

Online Infringement of Copyright and the Digital Economy Act 2010 Draft Initial Obligations Code

30 July 2010

Introduction

KCOM Group delivers communications services to a range of businesses and consumers throughout the UK under a number of different brands all of which offer broadband connectivity to end-users. Kcom provides communications services for national multi-site enterprise and public sector organisations across the UK. In Hull and East Yorkshire, KC provides a range of communications services to businesses and consumers. Nationally, Eclipse Internet delivers a portfolio of internet based communications services with a focus on the SME market.

Ofcom's proposals for an Initial Obligations Code are therefore of great interest to KCOM and we welcome the opportunity to comment on the draft Code. In particular, we highlight the following:

- KCOM Group delivers services through three ISPs – Karoo, Eclipse and Kcom. Both commercially and operationally these businesses are managed separately serving distinct customer segments and geographies. The Code therefore has the potential to have significant impacts for our business and for smaller ISPs such as ourselves the costs implications of a requirement to comply with the Code would be material.
- KCOM therefore agrees with the proposed qualification criteria for the first notification period under the Code and a threshold of ISPs with 400,000 or more Subscribers for application of the Code. Given the evidence currently available to Ofcom we believe that this is a proportionate approach.
- Further time is needed to deal with the operational aspects of compliance with the Code. While the Digital Economy Act specifies a time by which the Code must be in place, it does not state that notifications under the Code must start from that date. To ensure that a workable and robust process is in place an additional implementation period of 6 months should be allowed once the Code is finalised.
- In particular, we have concerns regarding the reliance on IP addresses for identification of a Subscriber who is alleged to have engaged in activity which infringes copyright. Further detail is required regarding the process Qualifying Copyright Owners will use to identify IP addresses and recognition of the factors which limit an ISP's ability to unequivocally match an IP address to a particular Subscriber.
- The information which has been provided regarding the appeals process is inadequate. It should be made clear how the Appeals Body will be appointed and its procedures agreed. This should be done in consultation with all stakeholders. Additionally the draft Code itself does not include all of the provisions required by the Digital Economy Act, most notably who has the burden of proof in respect of any appeal.

Responses to Specific Questions

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

KCOM agrees that Copyright Owners should only be able to take advantage of the online copyright infringement procedures set out in the DEA and the Code where they have met their obligations under the Secretary of State's Order under section 123 of the 2003 Act.

The number of notifications which a Copyright Owner anticipates sending to an individual ISP who is covered by the Code will have a fundamental impact in terms of that ISP's costs and resources and how it organises its operations in order to process those notifications. It is therefore vital that ISPs have access to as much information as possible in advance of the beginning of any given notification period.

We do however have some concerns as to how this system will operate in practice. Firstly, there is nothing to stop those who are not Qualifying Copyright Owners from continuing to send notifications and other correspondence to ISPs. While ISPs would have no obligation to act on these notifications additional work will result from having to identify and remove these notifications. As a general point we believe that organisations operating outside of the Code will continue to be a source of concern for ISPs and their Subscribers.

Secondly, there is no provision for the review of forecasts, or any measures designed to incentivise the provision of accurate forecasts. We believe that this is something that Ofcom should consider addressing, particularly where a Copyright Owner under-forecasts thereby minimising their upfront costs. This could well result in ISPs incurring significant additional costs in order to deal with higher volumes of notifications but without any mechanism which would allow recovery of those additional costs.

Question 3.2: Is two months an appropriate lead time for the purposes of planning ISP and Copyright Owner activity in a given notification period? If a notification period is significantly more or less than a year, how should the lead time be varied? Please provide supporting evidence of the benefits of an alternative lead time.

Working on the assumption that as far as possible notification processes will be automated we believe that the need for ISPs to assess any necessary systems development against forecast notifications means that two months is not an adequate lead time for the purposes of planning. This is particularly the case in respect of the initial notification period in which the Code is operational when ISPs will first have to establish the appropriate systems and processes in order to deal with Copyright Infringement Reports. Copyright Owners may argue that ISPs could now be carrying out preparatory work, but until a number of aspects of the Code become clearer it would be premature for ISPs to do so. Not least because the threshold for application of the Code is subject to consultation and ISPs have no clear view of the number of "Qualifying Copyright Owners" they will have to deal with.

