



**Consumer  
Focus**  
Campaigning for a fair deal

# **Consumer Focus response to Ofcom consultation – ‘Online Infringement of Copyright and the Digital Economy Act 2010 Draft initial obligations code’**

**July 2010**

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# Executive summary

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## About Consumer Focus

Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and (for postal consumers) Northern Ireland. Our role is to represent the interests of consumers, particularly those who are disadvantaged. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus has been working on copyright related issues through our predecessor organisation, the National Consumer Council. We want to see a digital economy characterised by competitive, dynamic and innovative markets to which consumers have meaningful access and in which they are empowered to make informed choices. And we want to see a copyright culture that supports this by striking a fair balance between creators, investors and consumers.

In response to the '**Online Infringement of Copyright and the Digital Economy Act 2010 Draft initial obligations code**' consultation issued by Ofcom, Consumer Focus recommends that:

- Ofcom ensures that the draft initial obligations code (IOC) includes all the provisions required by the Digital Economy Act (DEA)
- that provisions that are subject to Ofcom's discretion are evidence based
- that Ofcom then consults again on the revised draft IOC

While we appreciate that Ofcom is under pressure to establish an IOC within the six months deadline set by the DEA, we would like to point out that the Secretary of State can grant Ofcom an extension. We recommend that Ofcom seeks an extension of this deadline. The six months deadline is clearly aspirational in light of the huge task Ofcom faces in establishing the IOC. The ultimate aim should be for the IOC to comply with all the requirements of the DEA and for any additional provisions made to implement the notification process to be evidence based. At this stage it does not appear to us that this can be achieved within six months, especially as in our opinion the draft IOC out for consultation will need significant changes.

The purpose of the IOC is to implement the online copyright infringement provisions of the DEA through secondary legislation. At this stage Consumer Focus has serious concerns:

- about whether the draft IOC meets all the requirements of the DEA
- that Ofcom has made significant decisions without demonstrating any evidence base
- that on a number of occasions there are disparities between the consultation document and the draft IOC itself

According to the consultation document this will be the only consultation on the parts of the IOC which do not relate to cost sharing and the enforcement of the code. However, if Ofcom was to include all the provisions required by the DEA, then in our opinion the draft IOC currently consulted on would have to be changed significantly. Any significant changes to the draft IOC ought to be subject to a proper consultation in line with good practice on transparency.

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Our concerns are outlined in detail in this consultation response. We are particularly concerned that the draft IOC does not make the required provisions in relation to:

- ‘the means of obtaining evidence of infringement of copyright for inclusion in a report’
- ‘the standard of evidence that must be included’<sup>1</sup>
- ‘the means by which the internet service provider identifies the subscriber’<sup>2</sup>

These provisions are of significant relevance to consumers in relation to data protection laws. Moreover they provide the only barrier against potentially thousands of subscribers being wrongly accused of online copyright infringement. On the basis of these incorrect accusations, consumers would be put on a ‘copyright infringement list’ making them subject to court action against them for copyright infringement. They could also face technical measures, if they are introduced at a later stage.

The subscriber appeal is of the utmost importance to all subscribers who receive a notification under the IOC, especially if the subscriber feels they have been wrongly accused. We believe the draft IOC does not comply with the requirements of the DEA in relation to grounds for appeal and burden of proof.

We are also concerned that the proposal to set a threshold for qualifying internet service providers on the number of subscribers, rather than the level of online copyright infringement on the networks, is not based on objective evidence. Furthermore we are greatly concerned that the draft IOC does not provide adequately for WiFi networks and public intermediaries such as libraries and universities. The Government clearly stated that the IOC should make such provisions during the passage of the Digital Economy Bill.

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<sup>1</sup> **Digital Economy Act 2010**, Section 7/124E, Subsection 2

<sup>2</sup> **Digital Economy Act 2010**, Section 7/124E, Subsection 3

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# Summary of recommendations

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## We recommend that:

- Ofcom should publish an assessment outlining how its draft IOC complies with the criteria for approval
- Ofcom should publish an analysis clarifying how its draft IOC complies with relevant provisions of the Telecoms Package
- Ofcom should set an evidence based threshold for qualifying internet service providers based on the level of infringement occurring on their network and with a view to ensure that no disproportionate costs are imposed on any internet service provider
- Ofcom should clarify whether the IOC can introduce different definitions of 'subscriber' and 'internet service provider' from those contained in the DEA for the purpose of implementation through secondary legislation
- Ofcom should re-issue the consultation, ensuring that the consultation document corresponds to the draft IOC that is consulted on
- Ofcom should clarify in the draft IOC that its definitions only apply for the purpose of the online copyright infringement provisions of the DEA, which is Sections 124A to 124M of the Communications Act
- Ofcom needs to clarify the position of wholesale and retail internet service providers in relation to the definitions contained in the DEA and by extension the IOC
- Ofcom needs to clarify the position of WiFi providers, who may be consumers, not for profit organisations, public intermediaries or commercial operators, in the draft IOC
- Ofcom needs to carry out an assessment on the level of online copyright infringement on WiFi networks, and ensure that the IOC does not impose a disproportionate cost on WiFi providers
- Ofcom needs to make provisions for public intermediaries in the IOC and re-issue the draft IOC for consultation
- Ofcom should redraft the IOC so that subscribers are notified of every copyright infringement report made by copyright owners
- Ofcom should redraft the IOC so that it complies with the DEA requirement that subscribers should be included in the 'copyright infringement list', and hence become 'relevant subscribers', on the basis of copyright infringement reports made by a copyright owner to the internet service provider in relation to the subscriber
- Ofcom should redraft the IOC so that it complies with the DEA requirement that subscribers only become relevant to a copyright owner in relation to copyright infringement reports made by that owner, not other copyright owners
- Ofcom should clarify in the draft IOC the relationship between actual copyright owners and their agents, which are defined as 'copyright owner' for the purpose of the online copyright infringement provisions; particularly in relation to request for disclosure of copyright infringement lists, and court actions that follow the disclosure

- Ofcom needs to correct the apparent inaccuracy contained in the Information Sheet
- Ofcom should include a provision in the IOC to the effect that copyright owners and internet service providers may not provide subscribers with inaccurate and/or misleading information about the notification process and possible technical measures
- Ofcom should standardise all information that is required to be included in a notification to a subscriber by the DEA, particularly in relation to appeals and reasonable steps to secure internet connections
- Ofcom should produce a model notification that contains all the standardised information, particularly in relation to evidence of infringement, appeals and reasonable steps, and consult on it with a view to establishing whether the information is likely to be understood by subscribers
- Ofcom needs to correct the inaccuracy contained in the draft IOC in relation to copyright owner being able to 'bring a legal action for damages in relation to an infringement'
- Ofcom needs to include provisions in relation to the means of obtaining evidence, the standard of evidence and the means of matching IP addresses in the IOC
- Ofcom needs to make the required provisions in relation the ground for appeal in the IOC
- Ofcom should make the required provisions in relation the means of obtaining evidence and matching of IP addresses in the IOC and publish an assessment on how these processes comply with the Data Protection Directive
- Ofcom should undertake and publish a full data protection impact assessment for its draft IOC
- Ofcom should redraft the IOC to reflect the fact that the IP address is personal data, particularly in relation to the required provisions in relation to the means of obtaining evidence, the standard of evidence and the matching of IP addresses
- Ofcom should make a clear statement on whether some or all of the data processed for the purpose of the notification process is 'sensitive data', if this is the case Ofcom needs to redraft the IOC accordingly
- Ofcom should ensure that the provisions in the draft IOC comply with the Data Protection Directive and the right to privacy as enshrined in the European Convention on Human Rights
- Ofcom should make the required provisions on how internet service providers are to keep information about subscribers in the IOC
- Ofcom should undertake and publish a full data retention impact assessment for its draft IOC

# Our response

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## Criteria for approval

Under the DEA, Ofcom has the option of approving an IOC 'made by any person for the purpose of regulating the initial obligations'<sup>3</sup> or, in the absence of an approved IOC, Ofcom 'must by order make a code for the purpose of regulating the initial obligations'.<sup>4</sup> In either case, the DEA states that Ofcom must not approve or make an IOC, 'unless they are satisfied that it meets the criteria set out in section 124E'.<sup>5</sup> Section 7/124E of the DEA list required provisions the IOC must include and the criteria the IOC must meet.

These criteria are:

- 'the provisions of the code are objectively justifiable in relation to the matters to which it relates'
- 'that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons'
- 'that those provisions are proportionate to what they are intended to achieve'
- 'that, in relation to what those provisions are intended to achieve, they are transparent'<sup>6</sup>

While the consultation document references these criteria in relation to its decision not to implement some of the DEA requirements Ofcom has provided no overall analysis on whether the draft IOC meets the criteria set out above. As outlined below, it is not obvious how a number of provisions in the draft IOC satisfy the criteria. Ofcom ought to assess whether what it is proposing in the draft IOC satisfies the criteria and publish this assessment.

## Recommendation

- Ofcom should publish an assessment outlining how its draft IOC complies with the criteria for approval

## Need to comply with the provisions of the Telecoms Package

Directive 2009/136/EC, amending Directive 2002/22/EC, Directive 2002/58/EC and Regulation (EC) No 2006/2004, (known as the Telecoms Package) needs to be implemented into UK law by May 2012 and as such all UK legislation needs to comply with its provisions. Section 3 to 8 of the DEA 2010 establish a process whereby the internet service providers notify of subscribers that copyright owners suspect that their internet connection has been used for the infringement of copyright.

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<sup>3</sup> **Digital Economy Act 2010**, Section 5/124C, Subsection 2

<sup>4</sup> **Digital Economy Act 2010**, Section 6/124D, Subsection 1

<sup>5</sup> **Digital Economy Act 2010**, Section 5/12C, Subsection 6 and Section 6/12D, Subsection 6

<sup>6</sup> **Digital Economy Act 2010**, Section 7/124E, Subsection 1

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The question whether the DEA itself complies with the Telecoms Package is not within Ofcom's remit. Though Ofcom must ensure that the IOC, which implements the online copyright infringement provisions of the DEA, complies with the provisions of the Telecom Package. This is because Ofcom will introduce the IOC to parliament as secondary legislation.

Unfortunately the consultation document makes no reference to the provisions of the Telecoms Package and on whether the draft IOC complies with it. Among others the following provisions are of particular relevance to the IOC:

Universal Service Directive 2002/22/EU to be amended to include:

New Article 1(3)

3. This Directive neither mandates nor prohibits conditions, imposed by providers of publicly available electronic communications and services, limiting end-users' access to, and/or use of, services and applications, where allowed under national law and in conformity with Community law, but lays down an obligation to provide information regarding such conditions. National measures regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy and due process, as defined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

New Article 5(2)

The directories referred to in paragraph 1 shall comprise, subject to the provisions of Article 12 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), all subscribers of publicly available telephone services.<sup>7</sup>

The intent of these provisions is explained in the recitals, which state that the Universal Service Directive as amended by the Telecoms Package mandates that 'Member States wishing to implement measures regarding end-users' access to and/or use of services and applications must respect the fundamental rights of citizens, including in relation to privacy and due process, and any such measures should take full account of policy goals

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<sup>7</sup> **Telecoms Package**, Universal Service Directive, new article 1(3) and new article 5(2) 'Online Infringement of Copyright and the Digital Economy Act 2010 Draft initial obligations code'

defined at Community level, such as furthering the development of the Community information society.’ Furthermore it is explained that the Universal Service Directive as amended ‘does not require providers to monitor information transmitted over their networks or to bring legal proceedings against their customers on grounds of such information, nor does it make providers liable for that information. Responsibility for punitive action or criminal prosecution is a matter for national law, respecting fundamental rights and freedoms, including the right to due process.’ It is also stated that in ‘the absence of relevant rules of Community law, content, applications and services are deemed lawful or harmful in accordance with national substantive and procedural law.’ And that it is for Member States, ‘not for providers of electronic communications networks or services,’ to decide ‘in accordance with due process, whether content, applications or services are lawful or harmful in accordance with the ‘mere conduit’ principle enshrined in EU law.’<sup>8</sup> The recitals furthermore state that:

‘Developments concerning the use of IP addresses should be followed closely, taking into consideration the work already done by, among others, the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (2), and in the light of such proposals as may be appropriate.’<sup>9</sup>

### Recommendation:

- Ofcom should publish an analysis clarifying how its draft IOC complies with relevant provisions of the Telecoms Package

## Threshold for qualifying internet service providers

Section 5/124C subsection 5 of the DEA states that in relation to Ofcom approving an IOC ‘made by any person’ the IOC may provide for ‘rights and obligations’ to ‘not apply in relation to an internet service provider unless the number of copyright infringement reports the provider receives within a particular period reaches the threshold set in the code’ and ‘if the threshold is reached, rights and obligations apply with effect from the date when it is reached or from a later time’.<sup>10</sup> The Explanatory Notes for the DEA state that:

‘The government’s intention is for the obligations to fall on all internet service providers except those who are demonstrated to have a very low level of online infringement. This is on the basis that it would be disproportionate (in cost terms) to require an internet service provider to incur significant costs to counter a problem that does not exist to any significant degree on its network. The proposal is therefore for the code to set out qualifying threshold criteria, based on the number of CIRs an internet service provider receives in a set period of time. The government anticipates that most small and medium-sized internet service providers and, possibly, the mobile networks would fall under the threshold. However, this exemption would not be a one-off exercise and the qualifying period would be a rolling one (for example, ‘x’ number of CIRs received in a rolling 3 month period). internet service providers would need to ensure online infringement of copyright remained at a low level or else face

<sup>8</sup> **Telecoms Package**, Universal Service Directive, recitals 29-31

<sup>9</sup> **Telecoms Package**, Universal Service Directive, recitals 52

<sup>10</sup> **Digital Economy Act 2010**, Section 5/124C, Subsection 5

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the prospect of passing the qualifying threshold. Once in scope, internet service providers would have to comply with the obligations and to continue to do so even if the number of CIRs later fell below the threshold.<sup>11</sup>

The consultation document and the draft IOC do not implement a threshold based on the number of copyright infringement reports received. Instead the draft IOC states that:

'2.4 an internet service provider is a Qualifying internet service provider to which this Code applies where:

2.4.1 it is a fixed internet service provider; and

2.4.2 it provides a fixed internet access service to more than 400,000 Subscribers.<sup>12</sup>

The consultation document contains the following explanation:

'3.7 Section 124C(5) of the 2003 Act envisages that the Code may indicate that rights and obligations contained in the Code do not apply to an internet service provider unless the number of CIRs received by it reach a certain threshold, to be determined in the Code. There is therefore a mechanism for the Code to limit the number of internet service providers to which it applies. In setting that threshold, Ofcom is subject to the requirement that the provisions of the Code are objectively justifiable, non-discriminatory, proportionate and transparent.

