

Ask if [redacted] replied. - no reply - verbally said fine.

From: [redacted]
Sent: 14 January 2009 17:01
To: [redacted]
Subject: Clearance: PHORM- better regs response
Attachments: Request to BRE website on copyright of websites.doc; Phorm_Better Regs. [redacted]
14.01.09 [redacted]

Now with attachment....

[redacted]
Sorry to burden you further - but I'd be grateful for your comments. BERR has to respond to Better Regs. By Weds 21 Jan.

[redacted]
-----Original Message-----

From: [redacted] [mailto:[redacted]@berr.gsi.gov.uk]
Sent: 14 January 2009 11:41
To: [redacted]
Subject: RE: Re: Copyright as IP - in relation to websites I own

[redacted]
I have been asked to draft a reply to a stakeholder request (attached) from the Better Regulation Executive's website on the subject of Website copyright.

Is it possible for you to send me your line that you spoke about on Monday so that I can respond?

[redacted]
Department for Business, Enterprise and Regulatory Reform,
1 Victoria Street
London
SW1H 0ET
Direct Tel: 0207 215 1772
E-mail [redacted]@berr.gsi.gov.uk
<http://www.getsafeonline.org/>

cc [REDACTED]

Please find, below, a proposal relating to 'Communications and Content Industries' (specifically websites and copyright issues), sent by a stakeholder - [REDACTED] (who is most likely an 'independent', or small business) to the Better Regulation Executives' 'Ideas' Web Portal for stakeholder better regulation suggestions at <http://www.betterregulation.gov.uk/idea/>

An 'official response' was provided to the request below: "This idea has previously been raised with government and is already being considered through alternative channels and will therefore be responded to directly by the appropriate government department and not taken further on the Better Regulation website."

However, the respondent has now asked for more information / further clarification.

I'd be very grateful if you, or someone from your Team, could draft a response to the stakeholder request below, which essentially asks for further clarification to [REDACTED] request (at the text 'Stakeholder Query - Response Required'), and e-mail it to me by close of play on Wednesday 21 January. You may provide further information (e.g. weblink, attachments) if you wish. Also attached, for info, is an e-mail (dated 2 December 2008) with some more background about the request, which the stakeholder sent subsequently .

Once your 'official response' has been cleared, it will be sent to the stakeholder will also be in the public domain, and placed on the BRE's 'Ideas' Web Portal.

Please let me know in advance if you are not the Policy Lead/Policy Team best placed to respond.

You may well be aware of the detail regarding the request, though in case not seen - background information relating it, is at: <http://news.bbc.co.uk/2/hi/technology/7619297.stm>. You coordinated a FOI response that is similar to this request, at http://74.125.77.132/search?q=cache:l-jfirO4ksEJ:https://dephormation.org.uk/documents/berr_foi.pdf+%22BERR.gov.uk%22+%22Phorm%22&hl=en&ct=clnk&cd=1&gl=uk

In the meantime, please don't hesitate to contact me, if you have any questions or require further clarification .

Many thanks,

[REDACTED]
Better Regulation Team
Corporate Law and Governance
Department for Business, Enterprise and Regulatory Reform
Bay 566
1 Victoria Street

London SW1H 0ET
Tel: +00 44(0)20 7215 2888
E-mail: [REDACTED]@berr.gsi.gov.uk

STAKEHOLDER QUERY - RESPONSE REQUIRED

Title:

Interception and Website Copyright

Problem Description:

Current press releases indicate that BERR, in discussion with the advertising network Phorm, are not considering the effect on copyright owners when it comes to the sourcing of and interception of the data streams used to collect the data which is provided by the Internet Service Providers to Phorm using Deep Packet Inspection Systems to make a copy of the content of websites before analysing the content for the most common words to establish relevance for advertising channels. The OIX website indicates that advertisers will be able to define which channels and which websites have been visited and with what frequency before their advertisement is displayed. Making use of website content in this manner and making visitor information available to competing businesses so that they can later target those visitors with their own products is a misuse of information gained without the consent of the website owner and is also a commercial use of a copy of the content of a website without providing any recompense or damages to the copyright owner.

Visitors to websites only have licence to copy the content of a website for their own personal use (the copy is displayed in their browser window and may also be cached to the hard disk). There is nothing within the Copyright, Designs and Patents Act which suggests that the visitor to a website has the right to permit some 3rd party (the ISP) to make a copy of that content and then pass a derivative of that copy to another 3rd party (Phorm) for the commercial gain of both the ISP and Phorm.