We believe that a period of at least 6 months would be appropriate for the purposes of planning for initial application of the Code. We do not foresee that this creates issues in terms of the timing set out in the Digital Economy Act which specifies a timescale for establishing a Code rather than a time by which the notification process must be active.

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KCOM accepts that a lower lead time should apply for future forecasts, however would urge Ofcom to consider some sort of rolling forecast process. Rolling forecasts are an accepted aid to planning in the communications industry and we believe they would greatly increase the accuracy of forecasts and provide ISPs with a clearer view of anticipated volumes of Copyright Infringement Reports.

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

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

KCOM agrees with Ofcom's approach to setting a threshold for initial application of the Code and with the proposed qualification criteria for the first notification period under the Code. In particular we believe that the breakpoint of 400,000 Subscribers is appropriate given that the ISPs captured together account for 96.5% of the residential and SME business broadband market.

We believe that the cost implications for smaller ISPs provide further justification for setting the threshold at the level proposed by Ofcom. We provide further confidential information on anticipated costs in Annex 1.

We also understand that although not clear from the consultation or the draft Code, Ofcom intends that the number of Subscribers which an ISP has should be calculated on a group basis rather than for each individual company or brand which offers broadband services. So if the Code were applied to KCOM, the number of Subscribers would be calculated taking to account Karoo, Eclipse and Kcom Subscribers.

KCOM not does believe that this is the appropriate way in which to calculate the number of Subscribers which an ISP has. We provide broadband services through three distinct business channels, Karoo which provides services to residential and business customers in the Hull area, Eclipse which focuses on providing services to SMEs in the national market and Kcom which provides services to national multi-site enterprise and public sector organisations across the UK. These businesses are very much run as separate entities with distinct customer bases defined not only by type of customer but also geographically. These businesses are operated separately both commercially and operationally, most significantly they have each have their own Customer Services operations. If KCOM were to be caught by the provisions of the Code simply on the basis of the combined KCOM Group customer base we would incur significant additional costs in establishing the appropriate processes for all of our businesses and ensuring that Customer Services support for the Code is provided across all three businesses.

Finally, we believe that the proposed qualification criteria provide a good starting point for testing the Code and the processes it entails. Given the complexities involved it would be sensible to take a limited approach to the launch of the Code and the imposition of its obligations in order to ensure that any problems can be identified and resolved before deciding the obligations should be more widely imposed.

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

KCOM accepts that Ofcom needs to regularly review application of the Code. However, to provide certainty for ISPs and Copyright Owners Ofcom should provide further detail of how and when it envisages any review taking place. For example, we believe it would be premature for Ofcom to begin a review of application of the Code until it has been in effect for a period of at least 9 months. This would ensure that the process has had some time to "bed-down", that some judgement can be made on the accuracy of forecasts of levels of Copyright Infringement Reports and of cost estimates and that the overall impact of the notification process on the level of online copyright infringement can be assessed.

We also note that we would expect any review and resulting amendment of the Code to be subject to consultation with all stakeholders, including ISPs, Copyright Owners and Subscribers.

We welcome Ofcom's acknowledgement that where there is a wholesale and a retail provider of internet access, the wholesale provider does not have obligations to comply with the Code on the basis that the downstream provider is not a "Subscriber". However, we do not believe that the consultation document recognises the complexities innate in the wholesale provision of services to support retail broadband offerings. Wholesale providers take a number of different approaches to the allocation of IP addresses and recording the owner of those addresses on RIPE. Additionally there are a number of ways in which a "wholesale" service might be provided, ranging from the provision of access to enable a competing provider to supply its own infrastructure based services to a pure resale model.

Whilst we are not suggesting that a prescriptive approach should be taken as to how ISPs and wholesale providers should address these issues, Ofcom needs to consider further how reliance on wholesale services from another provider impacts on the information available to ISPs, their ability to process Copyright Infringement Reports and any changes they may have to make to the arrangements they have in place with their wholesale providers in order to ensure that are able to comply with the provisions of the Code.

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

We note that Ofcom's interpretation and definition of a "Communications Provider" and "Subscriber" is consistent with the Communications Act 2003. However, the proposed definition of "Subscriber" is inconsistent with the definition of "Subscriber" contained in the General Conditions. Ofcom may wish to consider whether this has the potential to cause issues – a broadband Subscriber is not the same as a telephony Subscriber.