3.8 This presents a challenge for Ofcom. As no CIRs can have been issued to date, we do not have information about CIR volumes before the first notification period. We are therefore unable to set a CIR-based threshold for Qualifying internet service providers, which is objectively justifiable, non-discriminatory and proportionate.

3.9 However, Ofcom has a more general power under section 124D(5)(h) to make 'other provision for the purpose of regulating the initial obligations'. We consider that it is appropriate, in circumstances where it is not possible to determine an appropriate CIR threshold, to rely on this provision to set a threshold which is not based on the number of CIRs received but which nevertheless meets the requirements of objective justification, non-discrimination, proportionality and transparency.<sup>13</sup>

Because the DEA states that Ofcom may, rather than must, implement the threshold based on copyright infringement reports received, Ofcom is free to set the threshold on the basis of other criteria. However, it is not clear how Ofcom's proposal is objectively justifiable, non-discriminatory and proportionate. The Government viewed the number of copyright infringement reports received by an internet service provider as an indicator for the level of infringement on their network. The Government also clearly states that imposing obligations under the IOC on internet service providers with a low level of infringement would impose a disproportionate cost on them. Ofcom has failed to assess the level of infringement on internet service providers' networks, and the cost associated with its proposed subscriber threshold. It is therefore not clear how Ofcom comes to the conclusion that potentially imposing a disproportionate cost on internet service providers with low levels of infringement is 'proportionate' or 'transparent'.

The consultation document states in relation to internet service providers who fall under the proposed 400,000 threshold that they 'would need to ensure online infringement of

<sup>11</sup> **Explanatory Notes Digital Economy Act 2010**, Section 5: Approval of code about the initial obligations, paragraph 5

<sup>12</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 2.4

<sup>13</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, pg.11 'Online Infringement of Copyright and the Digital Economy Act 2010 Draft initial obligations code'

copyright remained at a low level or else face the prospect of passing the qualifying threshold.’ It is not clear how it would be possible for internet service providers to do that, especially as the ‘mere conduit’ principle enshrined in Article 12 of the Directive 2000/31/EC states that internet service providers are ‘not liable for the information transmitted’ on their networks.<sup>14</sup> Ofcom should clarify that under UK and EU law, internet service providers have no duty to ‘ensure online infringements of copyright remain at a low level’. Furthermore Ofcom should acknowledge that users who are determined to continue the infringement of copyright online are likely to migrate away from what Ofcom defines as ‘qualifying internet service providers’ and towards the ‘non-qualifying internet service providers’, that are smaller internet service providers. It is difficult to see what these smaller internet service providers would be able to do, within the boundaries of the mere conduit principle, to prevent that.

From the above statement it also appears that Ofcom assumes that any internet service provider currently falling under its proposed 400,000 subscriber threshold has a ‘low level’ of online copyright infringement. No evidence is advanced that would justify this claim. The reality is that setting an arbitrary threshold for qualifying internet service providers based on fixed line subscribers, means that internet service providers will find themselves subject to obligations under the draft IOC, or not, regardless of the level of infringement committed by users on their networks. This is entirely contrary to the intentions of the Government when it passed the DEA into law, which was for ‘the obligations to fall on all internet service providers except those who are demonstrated to have a very low level of online infringement. This is on the basis that it would be disproportionate (in cost terms) to require an internet service provider to incur significant costs to counter a problem that does not exist to any significant degree on its network.’

By proposing to set the threshold for qualifying internet service provider on the basis of the number of ‘fixed line subscribers’, with absolutely no regard for the level of infringement on their network, Ofcom creates a number of problems, particularly with regards to WiFi provided on a commercial basis. Public WiFi services such as The Cloud in the City of London, which provides WiFi on the basis of an agreement and against payment, and hence would be an internet service provider as per the definition proposed in the consultation document, are likely to provide internet access to more than 400,000 subscribers. Aside from the fact that Ofcom fails to define what ‘subscribers’ would be in relation to these services, the fact that Ofcom does not consider the actual level of infringement on a network, means that the obligations of the IOC would apply to networks even though the level of infringement is actually low. Ofcom’s proposals would therefore impose disproportionate costs on such internet service providers.

### **Recommendation:**

- Ofcom should set a evidence based threshold for qualifying internet service providers based on the level of infringement occurring on their network and with a view to ensure that no disproportionate costs are imposed on any internet service provider

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<sup>14</sup> **Directive on Electronic Commerce**, Directive 2000/31/EC, Article 12  
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## Definitions of ‘internet service provider’ and ‘subscriber’

The DEA provides the following definitions of internet service provider and subscriber for the purpose of the online copyright infringement provisions which are to be implemented by the IOC.

‘internet access service’ means an electronic communications service that—

- (a) is provided to a subscriber;
- (b) consists entirely or mainly of the provision of access to the internet; and
- (c) includes the allocation of an IP address or IP addresses to the subscriber to enable that access;

‘internet service provider’ means a person who provides an internet access service;

‘subscriber’, in relation to an internet access service, means a person who—

- (a) receives the service under an agreement between the person and the provider of the service; and
- (b) does not receive it as a communications provider;<sup>15</sup>

The draft IOC fails to adopt these definitions. Instead, the draft IOC provides that its obligations would only apply to what it terms ‘qualifying internet service providers’ – that is a provider that is ‘a fixed internet service provider’ providing ‘a fixed internet access service to more than 400,000 subscribers’.<sup>16</sup> The draft IOC provides the following definitions:

‘Fixed internet access service’ means an internet access service provided from one or more fixed locations and, for the avoidance of doubt, does not include an internet access service provided by means of a licensed mobile network.

‘Fixed internet service provider’ means an internet service provider that provides a fixed internet access service.

‘Internet access service’ means an electronic communications service that –

- (a) is provided to a Subscriber;
- (b) consists entirely or mainly of the provision of access to the internet; and
- (c) includes the allocation of an IP address or IP addresses to the Subscriber to enable that access.

‘internet service provider’ means a person who provides an internet access service.

‘Subscriber’, in relation to an internet access service, means a person who

- (a) receives the service under an agreement between the person and the provider of the service; and
- (b) does not receive it as a communications provider.<sup>17</sup>

<sup>15</sup> **Digital Economy Act 2010**, Section 16/124M, Subsection 1

<sup>16</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 2.4

<sup>17</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 1

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It is not clear whether the draft IOC, which is to be implemented as secondary legislation, can disregard the definitions contained in the DEA in this manner.

The definition provided in the draft IOC create a number of problems, particularly in relation to other definitions provided in the consultation document itself. For example, in relation to the definition of subscriber, the draft IOC states that the internet access service must be provided under agreement. But the consultation document states that a user of a WiFi network would only be a subscriber if the internet access service is provided under explicit or implicit agreement and in return for payment. But this definition is not contained in the draft IOC. If the definition in the draft IOC was applied to users of WiFi, all users of WiFi, including open WiFi, would be subscribers as they all receive it under an explicit or implicit agreement. In turn, because the draft IOC defines 'Fixed internet service provider' as any internet service provider which 'provides a fixed internet access service', all providers of WiFi would be Fixed internet service providers. But the consultation document states that WiFi operators may only be classified as an internet service provider if there is payment, if there is no payment the operator of the WiFi network is a subscriber.<sup>18</sup> This definition is not in the draft IOC.

This is one of a number of examples where the consultation document states one thing and the draft IOC states another. It is the draft IOC that will become secondary legislation, not the consultation document. As such is irrelevant what the consultation document actually states. It is likely that the responses to this consultation will be confused, in that some stakeholders will respond to the definitions provided in the consultation document, and other stakeholders will respond to the definitions offered in the draft IOC.

For its part Consumer Focus has chosen to focus on the draft IOC and to provide Ofcom with feedback on that, rather than the consultation document itself. This is to a large extent because it is the draft IOC that will become secondary legislation, and it is the draft IOC that will need to comply with the DEA.

### **Recommendations:**

- Ofcom should clarify whether the IOC can introduce different definitions of 'subscriber' and 'internet service provider' from those contained in the DEA for the purpose of implementation through secondary legislation
- Ofcom should re-issue the consultation, ensuring that the consultation document corresponds to the draft IOC that is consulted on

### **Definition of 'communications provider'**

According to the DEA anybody receiving internet access service is only to be classified as subscriber, if they do not receive the internet access service as a 'communications provider'. This is restated in the draft IOC, which provides that a communications provider 'means a person who (within the meaning of section 32(4) of the Communications Act 2003) provides an electronic communications network or an electronic communications service'. The Communications Act does not provide a definition of 'communications provider' as such, but defines 'electronic communication network' as:

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<sup>18</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, pg.15  
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(1) In this Act ‘electronic communications network’ means—  
(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and  
(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—  
(i) apparatus comprised in the system;  
(ii) apparatus used for the switching or routing of the signals; and  
(iii) software and stored data.  
(2) In this Act ‘electronic communications service’ means a service consisting in,  
or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.<sup>19</sup>

Ofcom’s work is frequently defined in relation to electronic communications networks. For example the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 relies on the Communications Act definition of electronic communications network and appears to apply to any electronic communications network, be it for fixed line telephone and internet, or mobile telephone and internet.<sup>20</sup> Given that the definitions Ofcom establishes in the IOC will become secondary legislation, Ofcom should assess how their new definitions will interact with existing definitions in legislation.

The consultation document states that the definition of ‘Fixed internet service provider’ provided in the IOC will only apply for the purpose of the online copyright infringement provisions in the DEA,<sup>21</sup> which is to be amended in the Communications Act. The IOC should make this clear and state that the definitions only apply to what would be Section 124A to 124M of the Communications Act.

### Recommendation:

- Ofcom should clarify in the draft IOC that its definitions only apply for the purpose of the online copyright infringement provisions of the DEA, which is Sections 124A to 124M of the Communications Act

## Wholesale internet service providers

The draft IOC does not differentiate between wholesale and retail internet service providers for the purposes of the online copyright infringement provisions. The definitions contained in the draft IOC suggest that no obligations are placed on wholesale internet service providers. This is because the draft IOC states that a Fixed internet service provider provides a fixed internet access service and allocates IP addresses to a subscriber, who receives the internet access service under an agreement.<sup>22</sup> This means that an internet service provider needs to provide internet access service to a ‘subscriber’ for the purposes of the copyright infringement provisions in order to be defined as an ‘internet service provider’. If an internet service provider provides internet access service only to what is an ‘internet service provider’ for the purpose of the copyright infringements provisions, they are clearly not an ‘internet service provider’ for the purpose of the provisions, because no internet access service is provided to a ‘subscriber’. The definitions do not allow an internet service provider to be both an ‘internet service

<sup>19</sup> Section 32, subsection 1 and 2, Communications Act 2003

<sup>20</sup> **The Electronic Communications Code (Conditions and Restrictions) Regulations 2003**, Statutory Instrument No 2553

<sup>21</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, pg.14

<sup>22</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010,

Annex 5, draft initial obligations code, Section 1

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provider' and a 'subscriber for the purposes of the online copyright infringement provisions.

