (DEB) promises to deliver what could be the death knell for public access WiFi points in the likes of coffee shops, pubs, clubs and hotels across the UK.

David Harrington from CMA explains: "It's becoming obvious that one of the Bill's provisions seems certain to inflict serious damage to the availability of public WiFi access points and thus to an important part of our broadband infrastructure.

"In its laudable attempt to protect the music and film industry from illicit downloading, the Government has included measures in the DEB that seem likely to cripple a key part of our broadband access system."

The Bill makes it possible for the provider of WiFi access (a Starbucks, a small private hotel, a bed and breakfast boarding house, a village hall community project) to be classed as a communications provider – an ISP – rather than as a subscriber and therefore subject to the same liabilities as BT or TalkTalk.

While BIS has issued a clarification note* on the rationale behind the DEB, CMA claims that it does not address the core issue.

Harrington continues: "The problem, as should be self-evident to the Bill's sponsors, is that in the case where an infringing guest or other end user is accessing via wireless it could be impossible to identify the miscreant. The WiFi access point owner is then unwittingly exposed to legal action.

"A further amendment to the Bill, introduced by the Lords, which will ensure that any action will be heard before the High Court**, doesn't improve matters – if anything, it makes them worse," according to Harrington.

CMA finds it odd that anyone (other than a lawyer) might suggest the High Court is a useful test-bed for the detection of spurious cases. Given the risk of ruinous costs facing any party going to court, CMA suspects it would be unlikely that the 'village hall WiFi co-operative'

would take such a route if they received a threat of action from solicitors representing a rights holder and equally unlikely they could find pro bono representation.

“The Lords still seem to have missed the point that the DEB Bill could identify a community WiFi owner as an ISP. The option to engage counsel in the hope of recovering costs is never going to be viable,” explains Harrington.

CMA believes the Bill will impose a significant financial and administrative burden on the smaller operators of wireless services, namely the need to invest in specialist software and/or the need to track clients to computer ports, and to retain client identity details.

Harrington says: “This is all theoretically possible but begs questions relating to ID verification, the retention of data, for how long, and in how much detail. The incidence of suspected infringement is also a factor - a single user obtaining a single MP3 album/film at a library etc will always be very hard to find, whereas repeat offences at the same location by the same user will be more readily identified. But without such clarification the legislation in this area is doomed to be unenforceable.”

CMA believes that the legislation should simply require the ISP to co-operate and support ongoing (real-time) investigations, without imposing expensive and unworkable restrictions on small WiFi operators that promise not to solve the problem (of illicit file downloading) but only to make the ownership or operation of WiFi access unacceptably hazardous.

Harrington continues: “The overwhelming impression is that the DEB sponsors have had their eye on the impact of the Bill on the ISPs, and that a technical analysis of the effect of their draft on the WiFi access market and the honest end user has been beyond their resources or outside the tight deadline set by the legislative process, pre-Election. The approach of “we can’t quite figure it out, so we’ll leave the difficult bits to the courts” doesn’t fill us with confidence. While the spotlight of dissent has fallen on the issue of “take-down”, (stoked by loud lobbying from the BPI and its allies, and latterly by the ISPs and the telecoms companies), there has been little or no exposure of this equally damaging unintended consequence.”

The ability of the user to connect with content independent of the access provider and be assured of privacy in normal circumstances in communications is a critical underpinning of our society.

Harrington adds: "DEB is destroying this relationship by requiring any number of protective measures by ISPs against their users. It is inevitable that users will fight back. In fact many companies already do by using VPNs and other techniques to prevent eavesdropping.

"So it could well be that the Lords and the Commons, in their haste to pass into law something – anything - to placate the BPI before the Election, will produce an Act that leaves pubs, clubs, libraries and universities with the need to put their case to Ofcom in the consultation phase and to: "engage with copyright owners and ISPs as soon as possible". When that course runs into the buffers, as it surely will, WiFi operators will face a stark choice between toughing it out in the High Court, or switching the kit off and walking away. Such a choice is no choice at all."

CMA believes the damage to the UK's broadband programme will be significant.

Harrington concludes: "More pubs will move closer to closure, the tourist trade will suffer, coffee bar footfall will decline and those mobile operators now putting their faith in smart phones that can hop between 3G and WiFi networks will find their plans seriously flawed."

ENDS

Notes:

*A "Clarification Note" from BIS on the rationale behind the DEB says:

"(we have) set out the position for libraries, universities and wi-fi providers in more detail and (we have provided) a guide to how we anticipate the Bill affecting each type of establishment.

"..... we cannot simply give a blanket exemption to such establishments – this would in effect give carte blanche to infringement and would attract infringers to exploit these spaces. Instead, we see a pragmatic approach as the best way forward using three elements:

1. existing action,
2. information and advice, and;
3. the independent appeals body.

"..... in the event that an establishment finds themselves on the infringers list, they will then have two options:

- they could wait for any legal action to be brought against them and pursue their case in court, or;
- they could take pre-emptive action, take their case to the independent body and seek to be removed from the infringers list.

"The body would consider each case on its merits and provided the university or library had followed the advice from their ISP and taken reasonable steps to address infringement, only in exceptional circumstances would we anticipate the appeal failing.

"There is the potential for the code to offer some flexibility and reflect the particular positions of libraries *and the like*. (CMA italics). Ofcom will consult on the code in due course which will then need Government and Parliamentary approval. However, it will be for universities, libraries etc to make their case during code discussions and I would therefore urge them to look closely at how they might be affected and to engage with copyright owners and ISPs as soon as possible."

BIS goes on say:

"If falling into the subscriber category, an establishment could receive notification notices from their ISP where their connection was linked to an allegation of copyright infringement. It would be up to the establishment to take action if they wished to avoid receiving further letters or avoid the prospect of inclusion on a copyright infringement list. ISPs will be required to provide

information about the sort of action that could be taken to try and prevent further infringement. In the event of the establishment seeking to appeal against a letter or being placed on a list, it would be for the appeals body to make a judgement on each individual case in the light of individual circumstances."

<http://interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2010/02/Libraries-Universities-WiFi-summary.pdf>

“(it) will ensure any action will be heard before the High Court. The liberal principle of equality before the law remains intact allowing both sides to make their case before a judge, not by appeal to the Secretary of State.” <http://www.libdemvoice.org/author/tim-clement-jones/>

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