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

KCOM believes that it is vital that a standard form of CIR is agreed. Our experience of other processes which require matching of customer information based on a notification, most notably RIPA notifications, shows that the use of non-standard notifications causes real issues and challenges, particularly with regard to interpretation. One key example of this is confusion regarding the time at which the data sought was generated. When requests for IP data originate from the US we often find that times have not been converted into UTC resulting in additional work being undertaken in order to process the request. Without a standard format for CIRs we estimate

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that processing costs could be up to 15% higher than they would be if a standard form were required. In Annex 1 we provide an indication of the percentage of RIPA requests we currently reject and those which return no data.

In terms of the information to be included in a CIR, we believe that it would be helpful if CIRs contained a telephone contact so that requests can be validated as genuine and having originated from the Qualifying Copyright Owner. We also note that the Code does not specify the method of delivery for CIRs – post, fax, email. This is important in terms of timeliness of notification and in validating delivery of the notice and should be specified in the Code.

More generally we do have concerns that the only information specified in the CIR which will enable an ISP to identify a Subscriber is effectively the IP address. We do not believe that on its own an IP address provides sufficient evidence that a particular Subscriber has engaged in online activities which infringe copyright, particularly when it is unclear what processes Qualifying Copyright Owners will go through in order to identify a particular IP address they believe is associated with copyright infringement. We are also concerned that Ofcom has not identified the issues which the use of dynamic IP addresses has the potential to cause in matching CIR data to Subscribers.

Finally, while we believe that we would be able to make use of current systems to process CIRs this is not without challenges and the need for some systems development which will incur costs. Further confidential information is provided in Annex 1.

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

KCOM agrees with the quality assurance approach proposed by Ofcom. The accuracy and robustness of evidence gathering by Qualifying Copyright Owners will be key in ensuring that the notification process is successful and does not result in an undue burden being placed on ISPs having to deal with invalid CIRs.

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

KCOM agrees that it is appropriate for Copyright Owners to be required to send CIRs within 10 working days of the day on which evidence is gathered. We are unclear however as to how long on average it will take a Copyright Owner to compile the information required by paragraph 3.3 of the proposed Code – we assume that this evidence will not all be available on the day of the alleged infringement taking place. It would be useful to understand the likely time a Copyright Owner will take to gather evidence in order to understand how long after an alleged infringement a customer might reasonably expect to receive a notification.

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

We agree that ISPs should have the ability to reject invalid CIRs and a period of ten working days would seem reasonable for notifying the Copyright Owner. We refer Ofcom back to our comments regarding the importance of standardising CIRs and the potential for incorrect as well as incomplete information to invalidate CIRs.

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One further point we believe should be made clear in the Code is that Copyright Owners should not be able to resubmit a CIR once rejected. We can envisage a situation where a Copyright Owner reissues a CIR when it is initially rejected for having incomplete information. The ability to reissue CIRs would not create the right incentives for Copyright Owners to provide full and accurate information in the initial CIR and therefore it would not be appropriate to allow Copyright Owners to reissue a CIR once rejected.

Ofcom does not address the issue of costs associated with rejected CIRs and we refer again to our experience with notifications received under RIPA. In order to create the right incentives we believe that ISPs should not have to bear any costs in respect of invalid CIRs. Our experience shows that a significant number of the reports of alleged infringement we currently receive are deficient and if the proportion of invalid CIRs reflected current levels then this would generate significant costs for ISPs. For these reasons the costs associated with invalid CIRs and how they will be covered is key.

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

KCOM accepts that it is reasonable that the processes and systems used by ISPs to identify Subscribers should be subject to a degree of quality assurance scrutiny. However, any requirement placed on ISPs must be proportionate and must not result in significant additional costs for ISPs. We are particularly concerned that it is not clear from Ofcom's consultation what base standards would be acceptable and therefore an ISP cannot know what they are being measured against and what would constitute grounds on which Ofcom might direct an ISP to undertake maintenance or enhancement of its processes and systems. We would like to understand how Ofcom intends the relevant standards will be developed.

We also note that if caught by the Code we would expect to use the systems we use for RIPA requests. One point we would make in respect of the certifications which Ofcom is proposing ISPs must provide is that we cannot guarantee that processes and systems are accurate in matching information provided in a CIR to a Subscriber account. We are not expected to do this when dealing with requests from law enforcement agencies and are concerned about the legal implications of being required to do so. We believe the level of comfort which can be provided by an ISP merits further consideration in view of the limitations inherent in the ability to correctly identify a single Subscriber through an IP address alone.