BERR's response to the EU's questions re the legality of past trials by Phorm and the future trial and later implementation of the full system gives the impression that by having a customer of the ISP agreeing to having relevant adverts displayed to them there is no need for the ISP to consider the rights of the copyright owner whose content has been used to create the profile nor is there anything under the existing legislation which will allow the copyright owner to prevent the interception of the data stream nor make a claim for infringement on the grounds of a copy having been made and then used for commercial gain without first coming to some form of licencing agreement with the copyright owner.

This problem is caused by conflicting regulations or guidance.

Proposed solution:

When the Home Office was asked to look into the matter of interception, no mention was made as to whether or not the website being accessed had given consent. Instead it has been assumed in the report that because a website allows visitors to access the site, anything on that site can be accessed by anyone for any purpose. The assumption that the majority of websites will consent to an interception which results in the commercial exploitation of the relationship between the visitor and the e-commerce site where there

is no relationship with the Phorm/OIX advertising partnership is incorrect. The majority of sites regard any information regarding what their visitors do while visiting the site as commercially sensitive information, the release of which could harm the financial viability of that e-business.

When enquiries have been made, the only response received has been that the only means of withdrawing consent to the interception which will take place and enable the profiling of the ISP customer is for the website to make use of a text file hosted on the website which is used to advise GoogleBot (a script used by google.com to cache the internet as part of its displayed content) whether or not GoogleBot is permitted to cache the content. It is claimed that the script used by Phorm to cache the content will obey directives provided for the exclusive use of GoogleBot.

This is not acceptable to many webmasters who rely on visits by GoogleBot as this is the means by which google.com is able to publish the advertisement for the website. To remove this advertising medium from websites would reduce the traffic to the site by 80 to 95%. For some sites, this would mean a 100% loss of business through internet advertising.

Another option has been to require webmasters to contact the ISPs with a list of web addresses which are to be excluded so that these addresses can be added to a 'blacklist'. Requests made with regards to how either of these exclusion lists will work with regards to insuring that data streams are not intercepted by any systems which are hosted by the ISPs and used to supply data to Phorm have not had any response.

By the Home Office not recognising the needs of the majority of providers of internet content, the rights of websites to opt into the interception has been removed from them. Instead of being asked for their consent before being intercepted, websites are expected to contact each ISP using the advertising system and request removal of internet addresses. It should be assumed and upheld that 100% of the internet does not consent to being intercepted unless specific consent has been provided by the content owner or a Court Order has been issued.

Cost or time incurred:

Costs and Loss of Revenue: Multiple Thousands of Pounds


Costs so far have been loss of earning for 6 months as a result of campaigning for public awareness about deep packet inspection systems and their effect on those businesses which are not part of the OIX advertising network.

If the system goes ahead, with 70% of visitors being used to pass on commercially sensitive information about the e-business to any commercial rival who is part of the OIX advertising network, the future viability of the e-business is in serious doubt. To protect the business generated by the 30% of visitors who where not being used to provide data to advertisers, those 70% would be prevented from accessing the websites: a 2 tier internet would be created.

One other possible solution is to use SSL to encrypt all communications between the website and its visitors. This has the added cost of the SSL certificats together with increased bandwidth cost which will be paid by both the website and the visitors to the website.

Sector(s):

Private Sector


The issues surrounding 'interception' is obvious not our lead, but as far as possible infringement of copyright is concerned, may we suggest:

The Copyright, Designs and Patents Act (1988) [as amended] already provides a number of remedies for copyright owners who feel their work is being infringed.

The majority of copyright infringement cases falls within the realms of the civil court systems as copyright is essentially a private right. Under UK legislation, the owner of a copyright work has exclusive rights over the copying of the whole or a substantial part of that work, so anyone making a copy either needs to obtain the consent of the copyright owner or the use must fall within an exception. If copyright exists in the works on the website the rights holder may seek to bring a civil proceedings against BT if it considered that their use of Phorm technology is infringing the copyright. Only the copyright owner or exclusive licensee can bring such an action.

The responsibility for pursuing alleged criminal offences in relation to copyright infringement lies with enforcement agencies and ultimately it is for the Crown Prosecution Service to decide whether there is enough evidence of a criminal offence before commencing a criminal prosecution. This is an independent judicial process which is separate from the work of central government.

It would be up to the courts to determine whether there has actually been an infringement – on the facts of a particular case – i.e. whether any copyright infringements linked to the use of Phorm technology are in breach of the civil or criminal provisions of the Copyright, Designs and Patents Act 1988 (as amended).