

**Title:**

Mr

**Forename:**

Martin

**Surname:**

Budden

**Representing:**

Self

**Organisation (if applicable):**

**What do you want Ofcom to keep confidential?:**

Keep nothing confidential

**If you want part of your response kept confidential, which parts?:**

**Ofcom may publish a response summary:**

Yes

**I confirm that I have read the declaration:**

Yes

**Ofcom should only publish this response after the consultation has ended:**

You may publish my response on receipt

**Additional comments:**

**Question 3.1: Do you agree that Copyright Owners should only be able to take advantage of the online copyright infringement procedures set out in the DEA and the Code where they have met their obligations under the Secretary of State's Order under section 124 of the 2003 Act? Please provide supporting arguments.:**

**Question 3.2: Is two months an appropriate lead time for the purposes of planning ISP and Copyright Owner activity in a given notification**

**period? If a notification period is significantly more or less than a year, how should the lead time be varied? Please provide supporting evidence of the benefits of an alternative lead time.:**

**Question 3.3: Do you agree with Ofcom's approach to the application of the Code to ISPs? If not, what alternative approach would you propose? Can you provide evidence in support of any alternative you propose?:**

**Question 3.4: Do you agree with the proposed qualification criteria for the first notification period under the Code, and the consequences for coverage of the ISP market, appropriate? If not, what alternative approaches would you propose? Can you provide evidence in support of any alternative you propose?:**

**Question 3.5: Do you agree with Ofcom's approach to the application of the 2003 Act to ISPs outside the initial definition of Qualifying ISP? If you favour an alternative approach, can you provide detail and supporting evidence for that approach?:**

I do not think Ofcom's position is sufficiently clear to either agree or disagree.

Paragraph 3.23 states:

“Where a Wi-Fi network is provided in conjunction with other goods or services to a customer, such as a coffee shop or a hotel, our presumption is that the provider is within the definition of internet service provider.”

However it is not clear what is meant by provider. So for example, consider a Starbucks coffee shop which also provides Wi-Fi. Is the provider the individual coffee shop, or is it the entire Starbucks chain? Similar questions apply to hotels, libraries, airports and other providers of Wi-Fi access. Even with this issue clarified, it is not at all clear how such providers of Wi-Fi would be expected to count their subscribers, or even how a subscriber could be defined.

**Question 3.6: Do you agree with Ofcom's approach to the application of the Act to subscribers and communications providers? If you favour alternative approaches, can you provide detail and supporting evidence for those approaches?:**

Paragraph 3.31 states:

“Those who wish to continue to enable others to access their service will need to consider whether take steps to protect their networks against use for infringement, to avoid the consequences that may follow.”

It is entirely unreasonable to expect users to police the use of their networks. Users should not be held to account for the activities of those who use their networks without permission, whether or not that network is protected. If someone steals a tool

from my garden shed and uses it to commit a crime I am not liable for that crime, whether or not my garden shed was locked.

**Question 4.1: Do you agree with the proposed content of CIRs? If not, what do you think should be included or excluded, providing supporting evidence in each case?:**

**Question 4.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of evidence gathering? If you believe that an alternative approach would be more appropriate please explain, providing supporting evidence.:**

The DEA states:

&quot;124E Contents of the Initial Obligations Code

2.26 This sets out what the code underpinning the initial obligations (whether an industry code or Ofcom&rsquo;s own code) must contain. The code must set out the process by which the initial obligations will operate and the procedures that copyright owners and ISPs must follow in relation to them. It must set out the criteria, evidence and standards of evidence required in a CIR and the required format and content of a notification letter sent to a subscriber. It must not permit any CIR more than 12 months old to be taken into account for the purposes of a notification.&quot;

Note it states that the code &quot;must set out the criteria, evidence and standards of evidence required in a CIR&quot;. The DEA is quite clear here.

Ofcom is not discharging its responsibility to set out the criteria, evidence and standards of evidence.

Ofcom is not even saying that it will agree an industry standard code with ISPs.

Ofcom is saying that copyright owners should provide a Quality Assurance Report detailing the &quot;steps taken to ensure the integrity and accuracy of evidence&quot;.

