



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

	Consultation
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Section 1

Executive Summary

- 1.1 We are consulting on how Ofcom proposes to give effect to measures introduced in the Digital Economy Act 2010 (“DEA”) aimed at reducing online copyright infringement. Specifically, we are seeking views on a code of practice called “the Online Copyright Infringement Initial Obligations Code”.
- 1.2 The DEA imposed new obligations on Internet Service providers (“ISPs”) to send notifications to their subscribers following receipt of reports of copyright infringement from Copyright Owners. ISPs must also record the number of reports made against their subscribers and provide Copyright Owners on request with an anonymised list which enables the Copyright Owner to see which of the reports it has made are linked to the same subscriber – also known as the ‘copyright infringement list’.
- 1.3 The DEA gave Ofcom duties to draw up and enforce a code of practice (“the Code”). The DEA is very clear on how Ofcom should implement many elements of the measures, but where there is discretion the interests of citizens and consumers are central to Ofcom’s approach. We propose a system of quality assurance reporting to ensure that where allegations are made against subscribers they are based upon credible evidence, gathered in a robust manner. We also propose that the independent appeals body, which Ofcom is required to establish, should adopt specific measures to protect subscribers during the hearing of appeals, including a right to anonymity.
- 1.4 We set out a draft Code in this document which covers, in particular, the provisioning and handling of copyright infringement reports. We also propose which ISPs should initially participate in the code, the process they should use to notify subscribers alleged to have infringed copyright and the threshold for including subscribers on a copyright infringers list.
- 1.5 We set out a three-stage notification process for informing subscribers of infringements through notifications and propose that subscribers, following receipt of a third notification, may be included in a copyright infringement list requested by a Copyright Owner, which has made at least one report against them. We propose that such notifications should be accompanied with easy to understand information on the nature of the allegations made against the subscriber and on what actions a subscriber can take, both to challenge the allegation and to protect their network from being hijacked for the purposes of infringement.
- 1.6 As regards those ISPs to whom the Code should apply, the guidance from Government on how we should implement the measures is very clear. The intent is that small and medium sized ISPs should not initially fall within the scope of the Code. However, should evidence be presented that infringement was a significant issue on those ISPs then we will consider bringing them within the scope of the Code. Our proposal is that fixed ISPs with more than 400,000 subscribers should initially be subject to the Code. We believe this approach to be appropriate because it focuses the obligations on the major ISPs who provide internet access to more than 96% of the UK market, it is consistent with the Government’s intentions and, based on evidence received from copyright owners, the vast majority of alleged infringement is amongst subscribers of those ISPs. Mobile operators are initially excluded, due in part to current mobile technologies being less conducive than fixed

for copyright infringement. However, we will review, on a regular basis, whether to extend coverage of the code.

- 1.7 The DEA prescribes additional provisions for the Code to include measures for an independent subscriber appeal mechanism for subscribers against acts taken under the Code. The DEA also requires Ofcom to include arrangements for enforcement in the Code and provision for dealing with industry disputes. The Code will also incorporate provisions in relation to the sharing of costs as set out in secondary legislation made by the Government.
- 1.8 While some of these latter measures are reflected at a high-level in this consultation, their details will be subject to separate consultations and discussions with stakeholders over the summer and we encourage stakeholders to respond to these, as appropriate. We are required to have made a code by January 8th unless the Secretary of State extends this timetable. We currently anticipate meeting this timetable, but this is subject to the outcomes of consultation, the making by Government of a cost sharing statutory instrument, notification to the European Commission and securing Parliamentary approval of the Code.
- 1.9 Whilst this document focuses on the Code of practice, we note that its measures were always expected to be complemented by a wider set of activity on online copyright infringement including consumer education, the promotion of lawful alternative services and targeted legal action against serious infringers. We therefore intend to monitor how these develop and, in accordance with additional obligations placed on Ofcom in the DEA, we will report regularly to Government on both the effectiveness of the code of practice and also on these broader measures.
- 1.10 We welcome responses to this consultation by 30th July 2010.

Section 2

Introduction

Purpose of this consultation

- 2.1 The Digital Economy Act (DEA) was passed by Parliament in April 2010.¹ It grants Ofcom new responsibilities for implementing measures aimed at significantly reducing online copyright infringement.
- 2.2 These measures form part of a multi-pronged approach by Government aimed at reducing online copyright infringement, through enforcement, educating consumers about copyright, and the encouraging industry to develop lawful alternatives.
- 2.3 As part of this approach, the DEA gave us new duties to draw up and enforce obligations in relation to online infringement of copyright through a code of practice called the Online Copyright Infringement Initial Obligations Code. This document sets out our views on the provisions which should be included in the Code and provides stakeholders with the opportunity to comment on draft provisions.
- 2.4 Section 3 sets out our proposals for the application of the Code to Copyright Owners and ISPs. In summary, we propose that the Code should, to be consistent with the Government's intentions, apply initially to fixed ISPs who have a subscriber base of more than 400,000 subscribers. We will keep the scope of the application of the Code under review and extend it should this become appropriate. The Code also proposes requirements that a Copyright Owner must meet in order to benefit from its provisions.
- 2.5 Section 4 sets out our proposals with regard to the Copyright Infringement Reports (CIRs) that Copyright Owners will generate and send to ISPs. Our proposals set out a minimum level of information which will need to be included in a CIR and a requirement to provide quality assurance reports in order to ensure that the underlying evidence gathering is robust and accurate.
- 2.6 Section 5 sets out our proposals in relation to ISPs 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. In order that the identification process is sufficient to ensure that subscribers receiving notifications have been reliably identified, we propose that ISPs should have in place effective technical systems to match IP address allocation to subscribers.
- 2.7 Section 6 sets out our proposals for Copyright Infringement Lists, i.e. the anonymised lists that Copyright Owners will be able to request from ISPs. 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.
- 2.8 Section 7 sets out our proposals with regard to subscriber appeals. Ofcom is required to ensure that there is an independent appeals body which we shall appoint in due

¹ http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1

course. Whilst the Code envisages that the appeals body will be required to set out procedures for the conduct of subscriber appeals, the Code sets out the powers of the appeals body and a framework for the conduct of subscriber appeals.

- 2.9 Section 8 provides for the Code to include cost sharing arrangements under the Cost Order.
- 2.10 Section 9 sets out our proposals with regard to administering the Code and carrying out enforcement and dispute resolution activity, including the processes which we anticipate will be followed and the information which may be required from ISPs and Copyright Owners.
- 2.11 Section 10 describes the next steps in our process and the other related consultations that we will be publishing in the near future.

