



Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012 Consultation

Response by British Sky Broadcasting

September 2012

SUMMARY

1. Sky welcomes this opportunity to respond to the Ofcom Consultation Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012. We have not sought to answer all the questions raised in the paper, some of which we believe to be primarily the preserve of copyright owners. Instead, we have focused on the key issues relevant to our business as an ISP and we address them in the order presented in the paper.
2. Sky has a unique perspective on the problem of illegal file sharing. We are one of the UK's most significant investors in content as well as one of the country's largest ISPs. Illegal file sharing continues to threaten the entire value chain and with it the incentives to invest in content.
3. In this response we do not intend to reopen discussions into the overall framework of costs constructed by Ofcom and contested by other ISPs. As a major producer of content we are supportive of the Code and its implementation.
4. It is vital Ofcom work with participating copyright owners and ISPs to explore how the process can be made efficient and cost effective.
5. Cost will determine the participation of copyright owners in the first two notification periods. A large response from copyright owners will lower per CIR prices for everyone and create positive momentum and an incentive structure for others to join the scheme.
6. Appeals and its associated cost to ISPs are not referred to at all in this consultation document. Subscribers will, however, be able to appeal against incorrect IP address matching and other ISP specific issues. The establishment of the independent appeals body remains a major obstacle to the implementation of the scheme and we would urge Ofcom to provide more detail on the proposed operation of this body as soon as possible.

Question 4.1: Do you have any comments on the proposed process for establishing CIR estimates and costs; do you have evidence which would suggest that a different process should be adopted?

7. We understand the need for negotiation between copyright owners and Ofcom in the course of the volume estimation process. Copyright Owners should be provided with as much information as possible on whole-industry demand for CIRs.

8. But we would rather not see the publication of copyright owner demand curves. During our own independent discussions, rights holders have wanted to ensure this information remains confidential. Resort to resolution negotiations of this type would increase the complexity of the process and absolute costs as Ofcom is asked to play more substantial role in determining volume. Sky believes that the regulator's involvement should be kept to a minimum during the process of establishing CIR estimates.
9. Given the potential impact on costs, we'd like to take this opportunity to urge Ofcom to recruit as many people as possible throughout the content industry.

Question 4.2: Do you have any comments on the proposed process or timetable for establishing the appeals body?

10. While we understand Ofcom's ability to act on the creation of an appeals body is restricted by the OJEU tender rules we would urge the regulator to begin the process as soon as is practically possible.
11. The publication of the Notice to Tender in February 2013 and subsequent five month bidding process leaves just four months for this new body to recruit staff, secure premises, draft guidance & develop a reporting framework. This schedule seems optimistic.
12. This process will have a large bearing on the ability of participants to fulfil their obligations under the Code and we would urge Ofcom to begin the tender procedure as soon as possible.

Question 4.3: Do you agree that Qualifying ISPs should have 9 months from the point at which estimates are finalised to prepare for the operation of the DEA scheme?

13. Our best estimate at this present time is that an implementation window of between 9 and 12 months is required. This estimate takes into consideration our ability to divert resources from projects already underway and to recruit staff as necessary.
14. Volume is essential to system design. We will need certainty on this aspect of the system before we could begin to invest in the automated systems required by the scheme. If nine months is to be a sufficient time, Ofcom will need to provide all ISPs with a regular updates on the process of the copyright owner negotiation process.

Question 4.4: In light of the evidence above, do you agree that the first notification period should start on March 1st 2014 and end on March 31 2015; do you have evidence which would suggest that different dates are feasible and preferable?

15. In section 4.30 Ofcom notes that "It is possible that Qualifying ISPs and Copyright Holders could reach a voluntary agreement under which ISPs agree to start early investment in CIR processing systems." As a result, the regulator notes that it may be possible to start the first notification period at an earlier date.
16. Given Sky's commitment to tackling the problem of online infringement of copyright we would welcome the opportunity to move the first notification forward. Discussions with major rights

holders indicate that that many of them share our sense of urgency and would be willing to explore ways to accelerate the implementation timetable.

