

Online Infringement of Copyright and the Digital Economy Act 2010; Consultation on Initial Obligations Code

26th July 2012

Summary

The Pirate Party UK¹ is a political organisation registered with the Electoral Commission. It campaigns for significant reform to copyright and patent law, protection for personal privacy and government transparency, and greater freedoms of speech and communication. It was formed in 2009 and has fielded candidates in elections for local government and the Scottish and UK Parliaments. The Party has links (through the umbrella organisation Pirate Parties International) with similar organisations in nearly fifty countries worldwide, and "Pirate" politicians have been elected to local, state and international Parliaments.

The Party has a number of concerns with the Draft Initial Obligations Code presented by Ofcom, which are set out below. The Party makes the following recommendations:

- ⤴ Clarify the definition of "subscriber" to confirm that it does not include those both receiving an Internet service as a subscriber and communications provider,
- ⤴ Define "relevant subscriber" to exclude intermediaries,
- ⤴ Encourage the appeals body (when established) to define what could count as "relevant steps" for preventing copyright infringement,

- ⤴ Amending the Code to place stricter requirements on when relevant information must be deleted by ISPs,
- ⤴ Increasing the time limit for which ISPs must retain the relevant information,

- ⤴ Clarify that the time limit for bringing appeals begins when the relevant information is actually received by the subscriber,
- ⤴ Extending the delay between an ISP sending a notification and a copyright owner gathering evidence towards a subsequent notification to at least thirty days,

- ⤴ Amending the section of the Code on subscriber appeals to ensure that the appeals body cannot provide information to a qualifying copyright owner that could enable them to identify the relevant subscriber.

1 For more information on the Party, contact the press office on press@pirateparty.org.uk or visit www.pirateparty.org.uk

1. Definition of Subscriber in relation to Intermediaries

- 1.1 The Party has concerns with the application of the Code to "intermediaries"; providers of Internet services to third parties, particularly academic institutions, small businesses or individuals. Under the current Code such groups could be classified as ISPs but are unlikely to count as qualifying ISPs and so will not be placed under any obligations by the Code. However, they could be considered subscribers under the definition in s124N of the Communications Act 2003. If an intermediary is found to be a subscriber, ISPs will be required to send any relevant notifications to them and they may feel obliged either to appeal their status as a subscriber or to implement "reasonable steps" to prevent infringement via their service. Both of these could be costly; an appeal in terms of the fee and the work involved in dealing with the notification and preparing arguments, and "reasonable steps" if there is no clear definition of what those could involve (which Ofcom feels it is unable to provide).
- 1.2 In theory an intermediary would not be required to carry out either of these steps, and would likely not be liable for any infringing act if, following their inclusion in a CIL a claim was brought against them for copyright infringement. However, the cost of defending their organisation (particularly with respect to anything inferred from their refusal to appeal) could be considerable, and they could find themselves the subject of "technical measures" if a technical obligations code were brought into force at a later date. Given this, it is important to clarify their position before bringing the Code into force.
- 1.3 Whether or not intermediaries are subscribers would seem to turn on the the interpretation of the requirement given in s124N that a subscriber "does not receive [an internet access service] as a communications provider". Ofcom appears to have interpreted this as meaning that someone who "essentially and verifiably" receives the service as a communications provider (i.e. in order to pass it on to third parties). However this interpretation does not appear to be supported by the Act as the "essential and verifiable" criteria has been added. Under the Act, anyone who does receive any part of an Internet service as a communications provider in any sense (not merely an essential part) cannot be a subscriber (and consequently cannot be receiving an "internet access service" under the definition in s124N). Ofcom should make this clear in the supporting documents to the Code.
- 1.4 Alternatively, if Ofcom feels bound by their interpretation of the definition of "subscriber" in s124N, Ofcom could amend the code by including a provision that anyone who receives an Internet service both as a subscriber and a communications provider (such as a small business, hotel or generous individual) can identify themselves as an "intermediary" to their ISP. An individual who is an intermediary could then be excluded from appearing on CILs by altering the definition of a "relevant subscriber" so as not to cover "intermediaries" (something Ofcom has the power to do under s124E(1)(c) combined with s124B(3)).
- 1.5 This would mean that while such an intermediary would receive relevant notifications, there would be no negative consequences to them ignoring such notifications and so would not feel required to take on the burden of appealing or implementing "reasonable steps". However, such intermediaries (particularly in the case of larger businesses, libraries or universities) are more likely to have static IP addresses, making it easier for a copyright owner to identify them as a repeat infringer, and therefore bring an action against an ISP independently (if they felt it necessary) to identify them based on their initial investigations.
- 1.6 Another approach that might be helpful would be for Ofcom to require that the appeals body define or set out guidelines for "reasonable steps" before the Code comes into force (if