Overview of Government policy and legislation

- 2.12 In December 2005, the Chancellor of the Exchequer asked Andrew Gowers to conduct an independent review into the UK Intellectual Property Framework. The Review was published on 6 December 2006.² On the issue of online copyright infringement, the Review made the following recommendation:

Recommendation 39: Observe the industry agreement of protocols for sharing data between ISPs and rights holders to remove and disbar users engaged in 'piracy'. If this has not proved operationally successful by the end of 2007, Government should consider whether to legislate.

- 2.13 Following the Gowers Review, Government facilitated a Memorandum of Understanding (MOU) between key stakeholders, including ISPs, Copyright Owners, Ofcom and Government to consider and to trial solutions for reducing online copyright infringement.³ However, this did not resolve these issues.
- 2.14 Therefore, in January 2009, Government set out proposals for reducing online copyright infringement in its Digital Britain interim report, explaining how it intended to legislate.⁴ In June 2009, Government set out its conclusions in the Digital Britain final report.⁵ In particular, it stated it would give Ofcom a duty to take steps aimed at reducing copyright infringement. Specifically, Government said that Ofcom will require ISPs to accept two specific obligations: firstly, that ISPs must send notifications to subscribers where allegations of infringing behaviour have been made by copyright owners; and secondly, that ISPs must retain anonymised information on those subscribers who receive multiple notifications that copyright owners could then request to in order to take targeted legal action.

² https://financialsanctions.hm-treasury.gov.uk/gowers_review_index.htm

³ <http://webarchive.nationalarchives.gov.uk/20080726153746/http://www.berr.gov.uk/files/file47139.pdf>

⁴ http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf

⁵ <http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf>

- 2.15 On 8 April 2010, the DEA received Royal Assent. The DEA confers duties onto Ofcom by inserting new sections (124A to 124N) into the Communications Act 2003 (“the 2003 Act”).

The initial obligations code

- 2.16 The subject of this consultation is the Code, as required by section 124D of the 2003 Act. That provision requires that in the absence of industry agreeing a code, Ofcom should make the Code within six months of the entry into force of the provisions concerning notification and copyright infringement lists. Those provisions will come into force on 8 June 2010.
- 2.17 The new provisions of the 2003 Act, as inserted by the DEA, impose obligations on ISPs where their networks may have been used for the purposes of copyright infringement. As the explanatory memorandum to the DEA sets out, ISPs must⁶:
- “Notify their subscribers if the internet protocol (“IP”) addresses associated with them are reported by Copyright Owners as being used to infringe copyright”; and
 - “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 initial obligations code. After obtaining a court order to obtain personal details, Copyright Owners will be able to take action against those included in the list.”
- 2.18 As well as setting out provisions for how these obligations should be implemented in the Code, the DEA also prescribes other provisions to be included within the Code. These are intended to protect the interests of those consumers and members of industry who may be affected by it, and include measures for subscriber appeals; administration, enforcement and disputes; and data protection. Separately, the Code must also include measures for sharing of costs between ISPs, Copyright Owners and subscribers. The specific requirements in relation to costs will be set out in an order made by the Secretary of State under section 124M of the 2003 Act. On 30 March 2010, the Secretary of State issued a consultation on the contents of the costs sharing statutory instrument, including a draft statutory instrument⁷. As the consultation process for the statutory instrument has not concluded, the draft Code attached to this consultation does not contain detailed provisions in relation to the sharing of costs at this time. We will issue a further consultation on these issues once the statutory instrument has been made.
- 2.19 The DEA also inserted provisions into the 2003 Act requiring Ofcom to assess and report to help the Secretary of State to monitor trends in online copyright infringement and to ascertain the effectiveness of the obligations on ISPs. Interim reports must be submitted on a 3 monthly basis with full reports being submitted annually. Ofcom’s reporting duty is not a matter on which we are consulting in this document, which only sets out our proposals in relation to the Code.

⁶ http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100024_en_1 at paragraph 31.

⁷ <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/10-915-consultation-online-infringement-of-copyright>

Overview of legal provisions relevant to the initial obligations code

- 2.20 The DEA inserts new sections 124A to 124N in the 2003 Act. A brief overview of each of these is provided below:

124A Obligation to notify subscribers of copyright infringement reports

- 2.21 This obliges ISPs to notify subscribers of copyright infringement reports (“CIRs”) received about them from copyright owners. It describes what CIRs and notifications to subscribers must contain, the procedures that copyright owners must comply with when making CIRs, and the procedures that ISPs must follow when sending subscriber notifications.

124B Obligation to provide copyright infringement lists to Copyright Owners

- 2.22 Under this provision, ISPs have to keep a record of the number of CIRs linked to each subscriber along with a record of which copyright owner sent the report. An ISP may be required to provide a copyright owner with copyright infringement lists, but in an anonymised form so as to ensure compliance with data protection legislation.

124C Approval of code about the initial obligations

- 2.23 The obligations provided for in new sections 124A and 124B will not have effect until there is a complementary code in force that has been approved or made by Ofcom. This section sets out the requirements for our approval of a code regulating matters in connection with the initial obligations. The process by which infringements are detected, the standard of evidence that the copyright owner must meet before an ISP must send a notification, the format of CIRs, and the routes of appeal for subscribers are all issues of detail which the Code is required to deal with.
- 2.24 The section envisages an industry elaborated Code which would be subject to approval by Ofcom. The section envisages public consultation on the Code.

124D Initial obligations code by OFCOM in the absence of an approved code

- 2.25 This provides for the making by Ofcom of a code regulating the initial obligations if there is no industry code.

124E Contents of the Initial Obligations Code

- 2.26 This sets out what the code underpinning the initial obligations (whether an industry code or Ofcom’s own code) must contain. The code must set out the process by which the initial obligations will operate and the procedures that copyright owners and ISPs must follow in relation to them. It must set out the criteria, evidence and standards of evidence required in a CIR and the required format and content of a notification letter sent to a subscriber. It must not permit any CIR more than 12 months old to be taken into account for the purposes of a notification.
- 2.27 The code must also set the threshold applying for the purposes of determining who is a “relevant subscriber” and therefore potentially included in a Copyright Infringement List. In addition, the code must provide for OFCOM to administer the code and to enforce it in the event of a failure to comply with the code, and it must meet the requirements concerning subscriber appeals

124F Progress reports

- 2.28 This provides for Ofcom's reporting to the Secretary of State on the infringement of copyright by internet subscribers but is not of relevance to this consultation.