However, the consultation document suggests otherwise:

3.25 Despite the diversity and potential complexity of the internet access market, our understanding is that the 2003 Act has clear implications for the majority of providers (see paragraph 3.6). In order to clarify the position, attention must focus on the provider of the final leg of the internet distribution chain, ie the point at which information about subscribers may be gathered.

3.26 It is clear from the definitions in the 2003 Act that, when there is a wholesale and a retail provider of internet access, the wholesale provider does not have obligations, as it is providing service to a downstream communications provider which will not be regarded as a subscriber. However, the downstream communications provider may well be an internet service provider (on the basis that it provides an internet access service to one or more subscribers) and therefore subject to obligations, in the event that it meets the criteria as a Qualifying internet service provider.

3.27 There may be instances where a retail provider of internet access may not have direct control over, or records of, the allocation of IP addresses to its subscribers since this function is performed by an upstream wholesale provider. In this situation, where there clearly is an agreement to provide an internet access service to a subscriber at the retail level, we would consider the retail provider to be the internet service provider with an obligation to process CIRs. If it does not hold sufficient information to process the CIRs it will be required to ensure that it is able to do so, possibly by entering into a contract for processing services from their wholesale access provider or other arrangement.<sup>23</sup>

Paragraph 3.27 does not appear to be in line with the definition of internet access service as provided for in the draft IOC. If the internet service provider provides internet access service to a subscriber under an agreement, but does not allocate IP addresses to enable that access, they are not an 'internet service provider' for the purpose of the online copyright infringement provisions.<sup>24</sup> Therefore no obligations can be imposed under the IOC. The consultation document suggests that 'in this situation, where there clearly is an agreement to provide an internet access service to a subscriber at the retail level, we would consider the retail provider to be the internet service provider with an obligation to process CIRs.' The definitions provided for in the draft IOC do not support such an interpretation. The IOC does not allow Ofcom to impose any obligations on any providers of electronic communications services who are not 'internet service providers' as defined in the IOC. Ofcom will need to clarify how it envisages imposing duties for the purpose of the online copyright infringement provisions on wholesale electronic communications providers which are not 'internet service providers' as per the IOC. This is particularly relevant because the consultation document states that the Post Office is one of the seven 'qualifying internet service providers'. The Post Office, like many smaller internet service providers provide an internet access service to its customers through BT's 'white label managed services venture' whereby all the network and technical support is contracted back to BT and the Post Office is simply a brand.<sup>25</sup>

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<sup>23</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, pg.15

<sup>24</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 1

<sup>25</sup> **Consultation on Legislation to Address Illicit Peer-to-Peer (P2P) Filesharing**, Department for Business, Innovation & Skills, 10 June 2009, pg.26  
'Online Infringement of Copyright and the Digital Economy Act 2010 Draft initial obligations code'

## Recommendation:

- Ofcom needs to clarify the position of wholesale and retail internet service providers in relation to the definitions contained in the DEA and by extension the IOC

## Open and public WiFi

It appears from the consultation document that Ofcom wants to establish different provisions for open WiFi networks.

'3.22 In principle, operators of Wi-Fi networks would fall within the definition of internet service provider where the service is provided by means of an agreement with the subscriber, even where this is oral or implicit. Indeed, Wi-Fi operators would be regarded as offering a fixed service on the basis that it is offered from fixed locations and is not a licensed mobile network. It may not, however, apply to open access Wi-Fi networks where there is no payment from, and no agreement with, those making use of them. In those circumstances, the person making open access Wi-Fi available would themselves be a subscriber (see paragraph 3.30).

3.23 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. We recognise, however, that there may be circumstances where there is an issue as to whether the agreement for goods or services extends to the use of the internet access service. Nevertheless, Ofcom's proposal for the threshold for determining a Qualifying internet service provider would initially exclude those operators since the number of subscribers would not meet the required threshold. Operators of such services are therefore provided with sufficient clarity as to whether or not the Code applies to them or will be applied to them in the immediate future.'<sup>26</sup>

'3.30 The critical question, in relation to subscribers, is the position of an individual or undertaking which both receives internet access as an end-user, and also makes it available to others. Some businesses provide access in their public areas, and some consumers may also run unprotected Wi-Fi networks to allow others in their community free access to the internet. We consider that a person or an undertaking receiving an internet access service for its own purposes is a subscriber, even if they also make access available to third parties.

3.31 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. The advice which internet service providers are required to provide to subscribers on protecting their networks (as part of the notification letters) may help in this objective, as may more general information which we hope will be provided by stakeholders. (Though it should be acknowledged that it will be more challenging to support subscribers to protect their networks against use for infringement while offering open access to a local community)'<sup>27</sup>

It appears from paragraph 3.22 of the consultation document that open WiFi providers will be classified as 'subscriber' or 'internet service provider' depending on whether there is

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<sup>26</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, pg.15

<sup>27</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, pg.16

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'payment' and an 'agreement' with those making use of it. If there is no payment and no agreement, the provider of the open WiFi is to be classified as a 'subscriber' for the purpose of the IOC. Paragraph 3.22 also states that an internet service provider can provide the open WiFi on the basis of an 'oral or implicit' agreement. According to the consultation document 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.' The consultation document also states that 'operators of such services are therefore provided with sufficient clarity as to whether or not the Code applies to them or will be applied to them in the immediate future.'

Based on the definition in the consultation document, an open WiFi is provided under an agreement; in that leaving the WiFi unprotected constitutes an implicit agreement that it may be used by anybody, though if there is no payment, the WiFi provider would be classified as a 'subscriber'. The consultation document states that if the WiFi is provided to a 'customer' 'in conjunction with other goods or services', the WiFi is provided against payment, making the WiFi provider an 'internet service provider'. Commercial providers of open WiFi, that is WiFi which is not password protected, by definition allow anybody to use the WiFi, regardless of whether they purchase goods or services. Therefore a commercial WiFi provider may provide internet access service to both users (unpaid) and customers (paid), making the WiFi provider both a 'subscriber' and an 'internet service provider' for the purposes of the online copyright infringement provisions.

As an 'internet service provider' the WiFi operator would become a qualifying internet service provider if it provides internet access service to more than 400,000 subscribers. If it has less than that it will be a non-qualifying internet service provider with no obligations under the IOC. But as a 'subscriber' the WiFi provider would still receive notifications from their actual internet service provider in relation to the WiFi it provides to users as a 'subscriber'. There is no mention in the consultation document as to how this would work in practice, and how the actual internet service provider is to know which copyright infringement reports made by copyright owners in relation to the WiFi provider would need to be sent on to the provider as 'subscriber' (because the copyright infringement report relates to the WiFi provided to users with no payment) and which would be disregarded because they relate to the operator as 'internet service provider' (because the copyright infringement report relates to WiFi provided to customers against payment). An example of such an operator would be the Apple Store in 235 Regent Street, which provides free WiFi access to anybody, including its customers and other users.<sup>28</sup>

With regards to such operators becoming qualifying internet service providers, Ofcom states that its 'proposal for the threshold for determining a Qualifying internet service provider would initially exclude those operators since the number of subscribers would not meet the required threshold' of 400,000 subscribers. But the consultation document contains no assessment of how many subscribers commercial WiFi networks are likely to serve. This is a shortcoming and it is far from clear that all commercial providers of WiFi in the UK would fall under the 400,000 subscriber threshold. For example, The Cloud provides WiFi against payment in the City of London and reportedly 'more than 350,000 people who work in and visit the area access to wireless broadband.'<sup>29</sup>

The Mayor of London now plans to roll out a similar service across London, stating that: 'London is the home of technological innovation. We in City Hall are doing our best to keep up, and one of our most important projects is called WiFi London'.<sup>30</sup> Because The Cloud provides internet access under an agreement and against payment, it would be an

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<sup>28</sup> [Apple Store](#), Hotspot Locations

<sup>29</sup> [Can London Go WiFi?](#), BBC News, 19 May 2010

<sup>30</sup> [Can London Go WiFi?](#), BBC News, 19 May 2010

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'internet service provider' as per the definition offered in the consultation document. The Cloud may already provide internet access service to more than 400,000 subscribers, making it a qualifying internet service provider, who would have to send notifications to its subscribers. If a service like The Cloud was rolled out across London, potentially allowing millions of people to access wireless broadband it would almost certainly become a qualifying internet service provider under the definition provided in the consultation document.

We therefore suggest that the definitions proposed by the consultation document do not provide sufficient clarity for commercial operators of open WiFi. Commercial providers of open WiFi, such as the Apple Store, may choose to close down their open WiFi networks to avoid being classified as 'subscribers'. If commercial WiFi operators who provide access to wireless broadband against payment become qualifying internet service providers it is likely that a significant cost would be imposed on them, making it commercially unviable to provide WiFi on a large scale.

Open WiFi provided by not for profit organisations and public intermediaries plays a key role in providing internet access to all users. Therefore Consumer Focus is concerned that the consultation document totally omits the question of open WiFi provided by public institutions and not-for profit organisations. As the open or free WiFi is not provided in conjunction with the purchase of a good or service, ie no payment is made, providers of such WiFi services would be classified as 'subscriber' for the purpose of the online copyright infringement provisions. This means that public intermediaries such as libraries and councils, who frequently provide open WiFi access to users, would be classified as subscribers, and therefore copyright owners may make copyright infringement reports against them. As these operators are put on copyright infringement lists, they would be subject to court action by copyright owners and to technical measures if those are introduced at a later date. For example Islington Council provides a free WiFi hotspot, called StreetNet, on Upper Street and Holloway Road.<sup>31</sup> It is not clear whether Islington Council would continue to operate their free WiFi service if they found themselves classified as 'subscriber' for the purposes of the online copyright infringement provisions.

Having said that, the definitions provided in the draft IOC actually allow for all providers of WiFi to be classified as internet service providers for the purposes of the online copyright infringement provisions. This is because the definition of 'internet service provider' in the draft IOC only requires the internet access service to be provided on agreement, which may be implicit or explicit. This would mean that consumers who leave their WiFi open to be used by anybody would be non-qualifying internet service providers under the draft IOC (assuming that less than 400,000 people use the open WiFi).

Consumer Focus is greatly concerned about the potential negative impact of the initial obligations on code on open WiFi provided by consumers, public intermediaries, not-for profit organisations and commercial providers. Many open WiFi networks are only used for a limited time by individual users. It is therefore likely that instances of online copyright infringement are low.

This should mean that the obligations under the IOC should not apply, as they would be disproportionate. Ideally Ofcom would undertake an assessment of the levels of online copyright infringement on such internet access services, and ensure that WiFi networks with low levels of infringement are excluded from the provisions of the IOC. In the absence of such an analysis it is difficult to see how an IOC that forces the closing of open WiFi or imposes a significant cost on other providers of WiFi with low levels of online copyright infringements would be objectively justifiable, non-discriminatory, proportionate and transparent.

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<sup>31</sup> **Where to Find Free WiFi in London**, TimeOut London, June 30 2010

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## Recommendation:

- Ofcom needs to clarify the position of WiFi providers, who may be consumers, not for profit organisations, public intermediaries or commercial operators, in the draft IOC
- Ofcom needs to carry out an assessment on the level of online copyright infringement on WiFi networks, and ensure that the IOC does not impose a disproportionate cost on WiFi providers

## Public intermediaries

Public intermediaries, such as libraries and universities, offer a combination of fixed terminal as well as WiFi access to over 30 million users to support education and lifelong learning and to more generally promote the ability of citizens to source, select and make use of knowledge and information, develop their skills base, improve their employability, support their children and families, and take an active part in their communities. Consumer Focus is greatly concerned that the consultation document and the draft IOC completely omit public intermediaries. The notification process clearly applies to public intermediaries, which will be either internet service providers or subscribers under the IOC. Public intermediaries were discussed numerous times by parliamentarians when the Digital Economy Bill passed through parliament and Lord Young stated clearly that the IOC must provide for them:

‘My Lords, I want to address some of the points that have been raised, starting with those made by the noble Lord Clement-Jones, who expressed a concern once again about the position of libraries, universities and WiFi cafes. It might be helpful if we put on record a number of occasions our view that we can deal with those organisations in a way that is proportionate and fair. We realise that the provisions of the Bill mean that organisations such as libraries, universities and other educational establishments, as well as public and commercial WiFi, will face particular challenges. We do not want to hamper their activities in providing internet access or to place unnecessary burdens or procedures on them.

At the same time we cannot set up an obvious loophole that would impact on such bodies in terms of degrading the service that they can offer... We think that this is something that the code is best suited to deliver, and we urge university and library representative bodies to get involved in the code process. We would find it hard to approve any code that did not recognise in some way the particular position of these and similar institutions...<sup>32</sup>

‘No one wants to see libraries or universities the subject of court action or technical measures if-I stress this-they are ever introduced. There is no question of them being some sort of quick sanction which cuts off those services. No one wants to see legitimate businesses suffer as a consequence of the actions of their customers but, equally, it cannot be right that they are totally excluded from the provisions of the Bill. My noble friend Lord Puttnam, with his background in universities, recognised that essential point eloquently

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<sup>32</sup> **Digital Economy Bill, House of Lords Commons Amendments, Wash-up, Lord Young for the Government, 8 April 2010**

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during our debate in Committee. It is better that the code recognises different circumstances; that is what the Government's amendments provide.<sup>33</sup>

Therefore it is not clear why the draft IOC and the consultation document makes no mention of public intermediaries. Public intermediary provisions must be added to the IOC before it is submitted to the Secretary of State for approval.