Ofcom has such a power). This could help reduce the burden placed on intermediaries by giving them an opportunity to investigate and implement reasonable steps before receiving notifications. Additionally, a clear initial definition would save the expense of the numerous appeals that are likely to be lodged on this ground once the Code is in force.

2. Retention of Information by ISPs

- 2.1 Paragraph 17 of the Code concerns the retention of CIRs by ISPs. 17(1)(a) and (b) require that the ISP keep CIRs and notifications for at least 12 months following receipt, and 17(2) states that the ISP must ensure that the CIRs and notifications are not kept longer than 12 months "insofar as reasonably practicable." The Party has several concerns with these provisions.
- 2.2 Section 124E(1)(e) of the Communications Act 2003 states that a Code cannot be produced or approved by Ofcom unless it "limits the time for which [ISPs] may keep [the] information." The Party is concerned that, as drafted, the Code fails to do this by including the words "insofar as reasonably practicable", as this could allow the ISP to keep information indefinitely if it would not be reasonably practicable to destroy it. A way to solve this possible problem would be to include a "hard" limit after which ISPs cannot keep the information either instead of, or alongside the current "soft" limit. Similarly, the Act refers to "information about subscribers" whereas the limits in the Code only cover CIRs and notifications; Ofcom may wish to clarify with the Government precisely what information s124E(1)(d)-(e) are referring to.
- 2.3 While less of a concern for consumers and more for ISPs, the Party notes that ISPs are required to keep the information for at least 12 months, but cannot keep it for longer than 12 months, giving them a limited time period in which the information must be deleted. The qualification on this in the current code ("insofar as reasonably practicable") would seem to apply to retention of the information, rather than merely the timings involved (as discussed above), meaning that if it was not practicable for an ISP to delete the data precisely on the 12 month mark, they could keep it indefinitely. While it is likely ISPs will comment on this point in more detail, the Party suggests altering the code by amending paragraph 17(2) to read as follows:

"A qualifying ISP must ensure that a copyright infringement report and notification retained pursuant to sub-paragraph (1) are destroyed as soon as reasonably practicable after the period of twelve months beginning with the day on which the relevant copyright infringement report was received, and are not kept for longer than the period of [eighteen] months from that day."
- 2.4 Finally, the Party is concerned about the time limit chosen. Under the current code CIRs will remain "current" for twelve months from when it was received by the qualifying ISP. However, the contents of a CIR could be relevant to a subscriber appeal lodged almost thirteen months after that point. For example, consider if an ISP were to receive an initial CIR on 1st January, a second on 1st July and a third on 1st December. If the "infringement list" notification was not received by the subscriber until 20th December (within the time limit for sending notifications), the subscriber could be included on a CIL issued between then and 1st January (at which point the initial CIR would no longer be current). However, they would have until approximately mid-January to appeal their inclusion on the CIL and thus increasing their chances of being targeted by copyright owners, or receiving technical measures to limit their Internet access if a "technical obligations code" were in force. In such an appeal, the details of the first CIR could be relevant (particularly if there was a problem with delivery or receipt of the first notifications) but would have been deleted by the ISP.

- 2.5 While such circumstances should be rare, given the large number of notifications expected, it is entirely possible that such a situation could arise, and a subscriber appeal could be significantly hampered by a lack of evidence. The Party recommends extending the time limits for retention of information to at least thirteen months from receipt of the CIR.