124G to 124 J Obligations to limit internet access

- 2.29 These provisions set out a procedure for the introduction of obligations to limit internet access. However, the provisions shall not be effective until the Secretary of State has decided that it is appropriate. As set out at paragraph 62 of the Explanatory Notes to the DEA:

“The government's aim is for the initial obligations in new sections 124A and 124B to significantly reduce online infringement of copyright. However, in case the initial obligations prove not as effective as expected, new section 124H gives the Secretary of State the power to introduce further obligations, should that prove appropriate.”

- 2.30 The Secretary of State has not indicated his intention to make use of these provisions at this time and this consultation is not concerned with this aspect of the DEA.

124K Subscriber appeals

- 2.31 This section sets out how the mechanism for subscriber appeals is to work. It requires that the Code provide a route for appeals and sets out grounds for appeal. It also provides for the ability of an appeals body to award costs or compensation in favour of a subscriber whose appeal is successful.

124L Enforcement of obligations

- 2.32 This sets out the penalties to be imposed where an ISP or Copyright Owner contravenes the obligations in the DEA. Penalties can be up to £250,000, but the Secretary has discretion to raise this maximum.

124M Sharing of costs

- 2.33 This confers a power on the Secretary of State to specify by order provision which must be included in the codes and which sets out how costs are to be apportioned between Copyright Owners, ISPs and, in the case of subscriber appeals, the subscriber concerned.

124N Interpretations

- 2.34 This provides definitions regarding terms used from 124A to 124N.

The Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order

- 2.35 As provided for in section 124M of the 2003 Act, the Secretary of State will pass an Order determining the basis on which costs incurred by Ofcom, by the Appeals process and by ISPs and Copyright Owners are to be shared. As discussed in Section 3, this Order may also set other conditions relating to costs with which ISPs and Copyright Owners must comply.

- 2.36 The Department for Business, Innovation and Skills issued a consultation on the contents of any order under section 124M on 30 March 2010, which set out proposals for the sharing of costs. That consultation closed on 25 May 2010.

Section 3

Application of the Code

Introduction

3.1 It is important to ensure from the outset that it is clear who is subject to the provisions of the Code. Indeed, under section 124C(3) to (5) of the 2003 Act, it is clearly envisaged that the Code should specify qualifying criteria for the Code to apply in a particular case.

Application of the Code to Copyright Owners

3.2 In principle, any Copyright Owner (as defined in the Copyright Designs and Patents Act 1988) or person acting on its behalf is entitled to take advantage of the provisions of the DEA in relation to online copyright infringement. However, section 124C(4) of the 2003 Act indicates that it may be appropriate for the Code to specify that rights or obligations do not apply unless a copyright owner has made arrangements with an ISP in relation to the number of CIRs which it intends to make to the ISP within the relevant period and has paid a contribution to the costs of the ISP in advance.

3.3 Arrangements in relation to the number of CIRs and payment of costs are set out in the draft order of the Secretary of State. The draft order defines a “*qualifying Copyright Owner*” as one who has “*has given an estimate of the number of copyright infringement reports it intends to make in a notification period to a qualifying internet service provider*”. In this definition a “*notification period*” is the forward planning period for the operation of the scheme. The draft Order proposes that the notification period should be the financial year, although this is clearly subject to the outcome of the consultation.⁸

3.4 The draft order also provides⁹ that a “qualifying Copyright Owner” must pay notification costs and qualifying costs to ISPs or Ofcom, as appropriate, at the start of each notification period. We therefore consider that, in determining who is a qualifying copyright owner for the purposes of the application of the Code, it is appropriate to require Copyright Owners to have met their obligations in respect of costs before they are able to take advantage of the online copyright infringement procedures set out in the DEA and the Code.

3.5 In the Code we therefore propose that, to be a qualifying Copyright Owner for a given notification period, a Copyright Owner must have provided estimates of the CIRs it intends to make *two months before the beginning of the notification period*. (The section below discusses our proposed approach to the identification of *qualifying internet service providers* for a given notification period). The Copyright Owner must also have met its obligations in respect of the payment of costs under the Order.

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

⁸ The notification period may therefore be shorter in the first year of the scheme if it starts later than 1st April

⁹ Article 6 of the draft order.

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.

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.

Application of the Code to Internet Service Providers

3.6 Paragraph 51 of the explanatory notes to the DEA states that:

“The government’s intention is for the obligations to fall on all ISPs 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 ISP 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 ISP receives in a set period of time. The government anticipates that most small and medium-sized ISPs 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). ISPs would need to ensure online infringement of copyright remained at a low level or else face the prospect of passing the qualifying threshold. Once in scope, ISPs would have to comply with the obligations and to continue to do so even if the number of CIRs later fell below the threshold.”

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 ISP 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 ISPs 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 ISPs, 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.

3.10 In considering the basis and level of such a threshold, we have therefore considered, in particular, the following three questions:

- Should the Code initially be applied both to fixed and mobile ISPs?

- If the Code is only applied to fixed ISPs, what coverage of fixed ISPs would be proportionate?
- What approach should we adopt to reduce the attractiveness to infringers of switching to providers outside the initial threshold?

We propose that the Code should not initially apply to mobile ISPs

- 3.11 In relation to the first question, we propose that mobile ISPs should not be Qualifying ISPs for the first notification period for two key reasons. Firstly, mobile networks are less conducive to online copyright infringement due to speed and capacity constraints (e.g. caps on uploading and downloading), traffic management policies (e.g. bandwidth throttling at certain times and locations) and pricing relative to fixed.¹⁰ Therefore, we think copyright infringement using mobile networks is likely to be lower in absolute and relative terms compared to fixed networks. This view is supported by our examination of evidence covering a recent sample period from Copyright Owners, during which more than 95% of alleged copyright infringement incidents identified occurred on fixed networks.
- 3.12 Second, we understand that mobile network operators (“MNOs”) assign public IP addresses differently to most fixed ISPs. MNOs typically have limited allocations of IP addresses and use those they have in a more dynamic way, sharing them across subscribers. An IP address identified as related to copyright infringement may be in use by multiple individual subscribers at the time of the alleged infringement. The capital expenditure required to modify their systems to allow them to identify subscribers from the IP addresses provided in CIRs will be significantly higher than for fixed ISPs. The MNOs have stated that this is likely to cost [x] per network operator. It is likely that at this stage the MNOs’ capital expenditure could outweigh the benefits of their initial inclusion, particularly where the likely numbers of infringements is low, as set out at paragraph 3.11 above.
- 3.13 However, we propose to continue to review the level of copyright infringement on mobile networks and if necessary will require mobile ISPs to participate in the Code.