17. Ofcom is clear, however, that the “establishment of the appeals body would also need to be completed” for the scheme to move forward under the regulator’s oversight. Given the concerns noted above on the timetable for this body, we remain sceptical that any movement in schedule can be achieved.

Question 4.5: Do you agree with the proposed industry payment schedules for fees in respect of Initial and Qualifying Costs.

18. The Costs Order provides that notification fees must be paid to the Qualifying ISPs on or before the first day of each notification period. Sky is content to fund the required capital investment in our reporting systems prior to payment.
19. We appreciate that capital costs will be recouped over the first notification period. ISP flexibility is likely to prove important in the smooth implementation of the DEA’s proposals.
20. Section 4.25 of the Consultation notes that the submission of final volume estimates to Ofcom amounts to a “legally binding financial liability” on copyright owners ensuring that “Qualifying ISPs have a legal entitlement to receive payment for processing CIRs.” The Consultation does not expand on the legal mechanism that will enforce this duty. We would welcome clarification of the nature of the contractual relationship envisaged between ISPs and rights holders.

Question 5.1: Do you have any comments on the activities which we anticipate carrying out under the DEA amendments which will give rise to Qualifying Costs in the First notification period?

21. Sky recognises the role required of Ofcom in the implementation of the DEA’s provisions and that delays in the process have not all been the fault of the regulator. We do, however, remain concerned at the overall level of expenditure forecast by Ofcom to be recouped from copyright owners.
22. As an ISP, although not liable for these costs, Sky would like to emphasise to Ofcom that it is vital qualifying and initial costs are not set at a level that will discourage copyright owner participation in first and second notification periods.

Question 6.1: Do you agree that all initially Qualifying ISPs will face the same model of efficient costs in carrying out the Initial Obligations and hence should be treated as having the same model of Relevant Costs for the purpose of setting a notification fee? If not, please provide your reasons for that view.

23. Without having access to other responses to the BWCS review into costs, we consider it a reasonable assumption that ISPs will have to make similar types of infrastructure investment in order to carry out the Initial Obligations.
24. Discussions within the technical implementation workshop meetings convened by ISPA have indicated that the operational approach of the qualifying ISPs, while certainly different in

matters of detail, will be relatively consistent across the sector. Sky, therefore, endorse Ofcom's application of a single model of costs for an efficient operator.

Question 6.2: Do you agree that we should apply the full automated cost model to all Qualifying ISPs for the full range of monthly activity from 2,500 to 200,000 CIRs per month? Do you have evidence that an alternative approach to costs should be adopted for any levels of CIR activity; and any evidence about what costs should be for those levels?

25. Sky agrees with Ofcom's assessment of the impracticality of costing for manual processing and welcomes the application of the full automated cost model to all qualifying ISPs. Although it may be possible to conduct manual processing of CIRs, this is inefficient and would compromise our ability to fulfil aspects of the Code, including CIR lists and record-keeping for customers.
26. Our own discussions with copyright owners have also given us confidence that the projected level of CIRs will be high enough to necessitate the use of a fully automated reporting system. While we have not yet had clear guidance as to the precise volume of CIRs envisaged by rights holders, the levels discussed have been substantially above any threshold below which manual processing would be either practical or cost-effective.
27. We, like Ofcom, anticipate the scheme will run over a number of years. It seems likely that the participation of copyright owners will grow in subsequent years given Ofcom's tariff model should mean declining costs for all concerned.
28. Our internal view is that a fully automated system built to respond to 200,000 CIRs per month would also be sufficient to cope with a significantly higher number of notifications without the need for major subsequent capital expenditure. Operating costs would, however, rise in proportion with the expanded number of CIRs.