Ofcom is saying that (paragraph 4.6) &quot;it requires Copyright Owners to develop appropriate technical standards&quot;. This is incredulous: technical standards do not lay within the domain expertise of Copyright Owners. It is much more appropriate for ISPs and Ofcom to develop the technical standards.

Ofcom also says (paragraph 4.4) &quot;we are proposing that a Copyright Owner (or an agent acting on their behalf) should, before submitting their first CIR (and from then on an annual basis), provide Ofcom with a Quality Assurance report&quot;. So not only can the Copyright Owner set their own standards, they don't have to make these standards available for scrutiny until they submit their first CIR.

Ofcom says (paragraph 4.6) &quot;it is similar to approaches that have been effective in other areas of Ofcom&rsquo;s remit, e.g. ensuring the accuracy of communications providers&rsquo; metering and billing; and interference standards for TV

transmission;” This again is beyond belief, Ofcom is saying that the standard of evidence required for prosecution under the DEA should be similar to the standards required to avoid TV transmission interference. This position is also inconsistent with Ofcom's position on CIRs. In paragraph 4.3 (in relation to CIRs) Ofcom states: “We believe that this matches the standard of evidence required by the courts in relation to civil proceedings by Copyright Owners for copyright infringement.”

So Ofcom is saying CIRs must meet “standard of evidence required by the courts in relation to civil proceedings”, yet the technical standards only need to meet the level of accuracy required for metering, billing and TV interference.

Does Ofcom not realise that a chain is only as strong as its weakest link? The overall standard of evidence in a chain is only as strong as the weakest piece of evidence in that chain.

Ofcom gives the impression that it regards the setting the criteria for evidence and standards of evidence as purely a technical matter, rather than both a technical and a legal matter. Has Ofcom even taken any legal advice on this?

**Question 4.3: Do you agree that it is appropriate for Copyright Owners to be required to send CIRs within 10 working days of evidence being gathered? If not, what time period do you believe to be appropriate and why?:**

**Question 5.1: Do you agree with our proposals for the treatment of invalid CIRs? If you favour an alternative approach, please provide supporting arguments.:**

**Question 5.2: Do you agree with our proposal to use a quality assurance approach to address the accuracy and robustness of subscriber identification? If not, please give reasons. If you believe that an alternative approach would be more appropriate please explain, providing supporting evidence.:**

No. My objections are similar to my objections stated in my answer to question 4.2. In short Ofcom is not meeting its obligations under the DEA. Ofcom must “set out the criteria, evidence and standards of evidence”, it cannot defer this obligation to the ISP.

**Question 5.3: Do you agree with our proposals for the notification process? If not, please give reasons. If you favour an alternative approach, please provide supporting arguments. :**

**Question 5.4: Do you believe we should add any additional requirements into the draft code for the content of the notifications? If so, can you provide evidence as to the benefits of adding those proposed additional requirements? Do you have any comments on the draft**

**illustrative notification (cover letters and information sheet) in Annex 6?:**

**Question 6.1: Do you agree with the threshold we are proposing? Do you agree with the frequency with which Copyright Owners may make requests? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence for that approach. :**

**Question 7.1: Do you agree with Ofcom's approach to subscriber appeals in the Code? If not, please provide reasons. If you would like to propose an alternative approach, please provide supporting evidence on the benefits of that approach.:**

Paragraph 7.8 states: &quot;In exceptional circumstances it may be appropriate for oral hearings to occur and the appeals body will therefore be able to order a hearing.&quot;

The subscriber should be able to request a hearing. If this request is denied the appeals body will have to justify why the hearing was denied.

In order to ascertain if there might be some systematic error in the process, subscribers must be able to request a list of all CIRs submitted by all Copyright Owners in relation to that subscriber. This would allow a subscribers to ascertain, for example, if some of the alleged infringements occurred when the subscriber was not at home.

**Question 8.1: Do you agree with Ofcom's approach to administration, enforcement, dispute resolution and information gathering in the Code? If not, please provide reasons. If you favour an alternative approach, please provide supporting evidence on the benefits of that approach.:**