



ONLINE INFRINGEMENT OF COPYRIGHT AND THE DIGITAL ECONOMY ACT 2010

RESPONSE FROM ALLIANCE AGAINST IP THEFT TO NOTICE OF OFCOM'S PROPOSAL TO MAKE BY ORDER A CODE FOR REGULATING THE INITIAL OBLIGATIONS

INTRODUCTION

The Alliance Against IP Theft welcomes the long awaited publication of the Initial Obligations Code which will underpin the notice sending provisions of the Digital Economy Act 2010 (DEA).

We strongly support the measures to address online copyright infringement contained in the DEA and believe that they are of crucial importance if rights and content are to be respected and valued in the digital environment. We particularly welcome the endorsement the DEA has received in the Court of Appeal as “a moderate and proportionate Parliamentary response to a serious economic issue”¹.

The Alliance supports the draft Initial Obligations Code (‘the Code’) published in June 2012 and believes it represents a sensible, practical approach to the growing problem of online copyright infringement. We believe its publication also provides an opportunity to dispel a number of myths surrounding the DEA and Initial Obligations process which persist.

➤ This is not a ‘three strikes and you’re out’ process

Elements of the media continue to use this phrase when talking about the DEA and the Initial Obligations Code. While the media cannot be controlled, it is frustrating to hear businesses and organisations directly involved using it. For example, at a recent IPO-organised seminar the phrase was used by Andrew Heaney of Talk Talk. This is misleading and adds to consumers’ confusion on what potentially will happen once the notification process starts. We urge Ofcom to encourage all parties to use accurate language when communicating and discussing the Act and the Code.

➤ Letters to subscribers will be not ‘threatening’

There is a clear commitment from all rights holders to ensure the letters are as educational as possible, assist consumers in finding legal content and confirm that their internet connections are safe and secure. We have no interest in the letters being accusatory or threatening and look forward to working with consumer representative groups and ISPs to ensure this is the case.

➤ Notifications will not be sent to the wrong individuals

Notification letters will be sent to the account subscriber and we are looking for it to be made clear in the letter that we appreciate that the subscriber may not be the person who committed the infringement.

¹ Mr Justice Buxton, Court of Appeal

Ultimately it will be costly to rights holders if letters are sent to wrong individuals, given the refundable on success £20 appeals fee, which is why we will ensure our evidence gathering is legally and technically watertight as possible.

➤ DEA costs should not be passed onto consumers

The overwhelming costs for the DEA fall to rights holders and we look to ISPs not to pass their element of the costs onto consumers.

SPECIFIC COMMENTS

1. Scope and application of the Code

1.1. We appreciate Ofcom's reasons for limiting application of the Code to fixed line ISPs with more than 400,000 subscribers and welcome Ofcom's commitment that this is reviewed. However, given the time scales involved, we believe this review should be undertaken separately from the wider review Ofcom is obliged to undertake under the DEA. One year (6 months before the review begins and 6 months to conduct the review) is too long to wait to evaluate infringement levels over public Wi-Fi and through mobile communications. It must be possible, using failed CIR data, to conduct a faster review which will give an indication on the level of infringement being conducted over these platforms and whether the Code needs to apply to them.

1.2. In addition, while we understand the need for the Code to be as explicit as possible in certain areas, we believe there is value in ensuring that the Code can, as far as is possible, adapt to technological advancements and changes in user behaviour, in particular, a) the increasing prevalence of smart phones and other mobile devices with internet access and b) the fact that 4G is round the corner.

1.3. A recent Ofcom survey highlighted this growing dependency on smart phones for internet access. 42% of smartphone users agreed with the statement "my phone is more important to me for accessing the internet than any other device" and with smartphone users representing 43% of mobile users and increasing (take-up rose 27% in 2011 to 39% in 2012), this will become more prevalent².

1.4. Therefore, our position remains as it was in our earlier submission of 20th July 2010, that all services providing access to the internet should be bound by the Code, but with only certain ISPs initially being 'in scope'. This was to guard against developments as outlined above and avoid the need for a whole new Code should it be required for others to be brought into scope.

1.5. We also remain unconvinced as to the reasons for KCOM's exclusion. As it holds a monopoly licence in the Kingston-upon-Hull region KCOM should be required to process CIRs and issue notifications.

2. Copyright Infringement Reports and evidence gathering

2.1. The Alliance supports Ofcom's decision to sponsor the development of an evidence-gathering technical standard by an independent standards body. We believe this will serve to instil confidence in rights holders evidence-gathering processes and distance this process from that conducted by ACS:Law.

² http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/UK_4.pdf

2.2. We also agree with Ofcom that this could prove to be a useful guide to smaller rights holders, who have not conducted evidence-gathering in the past, as to how such evidence should be gathered and presented. We do assume that this will not mandate certain technologies but simply state what evidential levels technologies should reach and confirmation on this would be appreciated.

3. Notifications

3.1. It is disappointing that Ofcom cannot mandate the content of the notification letters. We believed this was important to reduce consumer confusion, maintain a consistent tone and ensure nothing in the letters distracts from, or seeks to undermine, the purpose of the legislation.

3.2. In lieu of this, we request that it be made clear that Ofcom will use its enforcement powers should it be found that ISPs are sending letters which do not abide by the letter and spirit of the law.

3.3. In our previous submission we also raised concerns regarding the potential for ISPs to include general marketing material with the notification letter. We remain of the view that this would be inappropriate and may detract from the important message the letter is designed to communicate. It is also not something that, given the split of costs, rights holders should be subsidising. We urge Ofcom to consider whether this is something they can address in the Code.

4. Appeals

4.1. The Alliance supports Ofcom's decision, on advice from Government, to limit the grounds for appeal to those contained in the DEA and to include a fee, refundable on success. This latter point is particularly important in order to deter vexatious appeals and ensure the system is able to work effectively and fairly for all.

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About the Alliance

Established in 1998, the Alliance Against IP Theft is a UK-based coalition of trade associations and enforcement organisations concerned with ensuring that intellectual property rights are valued in the UK and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected. With a combined turnover of over £250 billion, our members include representatives of the audiovisual, music, games and business software, and sports industries, branded manufactured goods, publishers, retailers and designers.

The Alliance is concerned with ensuring that intellectual property rights are valued in the UK and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected. Our members work closely with trading standards and local police forces to reduce the harm caused by intellectual property crime in local communities and to ensure that legitimate businesses and traders are able to operate fairly.

We work closely with the Department for Business, Innovation and Skills and the Intellectual Property Office to raise awareness of the harm caused by IP theft. We, and many of our members, are also participants in the IP Crime Group, which facilitates cross departmental dialogue and joint working amongst the relevant enforcement bodies and organisations.

Alliance members

Anti-Copying in Design
Anti-Counterfeiting Group
Authors' Licensing and Collecting Society
British Brands Group
BPI (British Recorded Music Industry)
British Video Association
Business Software Alliance
Cinema Exhibitors Association
Copyright Licensing Agency
Design and Artists Copyright Society
Educational Recording Agency
Entertainment Retailers Association
Federation Against Copyright Theft
Film Distributors Association
Motion Picture Association
Premier League
PRS for Music
Publishers Association
Publishers Licensing Society
UK Interactive Entertainment

Supporters:

British Jewellery, Giftware & Finishing Federation
Video Standards Council