Question 6.3: Do you agree that the Relevant Costs for the first notification period should include 100% of ISP relevant capital expenditure?

29. While we hope the system will prove to be effective and will continue, at this point we can only be certain that the DEA systems will be in use for a single notification period. The inclusion of the full amount due to ISPs in the first period will effectively mitigate the risk that there may not be any opportunity to recover capital expenditure in periods after the first.
30. We also welcome the cost redistribution process proposed by Ofcom for copyright owners entering the scheme in the second notification period. It is possible that some content owners would delay participation until they have seen evidence of the scheme's effectiveness. These organisations should, therefore, share in the cost of setting up this scheme initially borne by early-adopters.

Question 6.4: Do you agree with our assessment of the fixed costs which will be reasonably and efficiently incurred by a Qualifying ISP in carrying out the Initial Obligations? Do you have evidence to suggest amounts attributed to these costs may be incorrect?

31. Having revalidated the original costs estimates we submitted to BWCS last year, we can confirm we remain comfortable with Ofcom's assessment of the notional ISP total fixed costs.

It should still be emphasised that there remains an element of uncertainty at this stage given we still lack a meaningful estimate of the potential rights holder demand.

32. Sky supports Ofcom's use of a low estimate of a notional efficient ISP's costs. As noted above, it is vitally important that ISP fixed costs remain low enough to incentivise broad participation from rights holders. High estimates of costs would add to the burden on potential participants and would remove an incentive for qualifying ISPs to implement the most cost-effective technical solution for the scheme.

Question 7.1: Do you agree with the proposals for the ISP cost items to be counted as part of the Relevant Costs; do you have evidence to support alternative approaches?

33. We are broadly content with Ofcom's assessment of which activities are eligible as qualifying ISP activities which can be counted as part of the Relevant Costs. While functions like complaint handling were not specifically included in the Costs Order, ISPs' role as the primary conduit for communication with customers means that they will be the primary focus for this type of activity.
34. We welcome the decision to disallow manual matching where automatic match fails. Any requirement to perform the task manually would significantly increase costs for all parties.

Question 7.2: Do you agree our proposals in relation to the activities which give rise to variable Relevant Costs and the proposed values of those relevant cost items? Please provide reasons and evidence to support any different assessment of the variable cost element of the Relevant Costs and/or alternative values?

35. We are comfortable with the majority of Ofcom's cost assessments. In particular, our own estimates of the cost of sending a letter, the cost of checking a CIR and of handling a complaint or escalation within the business are close to the regulator's figures.
36. We do, however, believe that the proposed £6.39 per call cost is an under-estimate of the potential impact on the business, particularly in the first year of the Code's implementation. With a call-centre staff the size of Sky's it is not possible to train all agents to be able to answer every single question or concern raised by our customers. Since the primary purpose of the scheme is educational, we need to ensure that our customers receive adequate time from our agents to explain the process, how they can avoid infringing copyright and handle escalations and appeal requests.
37. In effect, this would mean that a significant number of the calls would need to be escalated to a second line and, therefore, the on-going training and knowledge that would need to be given to our agents is greater than accounted for by Ofcom.

Question 7.3: Do you with agree the proposed values for the operational ratios? Can you provide evidence to support alternative values?

38. Our own internal estimates of the operational ratios are close to those put forward by Ofcom. The number of unique CIRs and proportion of letters resulting in a call our results are broadly similar.

39. The ratio of letters resulting in a complaint is a slightly more complex issue. As noted above in the answer to question 7.2, the particular way our call centres operate mean that significant number of calls on the specific subject would be escalated up to specifically trained agents. There is some discrepancy, therefore, in the way we calculate the proportion of letters resulting in a complaint.
40. We do accept that the proportion of 0.4% suggested by Ofcom is a sensible benchmark for calls that require a formal response from a senior member of staff. Our support for this low level of operational ratio is, however, dependent on consideration being given to the allocation of a higher value to the cost of a call.