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

KCOM believes that the notification process proposed by Ofcom is reasonable however, we do have concerns regarding possible development costs to ensure notifications are issued in accordance with the process. We provide further confidential information in Annex 1.

Question 5.4: Do you believe we should add any additional requirements into the draft code for the content of the notifications? If so, can you provide evidence as to the benefits of adding those proposed additional requirements? Do you have any comments on the draft illustrative notification (cover letters and information sheet) in Annex 6?

KCOM sees merit in standardising the notifications, and believes that the illustrative letters provided by Ofcom provide a very good starting point. We welcome Ofcom's acknowledgement of the fact that ISPs have their own style and communication methods with their Subscribers and

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believe that it should be possible to find a middle ground which specifies a degree of standardisation but also enables individual ISPs to personalise communications or provide additional information as appropriate.

We suggest that it may be useful for letters to reference ISPs' acceptable use policies as something which potentially has an impact on the contractual relationship with a Subscriber where a broadband connection is used in ways which infringe copyright. We would also suggest that it would be useful for Ofcom to test the draft notifications with customers in order to assess understanding and whether there is identify further information they might find useful.

One final point of concern we have is that given the notification and information sheet will be sent by the Subscriber's ISP the main point of contact for customers wishing to find out more information will invariably be their ISP. We fully expect that notifications will result in a high number of queries from customers which could result in ISPs incurring significant Customer Services costs. Further confidential information on potential costs is detailed in Annex 1.

Conversely the only provision which we believe could point Subscribers to the content industry for more information is the reference in the information sheet to where information can be obtained on legal ways of accessing sharing online content. ISPs will effectively bear the burden of educating consumers for the benefit of Copyright Owners. We would urge Ofcom to consider ways in which the burden might be shared more evenly between ISPs and Copyright Owners.

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

Ofcom has proposed that the threshold for inclusion of a Subscriber on a Copyright Infringement List is the Subscriber being sent a Third Notification within the previous 12 months and the Copyright Owner requesting the list has sent at least one CIR relating to that Subscriber within the previous 12 months. This seems a reasonable threshold.

We stress that the second requirement linking a particular Copyright Owner to a Subscriber is particularly important in order to avoid the possibility of "fishing expeditions" by Copyright Owners. In this regard, Ofcom must consider the implications in respect of requests for CIRs from those who are authorised to act on behalf of a number of others and as a result are "Copyright Owners" for the purposes of the Code. We are concerned that this might result in extensive lists of Subscriber information being provided to one Copyright Owner acting on behalf of others with the risk of information being shared inappropriately between the various parties.

KCOM does not agree that a period of five days is adequate to provide a Copyright Infringement List. The period for provision of a Copyright Infringement List should reflect the possible complexities of compiling such a list – information relating to both Subscribers and Copyright Owners will need to be filtered to ensure that any list provided contains the correct information. At the very least for consistency a period of 10 days should be allowed to mirror the time available to Copyright Owners to produce CIRs.

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

KCOM agrees that there should be an appeal mechanism available to Subscribers but believes that the provisions of the draft Code concerning appeals require substantial reworking to ensure

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that they meet the requirements of the Digital Economy Act. Additionally we are very concerned about the lack of detail Ofcom has provided regarding the proposed appeals process and the burden that it place on ISPs. We understood that Ofcom originally proposed that there would be a separate consultation on the appeals process however this does not seem to be referenced in this consultation. There are a number of aspects of the proposed appeals process which would benefit from further consultation.

Our main concern is that the draft Code does not set out all of the detail which section 124K of the Communications Act 2003 (as inserted by the Digital Economy Act 2010) requires. In particular sections 124K(5) and (6) have not been addressed in the draft Code. These sections address the issue of burden of proof and specifically state when appeals should be determined in favour of a Subscriber. Section 124K(5) requires that the Code must provide that an appeal on any grounds must be determined in favour of the Subscriber unless the Copyright Owner or ISP shows that the apparent infringement was an infringement of copyright and that the report in question relates to the Subscriber's IP address at the time of that infringement. Additionally, section 124K(6) states that the Code must provide that where a Subscriber appeals on the allowable grounds then the appeal must be determined in favour of the Subscriber if the Subscriber shows that the act constituting the alleged infringement to which the report relates was not done by the Subscriber and the Subscriber took reasonable steps to prevent others infringing copyright by means of their internet access service.