3. Time Limit for Bringing Appeals

- 3.1 The Party notes that under paragraphs 26(3)-(5) of the Code, appeals must be lodged no more than twenty working days either after "receipt" of the notification, when the subscriber "receives" details of a report or when they "became aware" of the relevant act or omission. The primary concern here is the definitions of the highlighted terms; what would be considered "receipt" etc. of a letter. While the Royal Mail aims to deliver most "First Class" letters within twenty-four hours, their failure rate for 2011-12 was over 7%². Based on the Costs order, Ofcom expects 70,000 to 175,000 CIRs to be sent a month and while this will not necessarily translate into an equal number of notifications for subsequent months, one would still expect between 4,900 and 12,250 notifications a month (or 60,000 to 150,000 a year) to take more than 24 hours to be delivered. It is also the Party's understanding that the Royal Mail's obligation to deliver letters within 24 hours is suspended during some or all of December and January, so these figures could be significantly higher. Similarly, while no figures seem to be readily available, estimates based on compensation payments suggest a small proportion of first class letters are either lost or destroyed. Given the large numbers of letters to be sent under the Code, problems with late or failed deliveries could become significant issues.
- 3.2 While paragraph 23(1) of the Code gives the appeals body the power to extend the time limits where it considers it appropriate, this power is discretionary and would seem to place the burden on the subscriber to ask the appeals body for an extension (which they would not have to grant even if the delay could be proved), adding an extra hurdle to what would already be a complex appeal. In situations where a subscriber has received an "intermediate" or "infringement list" notification without receiving one of the necessary previous notifications, there could be a considerable time gap between when the earlier notification was sent and when the failure became apparent and this could make displacing a presumption that they had received the notification difficult due to a lack of evidence. It would, of course, be open to the appeals body to reject a subscriber's claim that there had been no delivery if the evidence was not credible, but removing the burden of proof from the subscriber should simply the process from their point of view.
- 3.3 The Party would therefore suggest the Code confirms that "receipt" etc. mean the actual receipt of the letter (or relevant information) by the subscriber, and that no presumptions should be made as to when this occurs in relation to the sending of the letter. While covering situations with delayed or lost deliveries, this would also prevent situations where a subscriber may not personally receive a letter immediately after it arriving at their address due to absences or interference by a third party. Such clarification as to the definitions of "receipt" etc. would ensure that the deadline for appealing is as fair as possible to subscribers.

4. Time Limit for Gathering Evidence

- 4.1 Concerns with the failure rate of "First Class" are also relevant to the timings for sending "intermediate" and "infringement list" notifications under paragraphs 12 and 13 of the Code. Paragraphs 12(1)(c) and 13(1)(c) specify that the notification can only be sent if the relevant

2 Data from <http://www.consumerfocus.org.uk/files/2010/10/Quarterly-post-report-June-2012-Public1.pdf>

evidence was gathered at least twenty days after the previous notification "was sent." While changing this to "was received" would put ISPs in an impossible position, the Party would recommend extending this to at least thirty days. This would allow the subscriber time to bring an appeal over an earlier notification, change their behaviour or implement reasonable steps to secure their connection and leave enough room to account for the majority of delays in delivery of notifications (particularly around December and January, when the bulk of first class letters will not be delivered within twenty four hours).

5. Identification of Subscribers during Appeals

- 5.1 Paragraph 7.26 of the Notice document states that one of the requirements of the Code concerning the appeals body is "ensuring that the identity of a subscriber bringing an appeal is not disclosed to the copyright owner without the written consent of the subscriber. Paragraph 27(2) of the Code seems to be an attempt to implement this, stating that where the appeals body sends a notice of subscriber appeal to a copyright owner "it must ensure that information which would enable the qualifying copyright owner to identify the subscriber ... is not included". However, no such requirement is included in paragraph 31 of the Code, concerning notification of determination of appeals. Such a notification must be sent to the copyright owner (paragraph 31(3)) and could include details of payments to be made by the qualifying copyright owner to the subscriber (see paragraph 31(2)).
- 5.2 It would seem contrary to the stated requirement if the appeals body were (either deliberately or otherwise) to include information enabling a copyright owner to identify the relevant subscriber at this point, however this is not excluded by the current Code. Additionally, the exclusion in 27(2) only covers the subscriber which has submitted the notice, not any other relevant subscriber (particularly in the case of a joint appeal).
- 5.3 Such a restriction should be included in the code, either by mirroring 27(2) in paragraph 31, or by amending paragraph 27(2) to read as follows:

“The appeals body must ensure that information which would enable the qualifying copyright owner to identify a relevant subscriber is not included in any communication between the appeals body and the qualifying copyright owner without the express permission of the subscriber.”