We propose that the Code should initially apply only to those fixed ISPs with more than 400,000 subscribers

- 3.14 On the second question, relating to the potential coverage threshold for ISPs, we propose that, for the first notification period, Qualifying ISPs should be those which provide a fixed internet access service to more than 400,000 subscribers. Currently there are seven fixed ISPs that meet this criterion: BT, O2 (taking into account its fixed internet access subscribers only), Orange (taking into account its fixed internet access subscribers only), Post Office, Sky, TalkTalk Group and Virgin Media.
- 3.15 Whilst it may be unusual for Ofcom to make a code the application of which is limited according to the size of an operator, the guidance on how we are to interpret these provisions in the DEA is very clear (see paragraph 3.6 above). We believe, therefore, that the approach set out represents a proportionate means of delivering

¹⁰ For example, Orange’s cheapest mobile broadband service has a 500Mbit limit with speed of up to 8Mbit/s; while their cheapest fixed broadband service has no usage limit with speed of up to 20Mbit/s. Similarly, O2’s cheapest mobile broadband service has a 1Gbit limit (no speed quoted); while their cheapest fixed broadband service has no usage limit with speed of up to 8Mbit/s.

the objectives of the DEA. In particular, we consider that our approach is proportionate in this case for the following reasons:

- 3.15.1 The seven ISPs with more than 400,000 subscribers together account for 96.5% of the residential and SME business broadband market;
- 3.15.2 There is a natural breakpoint in that the smallest of the seven ISPs is more than twice the size of the next smallest;
- 3.15.3 According to information we have obtained from Copyright Owners on the distribution of alleged online copyright infringement activity by ISP, we consider there is a broad correlation between the number of subscribers an ISP has and the level of alleged copyright infringement activity on their service;
- 3.15.4 Having considered alternative approaches, we believe that our proposed approach provides the clarity and certainty required by stakeholders as they plan for the Code to come into force; and
- 3.15.5 It is consistent with the government's anticipation that most small and medium-sized ISPs and, possibly, the mobile networks would initially fall outside the threshold.¹¹

If online copyright infringers migrate to ISPs outside of the Code we will review the qualification criteria to address this

- 3.16 However, our approach to the definition of Qualifying ISP must be such as to ensure that there cannot be widespread evasion of the effects of the code, resulting from migration of online copyright infringers to ISPs not covered by the Code. The Code therefore provides, in section 3.5, for Ofcom to review the criteria which determine which ISPs are Qualifying ISPs in any given notification period.
- 3.17 We propose Ofcom should regularly review the qualification criteria, taking into account the number of subscribers and the volume of potential CIRs made by Copyright Owners in relation to ISPs not covered by the Code. Ofcom will be able to gather the necessary information to determine this as part of its reporting function. Therefore, the assessment should not give rise to an undue additional burden for us, Copyright Owners or ISPs.
- 3.18 As appropriate, we will alter the qualification criteria in the Code, so as to require the participation in the Code of any ISP where the scale of infringement is sufficient to objectively and proportionately justify its inclusion in the Code. In making such an assessment we would review evidence of alleged infringement across those ISPs outside the scope of the Code and consider both the costs and feasibility of requiring those ISPs to comply with the obligations. Our approach will in practice be guided by evidence gathered once the Code has been implemented. We would anticipate at this stage that any amendment to the qualification criteria would be made sufficiently in advance of any notification period to ensure that Copyright Owners are aware of those ISPs to whom they may submit estimates of CIRs for the purposes of the Code.

¹¹ http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1

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?

Definitions under the Act: ISPs

3.19 The relevant definitions in the 2003 Act are:

- internet service provider - "a person who provides an internet access service" (Section 124N);
- internet access service - "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" (Section 124N);
- subscriber – "in relation to an internet access service... 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" (Section 124N); and
- communications provider – "a person who (within the meaning of section 32(4)) provides an electronic communications network or an electronic communications service" (Section 405).

3.20 These definitions work to define the responsibilities under the 2003 Act as follows: the core obligations under the 2003 Act apply to (Qualifying) **ISPs**, who must process CIRs, send notifications and so on. To be an ISP under the 2003 Act, a service provider must have an **agreement** with **subscribers**, as defined above. If an internet access service is being provided to a **communications provider** (not a subscriber), then the provider of the internet access service will not be an ISP for the purposes of the online copyright infringement provisions of the 2003 Act, and may not be subject to the Code in relation to the processing of CIRs or the sending of notifications. It is therefore important to have a clear understanding of the conditions under which there may be an "agreement between the person and the provider of the service" since this will determine who may be considered to be an ISP, potentially subject to the obligations under the Code.

3.21 The definition in the 2003 Act of *Internet Service Provider* clearly encompasses the main fixed and mobile service providers we have considered in determining who should be a Qualifying ISP for the initial notification period under the Code. However, as many stakeholders have noted to us, there is a broad range of business models in the internet access market (from BT to Starbucks, via community Wi-Fi). It is important to ensure that it is clear to these different types of provider and to Copyright Owners whether they are ISPs under the 2003 Act, and therefore potentially Qualifying ISPs if they pass the relevant threshold. As set out above at paragraphs 3.14-3.18, whilst Ofcom's approach to defining a Qualifying ISP may be clear under the proposed criteria, we will keep those criteria under review. Providers and Copyright Owners should be clear as to who may be subject to the Code in future if those criteria change.

- 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 ISP 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.
- 3.24 When Ofcom reviews the criteria for qualification as a Qualifying ISP, we will need to carefully consider whether such operators should be brought within the scope of the Code. We will take into account all relevant factors in deciding upon this, including the extent to which consumers would be prejudiced by their inclusion, the level of online copyright infringement occurring through such networks and the cost to such operators of being subject to the scheme. ISPs who may become subject to the Code, particularly those whose business model would be severely affected by the obligations, may wish to consider whether they can reduce or avoid the possibility of being brought within the scope of the scheme by controlling the incidence of infringement on their networks.
- 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, i.e. 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 ISP (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 ISP.
- 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 ISP 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.

- 3.28 In addition, the 2003 Act requires that the obligation to notify a subscriber requires communication with “the electronic or postal address held by the internet service provider” (124A(9)). Certain providers such as pay-as-you-go mobile broadband operators or libraries, which might fall to be considered as ISPs and are therefore potentially subject to the Code, may not hold such information about their subscribers. In those circumstances, if such operators fall within a future definition of Qualifying ISP (initially they would not), they would need to ensure that they do collect this data so as to be able to comply with the obligations in the DEA and the Code.

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?