### Recommendation:

- Ofcom needs to make provisions for public intermediaries in the IOC and re-issue the draft IOC for consultation

## Subscriber notification of copyright infringement reports

According to the draft IOC, subscribers are not to be notified of every copyright infringement report made by the copyright owner to the internet service provider in relation to the subscriber. This means not every copyright infringement report will trigger a notification to the subscriber. Instead, Ofcom proposes a time-based system whereby a copyright infringement report made by the copyright owner only triggers a notification to the subscriber if it is made within a certain time frame:

'We propose a time-based process. We would see the notification process as working as follows:

- the first CIR would trigger the first notification;
- the second notification would be triggered by the first CIR received on or after one month from the date of the first notification. This notification would provide details of the 'trigger' CIR and also refer to any accumulated CIRs; and
- the third and final notification would be triggered by the first CIR received on or after one month from the date of the second notification. This notification would provide details of the 'trigger' CIR and also refer to any accumulated CIRs. The subscriber would be added to the copyright infringement list at this point.<sup>34</sup>

Therefore any copyright infringement report made by the copyright owner within one months of the first or second notification will not trigger a notification. So if for example a subscriber receives their first notification, any copyright infringement reports made within the following months won't trigger a notification, and the second notification will only be sent to the subscriber once a copyright infringement report has been made by the copyright owner on or after one month from the date of the first notification. Therefore an internet service provider may have received a large number of copyright infringement reports against a subscriber, but only sent out three notifications to the subscriber.

Consumer Focus does not agree with this approach. Subscribers need to be notified of every copyright infringement report made against them by a copyright owner. This is because the DEA requires that the threshold for inclusion in the copyright infringement list is set on the basis of copyright infringement reports received by the internet service provider, not the notifications send to the subscribers.

### Recommendation:

- Ofcom should redraft the IOC so that subscribers are notified of every copyright infringements report made by copyright owners

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<sup>33</sup> **Digital Economy Bill, House of Lords Report, 1st Day, Lord Young for the Government**, 1 March 2010

<sup>34</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, pg.22  
'Online Infringement of Copyright and the Digital Economy Act 2010 Draft initial obligations code'

## Definition of relevant subscriber and inclusion in the copyright infringement list

Section 7/124E subsection 1 of the DEA requires that the IOC 'sets the threshold applying for the purpose of determining who is a relevant subscriber within the meaning of section 124B(3)'. Section 4/124B subsection 3 of the DEA states that a 'subscriber is a 'relevant subscriber' in relation to a copyright owner and an internet service provider if copyright infringement reports made by the owner to the provider in relation to the subscriber have reached the threshold set in the IOC.'<sup>35</sup> Subsection 2 states that 'copyright infringement list' is 'a list that sets out, in relation to each relevant subscriber, which of the copyright infringement reports made by the owner to the provider relate to the subscriber'.<sup>36</sup>

However section 6.1 of the draft IOC states that 'A Qualifying internet service provider must maintain a database of Subscribers who have received a Third Notification within the previous 12 months.'<sup>37</sup> In doing so the draft IOC fails to set the threshold for 'relevant subscribers' directly and instead sets a threshold for inclusion in the copyright infringement list based on notification sent by the internet service provider to the subscriber. The DEA provides that subscribers who are included in the 'copyright infringement list' are 'relevant subscribers' and the IOC therefore determines 'relevant subscribers' in relation to notifications sent by internet service providers. Therefore the draft IOC clearly does not comply with the requirement of the DEA that the IOC needs to set the threshold for inclusion in the 'copyright infringement list' and determine 'relevant subscribers' on the basis of copyright infringement reports made by a copyright owner to the internet service provider in relation to the subscriber.

Unfortunately the consultation document contains a number of contradictions in relation to whether subscribers will be included in the copyright infringements list on the basis of copyright infringement reports or notifications. For example:

'2.6 Section 5 sets out our proposals in relation to internet service providers identification of subscribers from the information contained in CIRs and the operation of the notification process. In summary, we are proposing a three stage notification process, following which subscribers may be included on a copyright infringement list....

2.7 Section 6 sets out our proposals for Copyright Infringement Lists, ie the anonymised lists that Copyright Owners will be able to request from internet service providers. We are proposing that subscribers who have received three CIRs within 12 months may be included in a copyright infringement list requested by a Copyright Owner, if that owner has made at least one CIR relating to that subscriber.'<sup>38</sup>

Paragraph 2.6 of the consultation document appears to suggest that subscribers will be included in the copyright infringement list if they have received three notifications, while Paragraph 2.7 clearly states that subscribers will be included if they have received three copyright infringement reports. Though the draft IOC clearly states that subscribers will be included in the copyright infringement list if they have received three notifications within 12 months. As previously noted, not every copyright infringement report triggers a notification; therefore the consultation document appears to be in error in stating that the

<sup>35</sup> **Digital Economy Act 2010**, Section 4/124B, Subsection 3

<sup>36</sup> **Digital Economy Act 2010**, Section 4/124B, Subsection 2

<sup>37</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 6.1

<sup>38</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, pg.4 'Online Infringement of Copyright and the Digital Economy Act 2010 Draft initial obligations code'

threshold for inclusion in the copyright infringement list is three copyright infringement reports within 12 months.

## Recommendation

- Ofcom should redraft the IOC so that it complies with the DEA requirement that subscribers should be included in the ‘copyright infringement list’, and hence become ‘relevant subscribers’, on the basis of copyright infringement reports made by a copyright owner to the internet service provider in relation to the subscriber

## ‘Relevant subscribers’ to a ‘copyright owner’

Section 4/124B of the DEA states that the subscriber is only relevant to a copyright owner if the copyright infringement reports made by that owner reach a certain threshold.

(1) An internet service provider must provide a copyright owner with a copyright infringement list for a period if—

- (a) the owner requests the list for that period; and
- (b) an initial obligations code requires the internet service provider to provide it.

(2) A ‘copyright infringement list’ is a list that—

- (a) sets out, in relation to each relevant subscriber, which of the copyright infringement reports made by the owner to the provider relate to the subscriber, but
- (b) does not enable any subscriber to be identified.

(3) A subscriber is a ‘relevant subscriber’ in relation to a copyright owner and an internet service provider if copyright infringement reports made by the owner to the provider in relation to the subscriber have reached the threshold set in the initial obligations code.<sup>39</sup>

Therefore, under the DEA and the IOC, a subscriber does not become relevant to a copyright owner on the basis of copyright infringement reports made by another copyright owner. The draft IOC adopts the definition contained in the DEA:

‘A Copyright Infringement List is a list that sets out which of the CIRs made by a Qualifying Copyright Owner relate to a Subscriber who has met the threshold in paragraph 6.3 for being included on such a list. The list however must not enable any Subscriber to be identified by any party other than the Qualifying internet service provider in the absence of an appropriate court order.’<sup>40</sup>

But the draft IOC also suggests that the subscriber becomes relevant to any copyright owner in relation to copyright infringement reports made by any copyright owner.

‘A Qualifying internet service provider must maintain a database of Subscribers who have received a Third Notification within the previous 12 months.’<sup>41</sup>

<sup>39</sup> **Digital Economy Act 2010**, Section 4/124B, Subsection 1, 2 and 3

<sup>40</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 6.4

<sup>41</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 6.1

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The draft IOC would allow a subscriber to become a relevant subscriber by virtue of being included in the 'copyright infringement list' on the basis of any notification received from a particular internet service provider. These notifications can be based on copyright infringement reports made to the internet service provider by any copyright owner. Therefore it appears that the draft IOC does not comply with the DEA requirement that a subscriber only becomes relevant to a copyright owner in relation to the copyright infringement reports made by that copyright owner.

### Recommendation:

- Ofcom should redraft the IOC so that it complies with the DEA requirement that subscribers only become relevant to a copyright owner in relation to copyright infringement reports made by that owner, not other copyright owners

## Copyright owners and their agents

Under the DEA a 'copyright owner' means both the actual copyright owner; and someone authorised on their behalf.<sup>42</sup> This definition is adopted into the draft IOC, which states that:

'Copyright owner' means (a) a copyright owner within the meaning of Part 1 of the Copyright, Designs and Patents Act 1988 (see section 173 of that Act); or (b) someone authorised by that person to act on the person's behalf.<sup>43</sup>

Hence the DEA allows the actual copyright owner and its agent, to make copyright infringement reports against subscribers. It is likely that agencies such as the British Phonographic Industry (BPI) and the Motion Picture Association of America (MPAA) will act on behalf of their music and film industry copyright owner members. Therefore the IOC should clarify whether a subscriber is relevant to the agent of copyright owners on the basis of copyright infringement reports made by that agent. The draft IOC should also clarify whether subscribers are only relevant to a copyright owner in relation to the copyright infringement reports made by that copyright owner directly, as well as its agents.

This is significant in so far as the DEA provides that 'the copyright owner may require the provider to disclose which copyright infringement reports made by the owner to the provider relate to the subscriber'. The question is whether an actual copyright owner, who has sent copyright infringement reports through an agent, or several agents, can ask the internet service provider to disclose the copyright infringement list in relation to the copyright infringement reports relating to copyright owned by them.

Importantly the definition of 'copyright owner' for the purpose of the copyright infringement provisions only applies to the online infringement of copyright provisions. According to the DEA, following disclosure of the anonymised copyright infringement list, 'the copyright owner may apply to a court to learn the subscriber's identity and may bring proceedings against the subscriber for copyright.'<sup>44</sup> Under UK law only the actual copyright owner as defined in the Copyright Designs and Patent Act 1988 can apply for such a court order, not the agent, who for the purpose of the copyright infringement provisions is included in the definition of 'copyright owner'. Similarly it would only be possible for the copyright owner as defined in the Copyright, Designs and Patents Act 1988 to take a subscriber to court for copyright infringement, not the agent of the

<sup>42</sup> **Digital Economy Act 2010**, Section 16/124M, Subsection 1

<sup>43</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 1

<sup>44</sup> **Digital Economy Act 2010**, Section 1/124A, Subsection 8(c)

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copyright owner as defined in the DEA for the purpose of the online copyright infringement provisions. This raises questions as to how agents of actual copyright owners who have asked an internet service provider to disclose a 'copyright infringement' list share this list with the actual copyright owner for the purpose of that owner applying to court to learn the subscriber's identity.

### Recommendation:

- Ofcom should clarify in the draft IOC the relationship between actual copyright owners and their agents, which are defined as 'copyright owner' for the purpose of the online copyright infringement provisions; particularly in relation to request for disclosure of copyright infringement lists, and court actions that follow the disclosure

## The copyright infringement list and technical measures

Consumer Focus is greatly concerned that the 'Information Sheet on Online Copyright Infringement and Notifications' issued as part of the consultation document would appear to contain an inaccuracy in relation to whether or not technical measures may at a later date be applied against subscribers who are placed on the 'copyright infringement list'. The Information sheet states:

'17. Will my broadband service be cut off because of the copyright infringement reports?

No.<sup>145</sup>

This is obviously incorrect, especially as Section 3/124A of the DEA states that a notification to a subscriber may contain the following statement:

(8)The things that may be required under subsection (6)(i), whether in general or in a particular case, include in particular—

(d) where the requirement for the provider to send the notification arises partly because of a report that has already been the subject of a notification under subsection (4), a statement that the number of copyright infringement reports relating to the subscriber may be taken into account for the purposes of any technical measures.<sup>146</sup>

The Explanatory Notes of the DEA states that:

'A technical measure may only be applied against a 'relevant subscriber', that is a subscriber who has been linked to sufficient CIRs to make them eligible for inclusion in a copyright infringement list.'<sup>147</sup>

And the DEA clearly makes provisions to this effect in Section 9/124G and Section 4/124B:

(2) A 'technical obligation', in relation to an internet service provider, is an obligation for the provider to take a technical measure against some or all relevant subscribers to its service for the purpose of preventing or reducing infringement of copyright by means of the internet.