These are fundamental aspects of the appeals process and clearly were intended by the Government to be included in the Code, yet the Code as currently drafted does not include these provisions. Where a Subscriber is essentially being accused of acting illegally and ultimately could have action taken against them in the courts it is vital that it is clear where the burden of proof lies. We do not believe that it is sufficient for these issues to be left to be specified in the Appeals Body procedures.

More generally we have concerns as to how the Appeals Body will be appointed and its procedures agreed, an issue on which Ofcom provides no guidance. All stakeholders should be informed of the steps that Ofcom will take to appoint the Appeals Body, agree and approve the procedures of the Appeals Body and the timing for this. We would suggest that the procedures of the Appeals Body should be subject to a degree of consultation.

As we have had no visibility of the steps which Ofcom has taken or is planning to take to appoint the Appeals Body and agree its procedures we also have serious reservations as to whether it will be established concurrent with the anticipated start date for the notification process. It would not be acceptable for the notification process to come into effect until the Appeals Body is appointed and its procedures agreed.

It is also disappointing that we currently have no conclusion on the issue of how the costs of the Appeals Body will be met. KCOM is concerned that appeals could generate significant additional work for ISPs, both in terms of collating and providing information to the Appeals Body and more importantly in providing customers with information and guidance in respect of the appeals process. This second point is important – given that the notification regarding alleged infringements has been sent by their ISP we anticipate that a Subscriber's first port of call for information pertaining to the appeals process will be their ISP. This will place a further burden on ISP Customer Services functions in managing their obligations under the Code. It is also a further reason why it is imperative that the Appeals Body is established before any notifications are sent in order to provide Subscribers with an independent source of information concerning the process.

Finally, KCOM is concerned about a Subscriber's ability to effectively use the appeals process. The proposed grounds of appeal presuppose some degree of understanding of copyright and the

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basis on which it is being argued a particular Subscriber has allegedly infringed copyright. We can envisage that many of those with legitimate appeals will simply lack the knowledge to effectively argue their case to the required standard without assistance, particularly as submissions are only in writing. Again, this is likely to result in further approaches to a Subscriber's ISP, raising the issue of how involved an ISP can legitimately become on behalf of its Subscriber given its own involvement in the process which has given rise to the appeal. It also adds further weight to the importance of the Code including provisions which specify the matters addressed in section 124K(5) and (6) of the Code, namely when appeals should be determined in favour of Subscribers.

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

KCOM generally agrees with Ofcom's proposed approach to administration, enforcement, dispute resolution and information gathering however does have some comments on some of the specific provisions of the draft Code.

The Code gives Ofcom potentially very wide powers in respect of information gathering and we are particularly concerned about the potential impact for ISPs. We anticipate that Ofcom will carry out regular reviews and it would be helpful in terms of internal planning to understand how Ofcom's review process will work. Information requests can create a substantial amount of work for ISPs and any clarification from Ofcom regarding the likely timing of requests for information under the Code would be welcome.

The Code is inconsistent in references to Copyright Owners and ISPs. Some paragraphs specify they apply in respect of "Qualifying Copyright Owners" while others simply apply to "Copyright Owners". All the provisions of paragraph 9 extend to "ISPs" rather than "Qualifying ISPs". We believe that all provisions should refer to "Qualifying Copyright Owners" and "Qualifying ISPs".

The enforcement and dispute processes are unclear and require revision to ensure that they provide a clear framework for dispute resolution and enforcement action by Ofcom. Paragraph 9.4 states that Ofcom can take enforcement action where there are reasonable grounds to believe that a person who has received a direction from Ofcom in accordance with paragraph 9.10 has breached that direction. We have assumed the reference to a "direction" actually relates to a "Final Enforcement Notification" under paragraph 9.4 but note that it might be intended to refer to a direction issued pursuant to paragraph 9.19 which is concerned with dispute resolution and allows directions to be issued. The paragraphs concerned with enforcement also refer to a number of different enforcement notifications – "Notice of Enforcement", "Draft Enforcement Notification" and "Final Enforcement Notification". These are all undefined terms and it is unclear in which circumstances these differing notifications will be issued.

We note that Ofcom has considered the possibility of issuing guidelines with regard to enforcement and dispute resolution and would welcome this additional guidance.