Definitions under the Act: Subscribers and Communications Providers

- 3.29 As well as providing clarity for potentially qualifying ISPs, we seek to provide clarity in relation to subscribers and communications providers.
- 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 ISPs 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)

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?

Section 4

Copyright Infringement Reports

Introduction

- 4.1 Section 124A of the 2003 Act obliges ISPs within the scope of the Code to notify subscribers of incidences of copyright infringement, in which they have been alleged to have been involved, as reported to them by a Copyright Owner. It sets out what a Copyright Infringement Report (a “CIR”) and a notification are; and also the procedures by which an ISP and Copyright Owner must abide. The 2003 Act also sets out what must be included in a CIR and requires the Code to make provisions relating to the methods of obtaining evidence, the standard of that evidence and the form of the report.
- 4.2 Below we set out how we propose to implement these requirements of the 2003 Act with regard to CIRs, as set out in Section 4 of the Draft Code.

CIRs must contain all necessary information for ISPs to identify subscribers

- 4.3 We are proposing that Copyright Owners must include the following information within a CIR:
- the name and registered address of the Qualifying Copyright Owner;
 - where relevant, name and registered address of the person on whose behalf the Qualifying Copyright Owner is authorised to act and evidence of authorisation;
 - identification of the work in which copyright in the UK is said by the Qualifying Copyright Owner claims to subsist (the “Relevant Work”), including the title of the Relevant Work and a description of the nature of the Relevant Work;
 - a statement that there appears to have been an infringement of the owner’s copyright in the Relevant Work;
 - a description of the apparent infringement, including the filename, a description of the contents of the file, and (where appropriate) hash code¹² of the infringing content;

¹² A hash code is a unique identifier, attached to a digital content file. A hash code is created when a digital content file is created and a new hash code is allocated if the content file is edited or modified. hash code matching can also be used as part of the process of verifying the identify of a content asset.

- a statement that, to the best of the Qualifying Copyright Owner's knowledge, no consent has been given by the owner of the UK copyright in the Relevant Work for the acts described in the preceding paragraph to have occurred;
- the date and time using Universal Coordinated Time (UCT) on which the evidence was gathered, including both the start and end time of the relevant session;
- the IP address associated with the apparent infringement;
- port number used to conduct apparent infringement;
- the website, or protocol, via which apparent infringement occurred;
- a Unique infringement identifier (UII) allocated to CIR by the Qualifying Copyright Owner; and
- the date and time of issue of CIR.

This list is based on the information currently produced by agents working on behalf of Copyright Owners. We believe that this matches the standard of evidence required by the courts in relation to civil proceedings by Copyright Owners for copyright infringement.

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?

Ensuring robust and accurate evidence

4.4 For the notification process to be credible, effective and fair for consumers it is essential that the allegations of copyright infringement are evidentially robust and accurate. Therefore, we are proposing that a Copyright Owner (or an agent acting on their behalf) should, before submitting their first CIR (and from then on an annual basis), provide Ofcom with a Quality Assurance report, which:

- details the processes and systems used by the Copyright Owner (or any party acting on its behalf) to gather evidence;
- details steps taken to ensure the integrity and accuracy of evidence;
- details the processes the Qualifying Copyright Owner has put in place to audit its systems;
- identifies any examples of quality assurance issues occurring during the year and measures taken to assure their resolution;
- includes a certification that, in the reasonable opinion of the Qualifying Copyright Owner, the processes and systems described are effective in gathering robust and accurate evidence; and
- includes a statement of compliance with relevant data protection laws.

- 4.5 A Qualifying Copyright Owner must comply with the procedures that it has set out in the above documentation. We are also proposing that Copyright Owners must act on an Ofcom direction to take specified steps in relation to the maintenance or enhancement of the evidence gathering procedures. We propose that Ofcom may require that systems and processes used to gather evidence be subject to audit by an appropriate independent party.
- 4.6 We consider that this proposal is objectively justifiable and proportionate for the following reasons:
- it is similar to approaches that have been effective in other areas of Ofcom's remit, e.g. ensuring the accuracy of communications providers' metering and billing; and interference standards for TV transmission;
 - it requires Copyright Owners to develop appropriate technical standards and allows us to intervene;
 - it is sufficiently flexible to allow for technological change and decisions by the appeals body; and
 - it does not involve the setting of arbitrary standards that we are not in a position to understand.

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.

Delivery of CIRs

- 4.7 As the overall objectives of the provisions in the DEA are to secure a reduction in the use of unlawful services, and a change in the perception of the risks of being successfully identified as having unlawfully shared copyright content, it is important that CIRs are issued to Qualifying ISPs in a timely fashion. The longer the period between evidence being gathered and subscribers receiving a notification the less effective we believe the notifications programme will be.
- 4.8 Therefore, we propose that the Qualifying Copyright Owner must send the CIR to the Qualifying ISP within 10 working days of the required evidence having been gathered.
- 4.9 We believe that there are cost benefits for both ISPs and Copyright Owners in having a standard format for CIRs and propose, in the first instance, that industry pursue agreement on such a format. Should there be no agreement on a standard, and if there is evidence that a standard format would be proportionate, then Ofcom may look to require compliance with a standard format.

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?

Section 5

Identifying subscribers and making notifications

Introduction

5.1 Section 124A of the Act requires Qualifying ISPs who receive CIRs to identify the subscriber to which the CIR relates and send notifications as required by the Code. The Act also sets out:

- the mandatory content of the notifications;
- that the Code can require additional content in the notifications; and
- that the Code must set out how the notification process works.

5.2 In this section we set out how we propose to implement these requirements of the Act with regard to identifying subscribers and making notifications, as set out in Sections 5 and 6 of the Draft Code.

ISPs may reject invalid CIRs

5.3 The CIRs contain the information that ISPs need to identify subscribers, i.e. relevant IP address, port number and start and end of the relevant session. The Code requires ISPs to identify subscribers using this information. However, there are circumstances in which ISPs will not be able to identify a subscriber, for example:

- the IP address was not allocated to the ISP at the time of the alleged infringement;
- the IP address was not used by one of the ISP's subscribers at the relevant time;
- the Subscriber using the IP address at the time of the alleged infringement cannot reliably be identified, e.g. an IP address has been reallocated from one subscriber to another at or too near the time identified to enable robust matching;
- the CIR refers to an account that is no longer active;
- the Subscriber cannot be notified because the Qualifying ISP does not hold an electronic or postal address for the Subscriber and it is not reasonably practicable for the Qualifying ISP to obtain this information; and
- the IP address relates to a Subscriber which does not receive a fixed internet access service from the Qualifying ISP.