<sup>45</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, pg.73

<sup>46</sup> **Digital Economy Act 2010**, Section3/124A, Subsection 8(d)

<sup>47</sup> **Explanatory Notes Digital Economy Act 2010**, Section 10: Obligations to limit internet access, paragraph 65

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- (3) A ‘technical measure’ is a measure that—
- (a) limits the speed or other capacity of the service provided to a subscriber;
  - (b) prevents a subscriber from using the service to gain access to particular material, or limits such use;
  - (c) suspends the service provided to a subscriber; or
  - (d) limits the service provided to a subscriber in another way.
- (4) A subscriber to an internet access service is ‘relevant’ if the subscriber is a relevant subscriber, within the meaning of section 124B(3), in relation to the provider of the service and one or more copyright owners.<sup>48</sup>
- (2) A ‘copyright infringement list’ is a list that—
- (a) sets out, in relation to each relevant subscriber, which of the copyright infringement reports made by the owner to the provider relate to the subscriber, but
  - (b) does not enable any subscriber to be identified.
- (3) A subscriber is a ‘relevant subscriber’ in relation to a copyright owner and an internet service provider if copyright infringement reports made by the owner to the provider in relation to the subscriber have reached the threshold set in the IOC.<sup>49</sup>

The Explanatory Notes further elaborate that:

‘In case the initial obligations prove insufficient to reduce significantly the level of online infringement of copyright, the provisions also grant the Secretary of State a power to impose further obligations (‘technical obligations’) on internet service providers. These would be imposed on the basis of reports from OFCOM and any other matter that appears to the Secretary of State to be relevant no sooner than 12 months after an IOC enters into force, and would require internet service providers to take measures to limit internet access to certain subscribers. Technical measures could only be used against subscribers who met the threshold for inclusion in a copyright infringement list under the initial obligations. Technical measures would be likely to include bandwidth capping or shaping that would make it difficult for subscribers to continue file-sharing, but other measures may also be considered. If appropriate, temporary suspension of broadband connections could be considered.’<sup>50</sup>

The consultation document provides the ‘Information Sheet on Online Copyright Infringement and Notifications’ as a template for the kind of information internet service providers may be sent to subscribers against whom copyright owners have made a copyright infringement report. As qualifying internet service providers may rely on the information sheet to guide them in establishing their own notifications to subscribers, potentially providing them with inaccurate information about the link between copyright infringement reports, the ‘copyright infringement list’ and technical measures.

It is not acceptable that subscribers should be provided with inaccurate information about possible future consequences of copyright owners having submitted a copyright

<sup>48</sup> **Digital Economy Act 2010**, Section 9/124G, Subsection 2, 3 and 4

<sup>49</sup> **Digital Economy Act 2010**, Section 4/124B, Subsection 2 and 3

<sup>50</sup> **Explanatory Notes Digital Economy Act 2010**, Topic 2: Online infringement of copyright Background, paragraph 33

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infringement report to internet service providers in relation to their account. We therefore ask Ofcom to include a provision in the IOC to the effect that copyright owners and internet service providers shall not provide subscribers who are notified under the IOC with inaccurate and/or misleading information about the notification process and possible technical measures. Such a provision would ensure that Ofcom, which will have the power to enforce internet service provider and copyright owner compliance with the IOC, has the power to fine copyright owners and internet service providers who provide subscribers with inaccurate and/or misleading information.

### Recommendations:

- Ofcom needs to correct the apparent inaccuracy contained in the Information Sheet
- Ofcom should include a provision in the IOC to the effect that copyright owners and internet service providers may not provide subscribers with inaccurate and/or misleading information about the notification process and possible technical measures

### Content of notifications

Section 3/124A subsection 6 of the DEA outlines what information must be included by an internet service provider in a notification to a subscriber in relation to which a copyright infringement report has been made. As required by the DEA the draft IOC provides that the following information must be included in standardised form in all notifications sent: 'a statement that the notification is sent under this section in response to a copyright infringement report', 'the name of the copyright owner who made the report', 'a description of the apparent infringement', and 'evidence of the apparent infringement that shows the subscriber's IP address and the time at which the evidence was gathered'. The draft IOC requires this information to be standardised, by virtue of being standardised in the copyright infringement reports.<sup>51</sup> Consumer Focus is supportive of this approach. However the consultation document does not provide an example of this information, so it is not possible for us to comment on whether it would be provided in a way that would be accessible and easily understood by subscribers. This is of utmost importance because the subscriber will appeal on the basis of the information provided in the notification. Especially in relation to the defence 'that the report does not relate to the subscriber's IP address at the time of the apparent infringement'.<sup>52</sup>

Consumer Focus is concerned that the draft IOC does not standardise the required information in the notifications 'about subscriber appeals and the grounds on which they may be made'.<sup>53</sup> This information must be specified and standardised – otherwise subscribers will be provided with inconsistent information about the grounds for appeal, their rights and the process. Notifications will be sent out by up to seven qualifying internet service providers, who will potentially provide subscribers with varying information. To ensure that all subscribers receive accurate and reliable information about the appeal we suggest that Ofcom or the Appeals Body provide qualifying internet service providers with a standardised paragraph on appeals for inclusion in their notifications.

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<sup>51</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 5.11

<sup>52</sup> **Digital Economy Act 2010**, Section 13/124K, Subsection 3 and 6

<sup>53</sup> **Digital Economy Act 2010**, Section 3/124A Subsection 6

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Similarly the draft IOC does not standardise the 'information about copyright and its purpose' or 'advice, or information enabling the Subscriber to obtain advice, about how to obtain lawful access to copyright works'. Again, Ofcom or the Appeals Body should provide internet service providers with standardised information for inclusion in the notification.

Consumer Focus is greatly concerned that the draft IOC requires all notifications to include information about 'the ability of a Qualifying Copyright Owner to bring a legal action for damages in relation to an infringement'.<sup>54</sup> This is not required by the DEA and not factually correct. Any copyright owner has the right to take a subscriber suspected of copyright infringement to court for copyright infringement. In cases of civil copyright infringement the court can, after it has been decided that the subscribers is guilty of the alleged copyright infringement, impose the following remedies: damages to be paid by defendant, account of profits in cases where the defendant has made profit from the infringement, a search order, a interlocutory injunction, order the delivery up of infringing articles, order the destruction of infringing articles, and the seizure of infringing copies. Where the defendant is ordered to pay damages, the measure of damages will be the depreciation of the value of the copyright caused by the infringement. If the defendant did not know and has no reason to believe that copyright subsisted in the work the claimant is not entitled to damages. The court has the power to award 'additional damages' considering the flagrancy of the infringement and any benefit accruing to the defendant by reason of the infringement.

Hence it is not correct to state that the copyright owner can bring legal action for damages in relation to the infringement. Instead a copyright owner can bring legal action for copyright infringement against anybody they suspect of copyright infringement and if the defendant is found guilty the court can award damages to the copyright owner in certain circumstances. Ofcom should correct this inaccuracy in the draft IOC as a matter of urgency.

The draft IOC also requires that all notification must include 'advice, or information enabling the subscriber to obtain advice, about reasonable steps that they can take to protect an internet access service from unauthorised use', which is required by the DEA,<sup>55</sup> as well as information about how to 'prevent online copyright infringement in the future'.<sup>56</sup> This latter requirement is not mandated by the DEA and is wholly different in nature to 'advice on securing internet access services against unauthorised use'. We would suggest that Ofcom removes this unnecessary requirement from the draft IOC.

Consumer Focus believes that the appeals body should provide standardised advice on 'reasonable steps' to prevent online copyright infringement on a subscriber internet connection. This is because having taken such steps is one of the defences available to subscribers under the DEA. It states that if a subscriber appeals on the grounds that: 'the apparent infringement to which the report relates was not an infringement of copyright' or 'that the report does not relate to the subscriber's IP address at the time of the apparent infringement', the appeal must be determined in favour of the subscriber; if the subscriber shows that: 'the act constituting the apparent infringement to which the report relates was not done by the subscriber' and 'the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service'.<sup>57</sup>

Because a subscriber will rely on the information provided to them in the notification with regards to what reasonable steps are, it is absolutely vital that the advice subscribers

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<sup>54</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 5.11

<sup>55</sup> **Digital Economy Act 2010**, Section 3/124A, Subsection 6

<sup>56</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 5.11

<sup>57</sup> **Digital Economy Act 2010**, Section 13/124K, Subsection 3 and 6

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receive on this matter is in line with the opinion the appeals body takes on the matter. However, the current draft IOC does not standardise the information on reasonable steps by the internet service providers. If the Appeals Body was to provide such standardised information all qualifying internet service providers for inclusion in notification it would be certain that all subscribers receive accurate and reliable advice on the matter.

The draft IOC also states that any notification needs to include 'a statement that the Subscriber has the right under data protection legislation to any information, including CIRs, held on them.' This is not required by the DEA, but if it is provided it should be standardised. The notification should inform the subscribers of which information held on him/her by the copyright owners and their agents in relation to IP addresses and the internet service provider.

### **Recommendations:**

- Ofcom should standardise all information that is required to be included in a notification to a subscriber by the DEA, particularly in relation to appeals and reasonable steps to secure internet connections
- Ofcom should produce a model notification that contains all the standardised information, particularly in relation to evidence of infringement, appeals and reasonable steps, and consult on it with a view to establishing whether the information is likely to be understood by subscribers
- Ofcom needs to correct the inaccuracy contained in the draft IOC in relation to copyright owner being able to 'bring a legal action for damages in relation to an infringement'

## **The means of obtaining evidence of infringement of copyright for inclusion in a copyright infringement report, the standard of evidence and the matching of IP addresses by internet service providers**

Section 7/124E subsection 2 of the DEA requires that the IOC makes the required provision about copyright infringement reports by specifying 'requirements as to the means of obtaining evidence of infringement of copyright for inclusion in a report', and 'the standard of evidence that must be included'.<sup>58</sup> Furthermore Section 7/124E subsection 3 of the DEA requires that the IOC makes the required provisions about the notification of subscribers in relation to whom the internet service provider receives one or more copyright infringement reports. These provisions include 'requirements as to the means by which the internet service provider identifies the subscriber'.<sup>59</sup>

Consumer Focus is greatly concerned that the draft initial obligations fails to make the required provisions about the means of obtaining evidence, the standard of evidence and the way in which IP addresses are matched to subscriber details. In relation to evidence gathering process and the matching of IP addresses Section 3 and 4 of the draft IOC outlines what it calls a 'quality assurance process' but this process does not specify the means of obtaining evidence, the standard of evidence included, or the means of matching IP addresses. The assurance process relies entirely on copyright owners and internet service providers self-certifying that their method is 'robust and accurate'.<sup>60</sup> While

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<sup>58</sup> **Digital Economy Act 2010**, Section 7/124E, Subsection 2

<sup>59</sup> **Digital Economy Act 2010**, Section 7/124E, Subsection 3

<sup>60</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 3.55 and 4.5.5  
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Ofcom reserves the right to direct the copyright owner and the internet service provider to improve the process and may require an audit by an independent party, the process is not designed to ensure that all copyright infringement reports and notifications from day one are based on 'robust and accurate' evidence and processes.

Agents of copyright owners such as Davenport Lyons and ACS law have been widely criticised because a large number of consumers who received their threatening letters came forward claiming they had been wrongly identified. Both agents have always maintained that their evidence gathering process is beyond doubt. It is likely that all copyright owners, their agent and internet service providers would self-certify that their processes are 'robust and accurate'.

With regards to the required provisions on the standard of evidence, the draft IOC makes absolutely no provisions. Standard of evidence is the standard of proof that the qualifying copyright owner making the allegation has to provide to prove the facts of the case. While a list of information is provided which the qualifying copyright owner must provide in the copyright infringement reports, they are in themselves not a requirement as to the standard of evidence, because it is not known how reliable they are and how the evidence is gathered.

The quality assurance processes established in the draft IOC is clearly not in line with what the Government intended. During the Digital Economy Bill's passage parliamentarians repeatedly queried the way in which copyright owners will collect evidence of apparent infringement and the standard of evidence. In turn the Government repeatedly underlined that it expected the IOC to make detailed provisions in this respect. For example Lord Young stated that:

'The existing text protects internet service providers against the consequences of the failure of copyright owners to comply with the code or the requirements of copyright infringement reports, which includes the standard of evidence required, how the evidence is obtained and the way in which it is presented... Clearly, ensuring that they make an accurate and valid copyright infringement report is vital to the success of this process.'<sup>61</sup>

Lord Young also highlighted that the IOC should help to establish clear criteria and processes as a way of guarding against subscribers being accused of copyright infringement in error:

'Clearly, it will be important that the appeals body set up by the code should be capable of determining whether a copyright infringement notice has been properly generated, so it will require some technical knowledge and expertise of, for example - I stress the importance of this - whether an infringement has occurred; whether the time and date stamp is accurate; whether the IP address was correctly captured and recorded; whether it has been properly handled by the internet service provider; and whether the subscriber has been properly identified from the IP address and the time and date stamp provided. As I have said on a number of occasions, that means an audit trail, a validated evidence base, not incomplete information. No system is infallible, but we are talking about serious evidence that can be technically validated and proved and that has to be chronologically correct.'<sup>62</sup>

The 'Online infringement of copyright: Outline of Initial Obligations Code' issued by the Department for Business, Innovation and Skills (BIS) January 2010 provides further

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<sup>61</sup> **Digital Economy Bill, House of Lords Committee, 4<sup>th</sup> Day, Lord Young for the Government**, 20 January 2010

<sup>62</sup> **Digital Economy Bill, House of Lords Committee, 4<sup>th</sup> Day, Lord Young for the Government**, 20 January 2010

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clarification on the intention of the Government in relation to the means of obtaining evidence:

'It is in the interests of all parties involved that the standards of evidence associated with a CIR are as high and robust as possible. The Government wants the framework to ensure that notifications will only be sent to subscribers where there is real and strong evidence linking them to the alleged infringement. Copyright owners do not want the bad publicity and damage that significant false accusations would result in. Consumers and citizens want the re-assurance that notifications are only sent where there is strong evidence linking individuals with an infringement.

