

By e-mail

18 July 2012

Mr Justin Le Patourel,  
Head of Online Copyright,  
Floor 2, Internet Policy Team,  
Ofcom,  
Riverside House,  
2A Southwark Bridge Road,  
London SE1 9HA

Dear Mr Le Patourel,

**RESPONSE BY THE BRITISH HOSPITALITY ASSOCIATION, THE  
BRITISH BEER AND PUB ASSOCIATION, AND THE BRITISH HOLIDAY  
AND HOME PARKS ASSOCIATION TO THE OFCOM CONSULTATION ON  
THE ONLINE INFRINGEMENT OF COPYRIGHT AND THE DIGITAL  
ECONOMY ACT 2010**

**INTRODUCTION**

1. The three associations listed below are responding to the consultation on three specific points: first, the uncertainty as to whether their members are to be treated as downstream Internet Service providers and thus not subject to the Copyright Infringement Report (CIR) regime or as Subscribers and thus subject to the CIR regime; second, the implications of restricting the wi-fi exemption to public wi-fi services; and, finally, the twenty day limit for appealing against a CIR. This is all against the background that it is likely to be customers breaching copyright, not the hospitality businesses themselves.

**THE THREE ASSOCIATIONS**

2. The British Hospitality Association represents the hotel, restaurant and catering industry. Our members operate some 40,000 establishments with a turnover of around £25 billion and employ an estimated 500,000 people.

3. The British Beer and Pub Association (BBPA) represents brewing companies and their pub interests, and pub owning companies, accounting for 98% of beer production and around two thirds of the 52,000 pubs in the UK. The pub sector contributes over £22 billion to the economy and employs in the region of 600,000 people. Over 80% of pubs (i.e. around 45,000 outlets) are small businesses which are independently managed or run by self-employed licensees.

4. The British Holiday and Home Parks Association (BH&HPA) is the national trade body representing developers and operators of holiday, caravan and chalet parks and residential home parks in the UK. The Association represents an industry which accounts for a tourist spend of some £2.6 billion each year, accommodating some 20 per cent of all holiday bed nights in the UK. The industry comprises holiday chalets, caravan holiday homes, lodges, touring caravans, tenting and all types of self-catering accommodation. The BH&HPA membership owns and manages an estimated 80 per cent of the total licensed caravan and self-catering ‘on-site’ pitches in the UK.

5. The BH&HPA estimates that there to be some 3500 holiday parks geographically dispersed to the coastal and rural areas that are attractive to holiday makers. The industry includes well known brands but the majority of the 3500 businesses in the sector are SMEs or micro-enterprises, usually independently owned and managed as a family concern.

### **ISP OR SUBSCRIBER?**

6. The consultation presents a confusing picture, thus paragraph A5.40, in relation to the provision of internet services to customers:

“Providers of internet access 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. This will mean that a very broad range of providers are ISPs for the purposes of implementing the DEA provisions .... For example, a commercial enterprise like a hotel or café providing Wi-Fi to its customers is likely be an ISP; “

7. But paragraph A5.53, relevant to the position of the many establishments which receive internet access for internal use, such as receiving bookings or transmitting data to/from a head office, as well in order to “pass access on” to customers, says:

“We consider that a person or an undertaking receiving an internet access service for its own use (or that of its employees) is a subscriber, even if they also make access available to third parties and, in that regard, constitute communications providers potentially subject to general conditions set under section 45 CA03.”

8. It is totally unclear how the main ISPs operating the CIR regime will know which of their customers in the hospitality industry come within paragraph A5.40 and how many within A5.53. It has been suggested that hotels, restaurants, cafes and pubs should contact their main ISP ahead of the introduction of the CIR regime to establish the position, but there are perhaps 200,000 separate hospitality businesses in the United Kingdom and over 300,000 separate hospitality establishments. The cost and resource implications of them all seeking confirmation of their position (or, more likely, of most of them failing to do so and risking falling, rightly or wrongly, into the CIR regime) should be looked at as a matter of urgency.

## **THE WI-FI EXEMPTION**

9. It was initially understood that the present consultation exempted all wi-fi services, which would have been a relief to many pubs and holiday parks in particular. However, it now appears that the exemption is more restricted. Thus, paragraph 3.98 says:

“To be clear, the initial obligations will still apply to the provision of a fixed internet access service which is conveyed by physical means (for example, copper, fibre or cable) to the subscriber’s premises, but where the subscriber makes use of Wi-Fi for conveyance within the premises.”

10. We understand from this that, unless an establishment, such as a pub, offering wi-fi to customers can prove to its main ISP that it is itself an ISP rather than a subscriber, it will be subject to the CIR regime.

## **TWENTY WORKING DAYS**

11. The time now being allowed for subscribers to appeal against a CIR- twenty working days- is likely to prove insufficient in many cases. Two specific difficulties can arise in the case of the hospitality industry- first, it may take some time to track down which customer was responsible for the copyright infringement and to provide proof that (clause 25 (c) of the draft Statutory Instrument):

“the act constituting the apparent infringement to which a copyright infringement 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;”

12. Second, there are thousands of chain establishments in hotels, restaurants and public houses: if a CIR goes to a head office, it will take time to check the position with the individual establishment; if it goes to the establishment, handling with the head office will again take time and resources.

## **CONCLUSION**

13. There needs to be greater clarity for our members ahead of the introduction of the Code as to whether they are ISPs or subscribers.

14. The wi-fi exemption should apply to all wi-fi services.

15. The appeal period of twenty working days is insufficient and should be extended.

16. We confirm that the three associations have no objection to this response being made publicly available. We would add that the consultation period has been very short for reasons that are not apparent.

Yours faithfully,

MARTIN COUCHMAN  
Deputy Chief Executive  
British Hospitality Association

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The British Hospitality Association is a company limited by guarantee.  
Company Registration: 109030.

On behalf of:

British Hospitality Association;  
British Beer and Pub Association;  
British Holiday and Home Parks Association.