5.4 There are also other reasons why an ISP might not process a CIR, e.g. the CIR was issued after the maximum time period, the CIR is incomplete or the Copyright Owner has not paid the ISP for processing the CIR in accordance with the requirements of the costs order.

- 5.5 We are proposing that in these circumstances ISPs should notify the relevant Copyright Owner within ten working days of receiving the CIR. We propose that Copyright Owners and ISPs should agree a standard set of rejection codes.

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.

Ensuring the accuracy in matching IP addresses to subscribers

- 5.6 It is important that the process of matching IP addresses to subscribers is accurate and robust. Therefore, we are proposing that ISPs should, before issuing their first notification (and from then on an annual basis), provide Ofcom with a Quality Assurance report, which:
- details the processes and systems used by the Qualifying ISP to match information provided in CIRs to Subscriber accounts;
 - details steps taken to ensure the integrity and accuracy of this process;
 - details the processes the Qualifying ISP has put in place to audit its systems;
 - identifies any examples of quality assurance issues, such as failed CIRs, occurring during the year and measures taken to assure their resolution;
 - includes a certification that the Qualifying ISP has done what it is reasonably practical to do to ensure that the processes and systems described are robust and accurate in matching information provided in a CIR to a Subscriber account;
 - includes a statement of compliance with relevant data protection laws; and
 - any other information as directed by Ofcom.
- 5.7 A Qualifying ISP must comply with the procedures that it has set out in the above documentation. We are also proposing that ISPs must act on an Ofcom direction to take specified steps in relation to the maintenance or enhancement of the evidence gathering procedures. We propose that Ofcom may require that systems and processes used to gather evidence be subject to audit by an appropriate independent party.
- 5.8 We consider that this proposal is objectively justifiable and proportionate for the following reasons:
- it is similar to approaches that have been effective in other areas of Ofcom's remit, e.g. ensuring the accuracy of communications providers' metering and billing; and interference standards for TV transmission;
 - it requires ISPs to develop appropriate technical standards and allows us to intervene;
 - it is sufficiently flexible to allow for technological change; and
 - it does not involve the setting of arbitrary standards that we are not in a position to understand.

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.

Notification process

- 5.9 The explanatory notes to the Bill and the Act both describe a notification process that involves an escalation leading to the ISP putting a subscriber on a copyright infringement list.
- 5.10 We have considered three main options for escalation:
- volume of CIRs, e.g. we understand BIS was envisaging a system where the first notification was triggered by 10 CIRs; the second by 30; and the third by 50;
 - behaviour over time; and
 - value of copyright infringements, e.g. Copyright Owners consider certain copyright infringement as more serious than others, such as infringements in relation to pre-release material or a major software release.
- 5.11 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.
- 5.12 We also propose that those on a copyright infringement list should be sent, in the event that further CIRs are issued against their account, update notifications no more than once every three calendar months. We believe that this would give effect to the right of subscribers to appeal against CIRs.
- 5.13 We consider that this is the more proportionate and objectively justifiable approach as:
- it is relatively straightforward and pragmatic to implement, unlike a system that tried to trigger notifications by copyright value;
 - it is consistent with the objective of the legislation, in that it allows time for subscriber to come into compliance;
 - it avoids dispute over subjective evaluations of the value of copyright infringements;
 - there are no “free-hit” CIRs as there would be on a volume-based system; and

- it allows for different types of content having different patterns of copyright infringement.

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.

Required content of notifications

- 5.14 The content of notifications was set out in the DEA which amended the Communications Act – the relevant sections for notification content are 124A(6) and (7).
- 5.15 The new sections prescribe that the notifications will contain a certain level of information – the list of items are:
- a statement that the notification is sent under this section of the Communications Act in response to a CIR
 - the name of the Copyright Owner who made the CIR;
 - a copy of the information contained in the CIR;
 - evidence of the apparent infringement that shows the subscriber’s IP address and the time at which the evidence was collected;
 - information about the subscriber appeals and the grounds on which they may be made;
 - information about copyright and its purpose;
 - advice or information enabling the subscriber to obtain advice about how to obtain lawful access to copyright works;
 - advice or information enabling the subscriber to obtain advice, about steps that the subscriber can take to protect an internet access service from unauthorised use (for this the ISP should also take into account the suitability of different protection for subscribers in different circumstances); and
 - anything else that the initial obligations code requires the notification to include.
- 5.16 This last bullet gives some discretion to reflect additional requirements for the notifications and the detailed process agreed for the Code – although the DEA provided some steer on this by stating that “things that may be required whether in general or in a particular case” could include for example:
- a statement that information about the apparent infringement may be kept by the ISP;
 - a statement 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; and

- a statement that, following such a disclosure, the Copyright Owner may apply to court to learn the subscriber's identity and may bring proceedings against the subscriber for copyright infringement.
- 5.17 We have transposed the legal requirements into our draft code. We have also proposed some additional requirements. On evidence, we suggest:
- the registered address of the Copyright Owner and, where relevant, the evidence should also list the name and registered address of the person who is authorised to act on behalf of the Copyright Owner and evidence of authorisation;
 - ISPs must hold other CIRs associated with the subscriber and inform the subscriber that these are available on request;
 - details of the infringement should provide both the start and end time of the period during which the evidence was gathered; and
 - there should be a statement that the IP address allocated to the subscriber has been identified as being used for online copyright infringement.
- 5.18 We propose the content should also include the following points on data protection and the time-period for retaining information:
- a statement that the subscriber has the right under data protection legislation to any information, including CIRs, held on them; and
 - a statement that the ISP will, as far as is reasonably practicable, destroy information it holds in relation to the notification 12 months after receipt.
- 5.19 Finally, we propose the content should note:
- the Copyright Owner's statement that no express or implied licence has been granted to the act giving rise to the CIR; and
 - the ability of the Copyright Owner to bring a legal action for damages in relation to an infringement.