As a minimum we expect the code would require that the method of detection was via a robust and reputable technology (which was open to independent/Ofcom scrutiny), that a copy of the copyright material (or significant part thereof) was captured as part of the detection process, the copyright owner had verified that it had reason to believe that the usage identified was an infringement, the uploading IP address was captured and that an exact date/time stamp was taken.<sup>63</sup>

The standard of evidence and the way it is processed is of utmost importance. Copyright infringement reports made by copyright owners against a subscriber will lead to subscribers being put on a 'copyright infringement list', ie become relevant subscribers for the purpose of technical measures which may be introduced at a later date. The more immediate consequence for subscribers who have been put on the copyright infringement list is that copyright owners will take them to court for copyright infringement, on the basis that they are assumed to be 'repeat infringers'. If the means of obtaining evidence and the standard of evidence on which copyright infringement reports are based are not robust, potentially thousands of subscribers will be sued by copyright owners even though no credible evidence has been established.

It is apparent from Lord Young's comments in parliament that the Government intended the IOC to make detailed provisions about the way in which evidence is gathered by copyright owners and later processed by internet service providers, so that any mistakes can be treated as non-compliance with the IOC and a fine can be imposed on the relevant copyright owner, its agent, or internet service provider.

'Proposed new Section 124E(5) in Clause 8 and proposed new Section 124J(4) in Clause 13 allow the code to make provision for financial penalties when an internet service provider or a copyright owner fails to comply with one of the obligations or the provisions under the codes that put those provisions into practice.

It might help if I explain the Government's thinking. Failure on the part of either a copyright owner or an internet service provider to comply with the obligations or the code could have a damaging effect on a subscriber, a copyright owner or an internet service provider. In that situation it is appropriate that there should be some deterrent to ensure that the obligations and the code are complied with.

We have suggested two different types of deterrent, because the harm could occur in different ways, as the noble Lord, Lord Howard, identified. For example, if an internet service provider fails properly to process the copyright infringement notices, the notifications will not be issued and the resultant

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<sup>63</sup> **Online Infringement of Copyright: Outline of initial obligations code**, Department for Business, Innovation & Skills, Intellectual Property Office and Department for Culture, Media & Sports, January 2010, pg.5

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anticipated impact on the subscriber's infringement will not materialise. This is a generic failure causing generic rather than specific harm and, because it is generic, is appropriately dealt with through a fine. However, if a copyright owner makes a mistake in transcribing the time and date of an alleged infringement, an internet service provider might issue a notification to the wrong subscriber. If technical measures are in place, an internet service provider might even impose a technical measure on the wrong subscriber. This could cause real financial or other harm to the subscriber, who might then choose to take action against the internet service provider in relation to any loss suffered. If the subscriber were to win damages from the internet service provider in these circumstances, it seems only reasonable that the copyright owner responsible for the error should indemnify the internet service provider for any loss or damage resulting from the error.

We have put these two different mechanisms into the Bill not as alternatives but as complementary tools, because different types of harm could be suffered dependent on where the error or omission occurred. That is not to say that both would be used in any individual case, but the code should be able to contain both and apply them as appropriate. I hope that that has clarified the matter for the noble Lord.<sup>64</sup>

The Government also clearly recognised that subscribers need to be protected against negligence by copyright owners and internet service providers in processing the evidence relating to a copyright infringement report, and that this protection should be provided by the IOC.

'Arguably, subscribers are in at least as much need of protection against negligence on the part of copyright owners and internet service providers as are internet service providers in their relationship with copyright holders. I certainly concur with the noble Lord, Lord Howard, on that.

However, this situation will not arise in practice. Subscribers will have a clear path to appeal at each stage of the process. The grounds of such appeals will certainly include the failure of the internet service supplier or the copyright owner to comply with the code or the copyright infringement provisions, or failure to observe the provisions of the Data Protection Act, which in any case contains its own penalties for failure to comply.<sup>65</sup>

However, by not making the required provisions in relation to the means of obtaining evidence, the standard of evidence and the means of matching IP addresses, the draft IOC does not allow subscribers to appeal on the basis that the copyright owner or the internet service provider have not processed the evidence in an 'accurate and robust' manner. Similarly Ofcom, which will have the power of enforcing compliance with the IOC by copyright owners and internet service providers, cannot treat failure to process the evidence in an 'accurate and robust' manner by either the copyright owner or the internet service provider as non compliance with the IOC. All that is required currently by the draft IOC is that the copyright owner and the internet service provider must comply with the procedures that it has set out in the quality assurance report. So long as the copyright owners and the internet service provider follow the process set out in their initial quality assurance report, even if it was not 'accurate and robust', neither the subscriber nor Ofcom can bring a case against them for non-compliance.

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<sup>64</sup> **Digital Economy Bill, House of Lords Committee, 4th Day, Lord Young for the Government**, 20 Jan 2010

<sup>65</sup> **Digital Economy Bill, House of Lords Committee, 4<sup>th</sup> Day, Lord Young for the Government**, 20 January 2010

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The draft IOC requires copyright owners and internet service providers to ‘include a statement of compliance with relevant data protection laws’ in their self-certified quality assurance report. Consumer Focus is concerned that the draft IOC and the consultation document fail to establish which the relevant laws are. At the very least compliance with the relevant EU directives in relation to data protection and retention is required.

### Recommendation:

- Ofcom needs to include provisions in relation to the means of obtaining evidence, the standard of evidence and the means of matching IP addresses in the IOC

## Subscriber appeal and burden of proof

The DEA states that the IOC must provide subscribers with ‘the right to bring a subscriber appeal’.<sup>66</sup> The draft IOC does not explicitly enshrine this right to appeal and fails to properly implement the grounds for appeal and the corresponding defences mandated by the DEA. Overall Consumer Focus is concerned that the draft IOC implements the grounds of appeal and the corresponding defences and burden of proof in a way that makes it harder for subscribers to win an appeal than required by the DEA.

According to Section 13/124K subsection 3 and 6 of the DEA the IOC must provide that if a subscriber appeals on the grounds that ‘the apparent infringement to which the report relates was not an infringement of copyright’ or ‘that the report does not relate to the subscriber’s IP address at the time of the apparent infringement’; the appeal must be determined in favour of the subscriber if he or she shows that ‘the act constituting the apparent infringement to which the report relates was not done by the subscriber’ and ‘the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service’.<sup>67</sup>

The two relevant ground for appeals mentioned in the DEA are specified in Section 7.12.1 and 7.12.2 of the draft IOC. Overall the draft IOC provides for five grounds of appeal in sections 7.12.1 to 7.12.5. In section 7.24 the draft IOC provides that:

‘Where a Subscriber Appeal contains a ground set out in paragraph 7.12.1, 7.12.2, 7.12.3, 7.12.4 or 7.12.5 a Subscriber Appeal must be determined in accordance with 7.22.1 if the Appeals Body is satisfied that the Subscriber has shown that, in relation to a relevant CIR:

7.24.1 the act constituting the apparent infringement to which the CIR relates was not done by the Subscriber, and

7.24.2 the Subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service.’<sup>68</sup>

It therefore appears from the IOC that an appeal on any grounds can only be upheld if the subscriber proves that ‘the act constituting the apparent infringement to which the report relates was not done by the subscriber’ and ‘the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service’. However the DEA only requires that the subscriber proves the above two cases where the appeal is in relation to either ‘the apparent infringement to which the report relates was not an infringement of copyright’ or ‘that the report does not relate to the subscriber’s IP address at the time of the apparent infringement’. Hence the draft IOC places a considerable burden of proof on the subscriber which is not required by the DEA.

<sup>66</sup> **Digital Economy Act 2010**, Section 13/124K, Subsection 2

<sup>67</sup> **Digital Economy Act 2010**, Section 13/124K, Subsection 3 and 6

<sup>68</sup> <sup>68</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 7.24

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Section 13/124K subsection 5 of the DEA also requires that the IOC 'must provide that an appeal on any grounds must be determined in favour of the subscriber unless the copyright owner or internet service provider shows that... the apparent infringement was an infringement of copyright' and 'the report relating to the subscriber's IP address at the time of the infringement'.<sup>69</sup> However the draft IOC does not fully implement these DEA requirements. Section 7.23 of the draft IOC states that:

'a Subscriber Appeal on any grounds may only be determined in accordance with paragraph 7.22.2 (ie must be rejected) if the Appeals Body is satisfied that there is sufficient evidence to show that, as respects any CIR to which the Subscriber Appeal relates or by reference to which anything to which the Subscriber Appeal relates was done (or, if there is more than one such CIR, as respects each of them):  
7.23.1 the apparent infringement was an infringement of copyright, and  
7.23.2 the CIR relates to the Subscriber's IP address at the time of that infringement.'<sup>70</sup>

In doing so the draft initial obligations fails to implement the clear requirement for an appeal on any ground to be determined in favour of the subscriber (that is upheld) unless the copyright owner or the internet service provider can prove that 'the apparent infringement was an infringement of copyright' and 'the report relating to the subscriber's IP address at the time of the infringement'.

The consultation document states that 'The principal grounds of appeal on which a subscriber may rely are set out in section 124K of the 2003 Act. These are reproduced in section 8.12 of the draft Code...'.<sup>71</sup> However the grounds for appeal have not been reproduced in the draft IOC, instead they have been reworded and new requirements have been added. In order to illustrate this Annex A of our consultation response contains the ground for appeal as they appear in the DEA and the draft IOC, plus a revised draft IOC that reproduces the DEA ground for appeal without any alterations.

Section 13/124K subsection 7 of the DEA also requires that 'where the appeal is determined in favour of the subscriber, to direct the copyright owner or internet service provider to reimburse the reasonable costs of the subscriber'.<sup>72</sup> But the draft IOC states that the appeals body may only award such costs 'unless it is satisfied that it would be unjust to give such direction having regard to all the circumstances including the conduct of the parties before and during the proceedings'.<sup>73</sup> This is not required why the DEA and it is unclear why the right of the subscribers to have reasonable cost reimbursed is limited in this way. It is also not clear what Ofcom has in mind in relation to the reimbursement being 'unjust', a term that is not defined in law or the consultation document.

### Recommendation:

- Ofcom needs to make the required provisions in relation the ground for appeal in the IOC

<sup>69</sup> **Digital Economy Act 2010**, Section 13/124K, Subsection 5

<sup>70</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 7.23

<sup>71</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, pg.28

<sup>72</sup> **Digital Economy Act 2010**, Section 13/124K, Subsection 7

<sup>73</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 7.28

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## Data protection

Consumer Focus is particularly concerned about the way in which the consultation document and the draft IOC deal with issues relating to data protection and data retention. The need for compliance with data protection laws is referenced in the consultation document, but at no point is it made clear which data protection laws apply and how compliance with these laws will be ensured. Consumer Focus is also concerned that the Information Commissioners Office has not been closely involved in the establishment of the draft IOC. When the Digital Economy Bill was discussed in parliament data protection was raised repeatedly by parliamentarians and the Government stated that:

'Both internet service providers and copyright owners will have to comply fully with any obligations and duties that apply under the Data Protection Act in respect of information that is part of or associated with a copyright infringement report.'<sup>74</sup>

The Government also gave the following assurance:

'A quick summary of the process that the code must go through will help to explain why. Ofcom will have either to develop or approve a code to underpin the initial obligations. It knows that any code must fully comply with existing legislation, including data protection and privacy, before it submits it to the Secretary of State. But before the code gets the Ofcom stamp of approval, it would have been developed with stakeholders and put out to consultation. The Information Commissioner's Office responded to our earlier consultations on online copyright infringement and I would expect it to be similarly involved in the code consultation, if not the code development process itself.

The code then requires the approval of the Secretary of State before ultimately coming before Parliament for approval. As part of that process we must be sure that it complies with all legislation and not just that concerning data protection or privacy. Therefore, the code will have been developed with stakeholders, have gone through a consultation, had Ofcom approval, and had the Secretary's of State's approval and that of Cabinet colleagues before it reaches Parliament. It is hard to believe that in all that time the important issues of data protection and privacy would not have been fully investigated and checked.'<sup>75</sup>

At this stage it is not clear when Ofcom intends to consider data protection issues in detail.

The DEA requires the IOC to make provisions in relation to 'the means of obtaining evidence of infringement of copyright for inclusion in a report',<sup>76</sup> 'requirements as to the means by which the internet service provider identifies the subscriber'<sup>77</sup> and 'provisions about how internet service providers are to keep information about subscribers'.<sup>78</sup> However the draft IOC does not make these required provisions, which are the most relevant with regard to data protection. Instead the draft IOC provides that in relation to copyright owners gathering evidence of infringement of copyright for inclusion in a

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<sup>74</sup> **Digital Economy Bill, House of Lords Committee, 3<sup>rd</sup> Day, Lord Young for the Government**, 18 January 2010

<sup>75</sup> **Digital Economy Bill, House of Lords Report, 1st Day, Lord Young for the Government**, 1 March 2010

<sup>76</sup> **Digital Economy Act 2010**, Section 7/124E, Subsection 2

<sup>77</sup> **Digital Economy Act 2010**, Section 7/124E, Subsection 3

<sup>78</sup> **Digital Economy Act 2010**, Section 7/124E, Subsection 1

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copyright infringement report and the matching of IP addresses with subscriber details by the internet service provider for the purpose of notifying subscribers of a copyright infringement report received, both the copyright owner and the internet service provider must include 'a statement of compliance with relevant data protection laws' in their 'quality assurance reports'.<sup>79</sup> That is they need to self-certify that they comply with data protection law. Consumer Focus does not believe that this is sufficient or appropriate.

As outlined below there are a number of significant data protection issues in relation to the notification process. Ofcom needs to engage with these issues and establish a clear process for copyright owners and internet service providers which is designed to ensure compliance with relevant EU and UK data protection law. The Data Protection Directive applies to the processing of personal data where such processing is wholly or partly by automatic means, or where the processing is otherwise than by automatic means of personal data which form part of a 'filing system' or are intended to form part of a 'filing system'.<sup>80</sup> Therefore Ofcom needs to clarify how the process established by the IOC ensures that copyright owners and internet service providers comply with the relevant conditions for processing and the rights of individuals in relation to the processing of their personal data as established in the Data Protection Directive.<sup>81</sup> Given that the Data Protection Act does not fully implement this Directive<sup>82</sup> and is likely to be revised in the coming 12 months we would recommend that Ofcom seeks compliance with the Data protection Directive, not the Data Protection Act.

### Recommendation:

- Ofcom should make the required provisions in relation the means of obtaining evidence and matching of IP addresses in the IOC and publish an assessment on how these processes comply with the Data Protection Directive

## How laws on data protection and data retention relate to the notification process

The notification process is clearly subject to EU and UK data protection and retention law. The European Data Protection Supervisor has confirmed this and has stated in his opinion on the Anti-Counterfeit Trade Agreement, February 2010 that a notification process as established in section 3 to 8 of the DEA must comply with the requirements stemming from the right to privacy, as laid down in Article 8 European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights, and stemming from the right to data protection as laid down in Article 8 of the Charter of Fundamental Rights and Article 16 of the Treaty on the Functioning of the European Union, and as elaborated

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<sup>79</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 3.5.6 and 4.5.5

<sup>80</sup> **Data Protection Directive**, Directive 95/46/EC , Article 3

<sup>81</sup> **Data Protection Directive**, Directive 95/46/EC , Article 6 to11

<sup>82</sup> Paul Gershlick, **European Commission gives UK Government two month ultimatum to make Data Protection Act comply with EU Data Protection Directive requirements**, Matthew Arnold & Baldwin, 2 July 2010

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in Directive 95/46/EC and Directive 2002/58/EC.<sup>83</sup> Directive 2002/58/EC also applies because the notification process entails the collection of traffic and communication data.<sup>84</sup>

Consumer Focus therefore asks Ofcom to explicitly confirm that the draft IOC complies with the relevant laws on data protection and retention, and citizens' right to privacy.

### Recommendation:

- Ofcom should undertake and publish a full data protection impact assessment for its draft IOC

## IP address as personal data

During the engagement with Ofcom on the draft IOC Consumer Focus has highlighted repeatedly that the IP address is personal data for the purpose of the notification process implemented by the IOC. However the consultation document and the draft IOC do not acknowledge this and Ofcom has thus far failed to make a public statement to this effect.

The European Data Protection Supervisor has confirmed that the IP address is personal data at all stages of the notification process, ie that the IP address is personal data when collected by copyright owners and their agents as evidence of alleged copyright infringement, and once it is matched by the internet service provider to the name and address of a subscriber. The European Data Protection Supervisor explains that

'Directive 95/46/EC is applicable since the three strikes Internet disconnection policies involve the processing of IP addresses which — in any case under the relevant circumstances — should be considered as personal data... If one considers the definition of personal data provided in Article 2 of Directive 95/46/EC, 'any information relating to an identified or identifiable natural person (data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number', it is only possible to conclude that IP addresses and the information about the activities linked to such addresses constitutes personal data in all cases relevant here. Indeed, an IP address serves as an identification number which allows finding out the name of the subscriber to whom such IP address has been assigned. Furthermore, the information collected about the subscriber who holds such IP address ('he/she uploaded certain material onto the Web site ZS at 3 p.m. on 1 January 2010') relates to, ie is clearly about the activities of an identifiable individual (the holder of the IP address), and thus must also be considered personal data.'<sup>85</sup>

The European Data Protection Supervisor also states that:

'these views are fully shared by the Article 29 Working Party which, in a document on data protection issues related to intellectual property rights stated that IP addresses collected to enforce intellectual property rights, ie to identify Internet users who are alleged to have infringed intellectual property

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<sup>83</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 23

<sup>84</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 29

<sup>85</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 25 to 27

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rights, are personal data insofar as they are used for the enforcement of such rights against a given individual.<sup>86</sup>

In the 'Working document on data protection issues related to intellectual property rights' the Article 29 Data Protection Working Party states that:

'The legitimate purpose followed by right holders to prevent misuse of protected information often results in the tracing of users and the monitoring of their preferences. In particular, the use of unique identifiers linked with the personal information collected leads to the processing of detailed personal data. Directive 95/46 on the protection of personal data provides for several principles that shall be complied with by any right holder in such case where personal data are being processed. Article 2(3) (a) of Directive 2004/48/EC, on the enforcement of intellectual property rights confirmed the principle that the Directive 2004/48/EC does not affect Directive 95/46 and therefore the application of the data protection principles.'<sup>87</sup>

Consumer Focus hopes that in the light of these opinions by European data protection authorities, Ofcom will accept that the IP address is personal data at all stages of the notification process that the IOC is to implement. The IOC will be implemented as secondary legislation and all UK legislation needs to comply with relevant EU law. The Telecoms Package, to be implemented into UK law by May 2012, reiterates:

'Developments concerning the use of IP addresses should be followed closely, taking into consideration the work already done by, among others, the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (2), and in the light of such proposals as may be appropriate.'<sup>88</sup>

### Recommendation:

- Ofcom should redraft the IOC to reflect the fact that the IP address is personal data, particularly in relation to the required provisions in relation to the means of obtaining evidence, the standard of evidence and the matching of IP addresses

## Sensitive data

The consultation also fails to qualify whether the personal data processed by copyright owners and internet service providers amounts to sensitive data. The explanatory notes to the DEA confirm the intent of the Act is to:

'impose obligations on internet service providers ('internet service providers') to:... Keep track of the number of reports about each subscriber, and compile, on an anonymous basis, a list of those ('relevant subscribers') who are reported on above a threshold to be set in the IOC. After obtaining a court

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<sup>86</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 28

<sup>87</sup> **Working document on data protection issues related to intellectual property rights**, Article 29 Data Protection Working Party, 18 January 2006, pg.4

<sup>88</sup> **Telecoms Package**, Universal Service Directive, recitals 50

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order to obtain personal details, copyright owners will be able to take action against those included in the list.<sup>89</sup>

The explanatory notes furthermore state that:

‘...the high costs involved in legal action have deterred copyright owners from enforcing their rights. By allowing copyright owners to target only the most serious repeat infringers, copyright infringement lists provided by internet service providers are intended to make legal action a more attractive and effective tool for copyright owners to use in respect of their copyright.’<sup>90</sup>

The draft IOC confirms this by proposing to include a statement in subscriber notifications to the effect that ‘the Qualifying Copyright Owner may apply to a court for an order for the disclosure of the Subscriber’s identity with a view to bringing proceedings against the Subscriber for copyright infringement.’<sup>91</sup>

According to the Data Protection Directive sensitive data includes:

‘Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority. Member States may provide that data relating to administrative sanctions or judgements in civil cases shall also be processed under the control of official authority.’<sup>92</sup>

The European Data protection Supervisor has also confirmed that in relation to a notification process as established by the online copyright infringement provisions of the DEA:

‘the monitoring would entail the systematic recording of data, some of which may cause people to be brought to civil or even criminal courts... some of the information collected would therefore qualify as sensitive data under Article 8 of Directive 95/46/EC which requires stronger safeguards’.<sup>93</sup>

Therefore Ofcom needs to come to an opinion on whether or not the data processed for the purpose of the notification process is sensitive data and ensure that the IOC makes the necessary provisions in relation to the processing of this data as required by the Data Protection Directive.

### Recommendation:

- Ofcom should make a clear statement on whether some or all of the data processed for the purpose of the notification process is ‘sensitive data’, if this is the case Ofcom needs to redraft the IOC accordingly

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<sup>89</sup> **Explanatory Notes Digital Economy Act 2010**, Topic 2: Online infringement of copyright Background, paragraph 31

<sup>90</sup> **Explanatory Notes Digital Economy Act 2010**, Section 4: Obligation to provide infringement lists to copyright owners, paragraph 45

<sup>91</sup> **Online Infringement of Copyright: Draft initial obligations code**, Ofcom, 28 May 2010, Annex 5, draft initial obligations code, Section 5.16.3

<sup>92</sup> **Data Protection Directive**, Directive 95/46/EC, Article 8(5)

<sup>93</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 23(ii)

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## Monitoring of consumers activities by copyright owners and their agents

According to the European Data Protection Supervisor, copyright owners identify subscribers:

‘using automated technical means, possibly provided by third parties... by engaging in monitoring of Internet users’ activities, for example, via the surveillance of forums, blogs or by posing as file sharers in peer-to-peer networks to identify file sharers who allegedly exchange copyright material.’<sup>94</sup>  
‘After identifying Internet users alleged to be engaged in copyright violation by collecting their Internet Protocol addresses (IP addresses), copyright holders would send the IP addresses of those users to the relevant internet service provider(s) who would warn the subscriber to whom the IP address belongs about his potential engagement in copyright infringement....’<sup>95</sup> In the view of the European Data Protection Supervisor ‘the monitoring of Internet user’s behaviour and further collection of their IP addresses amounts to an interference with their rights to respect for their private life and their correspondence; in other words, there is an interference with their right to private life. This view is in line with the case law of the European Court of Human Rights.’<sup>96</sup>

The European Data Protection Supervisor also emphasises:

‘the far-reaching nature of the imposed measures. The following elements must be mentioned in this regard: the fact that the (unnoticed) monitoring would affect millions of individuals and all users, irrespective of whether they are under suspicion; the fact that the entity making the assessment and taking the decision will typically be a private entity (ie the copyright holders or the internet service provider). The EDPS already stated in a previous opinion his concerns regarding the monitoring of individuals by the private sector (eg internet service providers or copyright holders), in areas that are in principle under the competence of law enforcement authorities.’<sup>97</sup>

The European Data Protection Supervisor also notes that:

‘internet service providers might try to legitimise the processing carried out by copyright holders by inserting clauses in their customer’s contracts allowing the monitoring of their data... However, this practice raises first the basic question as to whether individuals can give consent to internet service providers for a data processing that will be carried out not by the internet service provider but by third parties which are not under the ‘authority’ of the

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<sup>94</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 21

<sup>95</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 22

<sup>96</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 24

<sup>97</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 23(v)

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internet service provider. Second, there is the question of the validity of consent. Article 2(h) of Directive 95/46/EC defines consent as 'any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed'.<sup>98</sup>

'An important point is that in order to be valid, consent, whatever the circumstances in which it is given, must be a freely given, specific and informed indication of the data subject's wishes, as defined in Article 2(h) of the Directive. The EDPS has serious doubts as to whether individuals asked to consent to the monitoring of their Internet activities will have the opportunity to make a genuine choice. Thirdly, it is highly questionable whether any such monitoring could ever be considered necessary for the performance of a contract to which the data subject is a party, as required in Article 7(b) of Directive 95/46/EC, since the monitoring is obviously not an object of the contract entered into by the data subject, but only a means for the internet service provider to serve other interests.'<sup>99</sup>

In the light of this Ofcom ought to assess whether the process established in the IOC complies with the relevant provisions of the Data Protection Directive, and specifically, whether the IOC can establish a process of evidence gathering by copyright owners which would not amount to unnoticed monitoring of millions of individuals. The European Data Protection Supervisor has highlighted other means of collecting evidence and Ofcom should take these into account. Consumer Focus believes that Ofcom should undertake a privacy impact assessment to ensure that the established process does not sanction mass surveillance of consumers by private parties.