Proposed content of notifications

- 5.20 Earlier in this chapter, we set out our key proposals for the notification process which is to use a time-based, three stage notification process for ISPs to inform subscribers of valid copyright infringement reports – and where the third notification becomes the threshold and trigger for including a subscriber in a copyright infringement list. Details of those appearing on a copyright infringement list may be disclosed, subject to a court order, to relevant copyright owners,
- 5.21 This time-based notification approach essentially provides a means to make subscribers aware of reported infringements and to allow escalation if they continue to be identified engaging in online copyright infringement. We believe that the content of notifications should reflect the nature of this escalation process and therefore the notifications should ideally:
- contain clear statements of how the process works – in other words, the respective implications of receiving a first, second and third notification; and

- be pitched appropriately to reflect the respective stage of the notification process – for instance, the tone should become stronger with each notification to reflect the increasing seriousness of the issue.
- 5.22 In order to highlight the legal requirements of the notifications and also the points above, we have attached in Annex 6 some illustrative draft notifications, comprising cover letters and a possible enclosure (an information sheet).¹³
- 5.23 We recognise that ISPs have their own style and communication methods with their subscribers and have to balance the need to meet their legal obligations to notify them about alleged infringements alongside their own need to maintain a good relationship to help with customer retention and satisfaction rates. They may also wish to tailor their notifications to reflect their own knowledge of their subscribers and their particular circumstances – e.g. customer demographics (e.g. some ISPs may have a relatively younger or older user base), particular circumstances e.g. whether they provided the customer with a wireless router, the package the subscriber is on and their type/term of contract.
- 5.24 We would welcome stakeholders' views on the proposed content of the notifications, the illustrative letters in Annex 6 and also on whether there would be some merit in standardising these notifications to some degree across ISPs covered by the code. We propose to reserve the right to impose a standard approach to notifications should we believe that be appropriate.

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?

¹³ The illustrations we have provided show how the proposed required content of the notifications can be addressed through the use of a cover letter alongside an enclosure (the information sheet). Information on the actual suspected infringement – i.e. copyright owner, date and time of evidence etc - could either be mentioned in the cover letter or perhaps, in an additional enclosure.

Section 6

Copyright infringement lists

Introduction

- 6.1 Section 124B (Obligation to provide copyright infringement lists to Copyright Owners) of the 2003 Act requires ISPs to provide Copyright Owners with lists that set out which of the CIRs made by the Copyright Owner relate to a subscriber (without identifying the individual), where that subscriber has reached a threshold under the Code.
- 6.2 In this section we set out how we propose to implement these requirements of the 2003 Act with regard to the generation and provision of copyright infringement lists, as set out in Section 7 of the Draft Code.

Copyright infringement list

- 6.3 ISPs will have to keep a record of the CIRs linked to each subscriber along with a record of which Copyright Owner sent the report. A Copyright Owner can request an ISP to provide them with relevant parts of those records on request, but in an anonymised form to comply with data protection legislation. This is called a Copyright Infringement List.
- 6.4 We are required to set the threshold for determining who is a relevant subscriber and may therefore be included in a copyright infringement list that the ISP provides to a Copyright Owner. We can set this threshold by reference to any matter, including the number of CIRs made. We propose the threshold is that the ISP has sent the subscriber 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.
- 6.5 The list will only contain information directly related to CIRs made by the requesting Copyright Owner. Therefore, although a number of CIRs may have been submitted by different Copyright Owners in relation to a subscriber, the list (in anonymised form) that is disclosed to one Copyright Owner will only contain details of the CIRs submitted by that Copyright Owner in relation to that subscriber. However, it should be noted that a Copyright Owner is defined as including a person authorised to act on behalf of another Copyright Owner. Where that person is so authorised in relation to a number of different Copyright Owners the list provided will relate to all CIRs made by the authorised person.
- 6.6 The information in the copyright infringement list is intended to help Copyright Owners to target any litigation against those subscribers that appear to have infringed against them to the greatest degree.
- 6.7 We are also proposing that Copyright Owners may not make more than one request for a Copyright Infringement List to each ISP within any period of 3 months and ISPs should provide the list within five days of the request.

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.

Section 7

Subscriber appeals

Introduction

7.1 Section 124M of the 2003 Act requires the Code to give subscribers the right to bring a subscriber appeal to an independent appeals body. Whilst the precise procedures in relation to subscriber appeals will fall to be determined by the independent appeals body, Ofcom must nevertheless ensure that the requirements set out in section 124K of the 2003 Act are met in relation to subscriber appeals. This section contains a summary of the provision of the draft Code.

Appeals Body

7.2 Under section 124K (2) of the 2003 Act, Ofcom is required to appoint an independent person to determine subscriber appeals. The draft Code sets out our proposals for the principal functions of the appeals body, including the determination of subscriber appeals and the establishment of detailed appeals procedures. The draft Code also proposes provisions for Ofcom to be able to require the appeals body to provide it with information in order to assist us in carrying out our own functions under the 2003 Act.

Anonymity

7.3 The notification procedure proposed in the draft Code ensures that a subscriber's identity is not disclosed directly or indirectly to a Copyright Owner without the express written consent of the subscriber. A Copyright Owner would need to apply to Court to obtain such disclosure. We have sought to ensure that this remains the case where a subscriber submits an appeal since failure to do so might discourage subscribers from appealing against actions which they consider to be unfounded.

Notices and Periods of Time

7.4 The draft Code proposes that the appeal procedures set out, in standard form, the information which will allow a subscriber to submit all relevant information to support their case. The basic information which a subscriber must be able to put forward is set out in the Code although additional information may be set out in the standard form of appeal notice. The Code also provides for the appeals procedures to set out time limits for the submission of documentation and for deadlines to be extended at the discretion of the appeals body.

Grounds of appeal

7.5 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, which also makes clear that subscribers may advance any other ground they consider appropriate. The grounds of appeal may include the following:

- that the apparent infringement to which the CIR relates was not an infringement of copyright;

- that the CIR does not relate to the Subscriber's IP address at the time of the apparent infringement;
- 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;
- that an act or omission by a Qualifying ISP or Qualifying Copyright Owner amounts to a contravention of the Code or of an obligation regulated by the Code; or
- any other ground on which a Subscriber chooses to rely as to why the act or omission should not have occurred.

Response of ISPs and Copyright Owners

- 7.6 The draft Code includes provisions for ISPs and Copyright Owners to be given an opportunity to respond to a subscriber appeal and sets out the evidence which will be expected from ISPs and Copyright Owners in support of any defence to the subscriber appeal. Additional evidence which the appeals body would consider as being relevant may be set out in the appeal procedures.

Additional Representations and Hearings

- 7.7 There may be certain circumstances in which it is appropriate to provide an additional opportunity to subscribers, ISPs or Copyright Owners to make representations. The appeals body will therefore have discretion as to whether or not to request further submissions.
- 7.8 In exceptional circumstances it may be appropriate for oral hearings to occur and the appeals body will therefore be able to order a hearing.

Information

- 7.9 The appeals body may require any information it considers necessary from Copyright Owners and ISPs to assist it is reaching its determination. Any failure to provide information will be a breach of the Code and actionable accordingly.