### **Recommendation:**

- Ofcom should ensure that the provisions in the draft IOC comply with the Data Protection Directive and the right to privacy as enshrined in the European Convention on Human Rights

## **Data retention in relation to IP addresses by copyright owners and internet service providers**

On the question of data retention the European Data Protection Supervisor notes that:

'Under Directive 2002/58/EC, more in particular its Article 6, traffic data such as IP addresses may only be collected and stored for reasons directly related to the communication itself, including billing, traffic management and fraud prevention purposes. Afterwards, the data must be erased. This is without prejudice to the obligations under the Data Retention Directive which, as discussed, requires the conservation of traffic data and its release to police and prosecutors to aid in the investigation of a serious crime only. In accordance with the above, internet service providers should discard any log file revealing Internet users' activities that is no longer required for the above purposes. Taking into account that log files are not necessary for billing purposes, it would appear that three or four weeks should be sufficient for

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<sup>98</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 54

<sup>99</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 54 to 56

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internet service provider for traffic management purposes. This means that, when contacted by copyright holders, unless such contact occurred within the limited period outlined above, internet service providers should not have the log files linking the IP addresses to the relevant subscribers. Retaining the log files beyond such period should only be done for justified reasons within the scope of the purposes provided by law. In practical terms this means that, unless carried out very quickly, copyright holder's requests addressed to IPSs will not be able to be fulfilled, simply because the internet service provider will no longer have the information. This in itself sets the boundaries of what is meant by acceptable monitoring practices described in the above section.<sup>100</sup>

As and when internet service providers retain information about which IP address has been allocated to their subscribers to access the internet, ie IP log retention, they do so under data retention laws. The following laws apply in these cases: the Data Protection Act 1998, the Regulation of Investigatory Powers Act 2000, the Anti-Terrorism, Crime & Security Act 2001, the Human Rights Act 1998, the Electronic Communications (Universal Service) Order 2003, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, the Privacy and Electronic Communications (EC Directive) Regulations 2003 and the European Union's Data Retention Directive.

Article 6(1) of the privacy directive (2002/58/EC) provides that 'traffic data relating to subscribers and users processed and stored by the providers of a publicly available electronic communications service must be erased or made anonymous... when it is no longer needed for the purpose of the transmission of a communication.' Article 6(2) creates a general obligation to store traffic data to the extent such data is necessary 'for purposes of subscriber billing and interconnection payments' 'up to the end of the period during which the bill may be lawfully challenged or payment pursued.'<sup>101</sup>

In addition to this the Directive 2006/24/EC states that:

'Because retention of data has proven to be such a necessary and effective investigative tool for law enforcement in several Member States, and in particular concerning serious matters such as organised crime and terrorism, it is necessary to ensure that retained data are made available to law enforcement authorities for a certain period, subject to the conditions provided for in this Directive. The adoption of an instrument on data retention that complies with the requirements of Article 8 of the ECHR is therefore a necessary measure.'<sup>102</sup>

The objective of the Directive is to 'harmonise the obligations on providers to retain certain data and to ensure that those data are made available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law'.<sup>103</sup> So in summary, internet service providers are not allowed to retain data such as IP logs other than for the purpose of transmitting the communications,

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<sup>100</sup> **Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA)**, 2010/C 147/01, 22 February 2010, paragraph 57 to 60

<sup>101</sup> **Report 01/2010 on the second joint enforcement action: Compliance at national level of Telecom Providers and ISPs with the obligations required from national traffic data retention legislation on the legal basis of articles 6 and 9 of the e-Privacy Directive 2002/58/EC and the Data Retention Directive 2006/24/EC amending the e-Privacy Directive**, pg.3

<sup>102</sup> **Data Retention Directive**, Directive 2006/24/EC, Paragraph 9

<sup>103</sup> **Data Retention Directive**, Directive 2006/24/EC, Paragraph 21

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billing purposes, and where required to do so in relation to 'serious crimes' as defined by UK law and in compliance with the right to privacy as enshrined in the European Convention on Human Rights.

The Article 29 Data Protection Working Party has found that many member states have not properly implemented EU data retention law<sup>104</sup> and UK data retention law does not specify what 'serious crime' is. Consumer Focus considers it unlikely that non-commercial copyright infringement by consumers, which is a civil matter in UK law, would be regarded as serious crime. In response to a written question the Government has stated that:

'Our ability to lawfully intercept communications and obtain communications data is critical to combating the threat posed by terrorism and in tackling serious and organised crime such as child sex abuse, kidnap, murder and drug related crime.'<sup>105</sup>

The Article 29 Data Protection Working Party takes the position that non-commercial copyright infringement by consumers is not serious crime for the purpose of data retention laws. It states that:

'In this regard, the Working Party notes that the recent Directive 2004/48 of 28 April 2004 on the enforcement of intellectual property rights provides for conditions in which personal data shall be requested by judicial authorities. These authorities may order, on justified and proportionate request, communication of information on the origin and distribution networks of the goods or services which infringe an intellectual property right, when the infringement presents a commercial scale, and without prejudice of principles related to confidentiality of information sources or the processing of personal data. A fair balance shall have to be found between the legitimate interests'<sup>106</sup>

Furthermore the Article 29 Data Protection Working Party warns that:

'...no systematic obligation of surveillance and collaboration can be imposed on internet service providers, pursuant to article 15 of Directive 2000/31 on electronic commerce. internet service providers can neither be obliged, except in specific cases where there is an injunction of enforcement authorities, to provide for a general 'a priori' storage of all traffic data related to copyright. The Working Party has stated at several occasions that 'where traffic data are to be retained in specific cases, there must therefore be a demonstrable need, the period of retention must be as short as possible and the practice must be clearly regulated by law, in a way that provides sufficient safeguards against unlawful access and any other abuse.'<sup>107</sup>

While the draft IOC fails to make the required provisions 'about how internet service providers are to keep information about subscribers', as required by Section 7/124E subsection 3 of the DEA, the current draft IOC places a de facto obligation on qualifying internet service providers to retain the IP logs for the purpose of matching IP addresses provided by copyright owners as evidence for alleged copyright infringement to their subscribers. In doing so the draft IOC appears to be placing a data retention obligation on internet service providers to pursue offences which are not serious crimes.

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<sup>104</sup> **European Data Protection Authorities find current implementation of data retention directive unlawful, Article 29 Data protection Working Party**, Press release, 14 July 2010

<sup>105</sup> **Telecommunications: Databases , Written question James Brokenshire, Answer Mr. Coaker** , 8 October 2008

<sup>106</sup> **Working document on data protection issues related to intellectual property rights**, Article 29 Data Protection Working Party, 18 January 2006, pg.7-8

<sup>107</sup> **Working document on data protection issues related to intellectual property rights**, Article 29 Data Protection Working Party, 18 January 2006, pg.7

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**Recommendation:**

- Ofcom should make the required provisions on how internet service providers are to keep information about subscribers in the IOC
- Ofcom should undertake and publish a full data retention impact assessment for its draft IOC

# Annex A

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## Ground for appeals

The ground for appeal and defences contained in the DEA have not been fully reproduced in the draft IOC that is subject to consultation. To illustrate that please find below the relevant provisions of the DEA, the draft IOC, and the amended draft IOC so that the DEA provisions are fully reproduced.

### The relevant provisions in the DEA 2010

#### Section 7/124 K Subscriber Appeals

(3)The code must provide for the grounds of appeal (so far as an appeal relates to, or to anything done by reference to, a copyright infringement report) to include the following—

(a)that the apparent infringement to which the report relates was not an infringement of copyright;

(b)that the report does not relate to the subscriber's IP address at the time of the apparent infringement.

(5)The code must provide that an appeal on any grounds must be determined in favour of the subscriber unless the copyright owner or internet service provider shows that, as respects any copyright infringement report to which the appeal relates or by reference to which anything to which the appeal relates was done (or, if there is more than one such report, as respects each of them)—

(a)the apparent infringement was an infringement of copyright, and

(b)the report relates to the subscriber's IP address at the time of that infringement.

(6)The code must provide that, where a ground mentioned in subsection (3) is relied on, the appeal must be determined in favour of the subscriber if the subscriber shows that—

(a)the act constituting the apparent infringement to which the report relates was not done by the subscriber, and

(b)the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service.

## The relevant provision in the draft IOC

### Section 7 Subscriber appeals

7.12 The grounds of appeal may include the following:

- 7.12.1 that the apparent infringement to which the CIR relates was not an infringement of copyright;
- 7.12.2 that the CIR does not relate to the Subscriber's IP address at the time of the apparent infringement;
- 7.12.3 that the act constituting the apparent infringement to which a CIR relates was not done by the Subscriber and the Subscriber took reasonable steps to prevent other persons infringing copyright by means of his/her internet access service;
- 7.12.4 that an act or omission by a Qualifying internet service provider or Qualifying Copyright Owner amounts to a contravention of the Code or of an obligation regulated by the Code; or
- 7.12.5 any other ground on which a Subscriber chooses to rely as to why the act or omission should not have occurred.

7.22 On determination of a Subscriber Appeal under paragraph 7.20, the Appeals Body may (subject to the requirements in paragraph 7.20 and 7.21), in relation to a CIR, Notification, inclusion of a Subscriber on a Copyright Infringement List, proposal to include a Subscriber on a Copyright Infringement List or any other act or omission which is the subject of the Subscriber Appeal:

- 7.22.1 uphold the Subscriber Appeal; or
- 7.22.2 reject the Subscriber Appeal.

7.23 A Subscriber Appeal on any grounds may only be determined in accordance with paragraph 7.22.2 if the Appeals Body is satisfied that there is sufficient evidence to show that, as respects any CIR to which the Subscriber Appeal relates or by reference to which anything to which the Subscriber Appeal relates was done (or, if there is more than one such CIR, as respects each of them):

- 7.23.1 the apparent infringement was an infringement of copyright, and
- 7.23.2 the CIR relates to the Subscriber's IP address at the time of that infringement.

7.24 Where a Subscriber Appeal contains a ground set out in paragraph 7.12.1, 7.12.2, 7.12.3, 7.12.4 or 7.12.5 a Subscriber Appeal must be determined in accordance with 7.22.1 if the Appeals Body is satisfied that the Subscriber has shown that, in relation to a relevant CIR:

- 7.24.1 the act constituting the apparent infringement to which the CIR relates was not done by the Subscriber, and
- 7.24.2 the Subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service.

**The draft IOC amended so that the provisions of the DEA on the ground for appeal are fully reproduced (changes highlighted in grey)**

7.12 The grounds of appeal may include the following:

- 7.12.1 that the apparent infringement to which the CIR relates was not an infringement of copyright;
- 7.12.2 that the CIR does not relate to the Subscriber's IP address at the time of the apparent infringement;
- 7.12.3 that the act constituting the apparent infringement to which a CIR relates was not done by the Subscriber and the Subscriber took reasonable steps to prevent other persons infringing copyright by means of his/her internet access service;
- 7.12.4 that an act or omission by a Qualifying internet service provider or Qualifying Copyright Owner amounts to a contravention of the Code or of an obligation regulated by the Code; or
- 7.12.5 any other ground on which a Subscriber chooses to rely as to why the act or omission should not have occurred.

7.22 On determination of a Subscriber Appeal under paragraph 7.20, the Appeals Body may (subject to the requirements in paragraph 7.20 and 7.21), in relation to a CIR, Notification, inclusion of a Subscriber on a Copyright Infringement List, proposal to include a Subscriber on a Copyright Infringement List or any other act or omission which is the subject of the Subscriber Appeal:

- 7.22.1 uphold the Subscriber Appeal; or
- 7.22.2 reject the Subscriber Appeal.

7.23 A Subscriber Appeal on any grounds must be determined in accordance with paragraph 7.22.1 unless the Appeals Body is satisfied that the copyright owner or internet service provider have shown that, as respects any copyright infringement report to which the appeal relates or by reference to which anything to which the appeal relates was done (or, if there is more than one such report, as respects each of them) that:

- 7.23.1 the apparent infringement was an infringement of copyright, and
- 7.23.2 the CIR relates to the Subscriber's IP address at the time of that infringement.

7.24 Where a Subscriber Appeal contains a ground set out in paragraph 7.12.1 and 7.12.2 a Subscriber Appeal must be determined in accordance with 7.22.1 if the Appeals Body is satisfied that the Subscriber has shown that:

- 7.24.1 the act constituting the apparent infringement to which the CIR relates was not done by the Subscriber, and
- 7.24.2 the Subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service.



## **Consumer Focus response to Ofcom consultation – ‘Online Infringement of Copyright and the Digital Economy Act 2010 Draft initial obligations code’**

If you have any questions or would like further information about our response please contact Saskia Walzel, Policy Advocate, by telephone on 020 7799 7977 or via email: [saskia.walzel@consumerfocus.org.uk](mailto:saskia.walzel@consumerfocus.org.uk)

[www.consumerfocus.org.uk/campaigns/copyright](http://www.consumerfocus.org.uk/campaigns/copyright)

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