Determination of Appeals

- 7.10 The appeals body shall determine whether or not a subscriber appeal is well founded by reference to the information before it, taking into account the particular circumstances of individual subscribers. In reaching its decision, it shall either allow the appeal or reject it.

- 7.11 Section 124K(5) and (6) of the 2003 Act sets out circumstances in which the appeals body must allow the appeal and these are reflected in the Code. For example, the appeals body must find in favour of the subscriber if:
- the act constituting the apparent infringement to which the CIR 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.
- 7.12 Where the appeal body allows the appeal, it may require Copyright Owners or ISPs to remedy the consequences of the act or omission which is the subject of appeal, notably by invalidating a notification or removing a subscriber from those potentially included in a Copyright Infringement List. In addition, it may require the payments of compensation and costs to the subscriber. These provisions are contained in section 124K(7) and (8) and are reflected in the Code.
- 7.13 Where the appeals body rejects the appeal, the CIR which is being challenged will be recorded against the subscriber's account by the ISP. Subscribers may consequently be included on a Copyright Infringement List in virtue of the CIR which was the subject of the appeal.
- 7.14 The costs of the appeals body, and the possibility that a subscriber may have to pay a fee, was raised in the Government's consultation on the cost sharing arrangements.

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.

Section 8

Administration, enforcement, disputes and information gathering

Introduction

8.1 Section 124E of the 2003 Act requires the Code to include provision for the administration and enforcement of the code, including the ability to resolve disputes between Qualifying ISPs and Qualifying Copyright Owners. In this section we set out how we propose to implement these requirements, as set out in Section 10 of the Draft Code.

Administration

8.2 There are various activities that we may need to carry out in order to administer the Code effectively. We do not think it possible to identify an exclusive list of these activities. Therefore, the Code allows Ofcom to make directions that are necessary to give effect to the Code's requirements.

Information gathering

8.3 Section 124E(7)(b) provides that the Code must ensure that Ofcom is able to obtain information from ISPs and Copyright Owners for the purposes of administering and enforcing the Code. That provision has been reflected in the Code.

Enforcement and dispute resolution

8.4 In order to ensure compliance with the Code, Ofcom needs to be able to carry out enforcement action against ISPs and Copyright Owners that breach the Code. The 2003 Act also requires Ofcom to resolve disputes between Copyright Owners and ISPs.

8.5 We have therefore designed an enforcement and dispute resolution process to address the issues raised by the Code. The regime is designed to strike the right balance between certainty and transparency in process, with the desire for a streamlined process. This process is set out in full in Section 10 of the Draft Code.

8.6 We have considered the possibility of issuing guidelines with regard to the enforcement and dispute resolution regime. We would be interested in stakeholders views as to whether this would be a worthwhile exercise.

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.

Section 9

Next steps

We will issue two further consultations related to the code over the summer

- 9.1 This consultation document relates to the draft initial obligations code. However, for the reasons set out below, the draft code on which we are consulting within this document does not include all the details and components which we are required to include under the DEA.
- 9.2 This consultation is therefore the first in a series (of three) we intend to issue this calendar year related to measures introduced in the DEA. We expect to issue another two in total over the next few months. Our indicative consultation process is as follows, with dates for consultation publications in brackets:
- Initial obligations code [this consultation document]
 - Enforcement of the code and the handling of industry disputes [July]
 - Tariff setting – i.e. sharing costs - from implementing and fulfilling requirements in the code [September – but dependent on the progress of Government’s cost sharing consultation and statutory instrument]
- 9.3 These further consultations will be pivotal in allowing the further development of appropriate safeguards for consumers, securing appropriate resourcing for the requirements flowing from the code and ensuring these requirements are fulfilled.

We recognise there are linkages between consultations which are relevant to stakeholder responses

- 9.4 We appreciate there are close linkages between these various aspects of the code and are therefore sequencing the consultations and respective statements to take account of key interdependencies. For instance, stakeholders may wish to understand the key requirements of the Code before they consider how to best respond to our proposals for resolving disputes. We have therefore timed these respective consultations to make this possible – in other words, there is an overlap between the consultation periods of this consultation and the separate document on dispute resolution, as shown see below.
- 9.5 Furthermore, as can be seen from the diagram, the statement on the Code will be published before the conclusion of the consultation on dispute resolution. This will allow us to amend the proposed approach to dispute resolution to reflect key outcomes on the consultation on the Code and we would intend to do so if this is appropriate. Given these links on outcomes, it is very important stakeholders consider the potential need to digest and respond, if relevant, to a number or the full set of consultations on online copyright infringement.

Figure 1: Online Copyright Infringement – indicative process for consultation

2010/10	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Initial Obligations Code		Yellow	Green	Green	Green	Blue						
Disputes & Enforcement				Yellow	Green	Green	Green	Green	Blue			
Tariff Setting						Yellow	Green	Green	Blue			
Government's Cost Sharing Statutory Instrument				Purple								
Government sends Initial code to EU						Grey						
Potential EU & Parliamentary Approval of Code										Grey		

- Publish Consultation
- Consultation Period & Analysis or Responses
- Publish Statement
- Possible Date for Government's Cost Sharing Statutory Instrument
- Possible dates for sending Code to EU and for obtaining EU/UK Parliament approval of Code

9.6 We will allow stakeholders the period until July 30th 2010 to respond to this consultation on the Digital Economy Act Initial Obligations Code. During this period, we will also aim to issue a consultation document on the process for enforcing the obligations and for handling disputes.

We plan to issue our consultation on tariff setting after BIS concludes its process on cost sharing

9.7 The draft initial obligations code on which we are consulting within this document does not make any provision in relation to contributions towards meeting the costs required by the DEA. This is because the DEA requires that the relevant provisions in the Code (on cost sharing) must be those which are set out in an Order to be made by the Secretary of State under section 124M of the 2003 Act. The Government (BIS) recently closed a consultation on such an Order.¹⁴

¹⁴ BIS (Department for Innovation, Business and Skills) *Online Infringement of Copyright (Initial Obligations) Cost Sharing*, 30th March 2010 – The consultation closed for responses on 25 May 2010 <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/10-915-consultation-online-infringement-of-copyright.pdf>. Section 124M of the DEA enables the relevant Secretary of State to make an Order which frames how these costs will be recovered.

- 9.8 The BIS consultation sets out proposals and questions on costs associated with the Code – which means those arising from the obligations on notifications, those related to the establishment and running of an appeals mechanism, as well as Ofcom’s own costs in discharging its duties in relation to these obligations. The BIS document contains the draft Order - the draft statutory instrument – which would make this cost-sharing possible.
- 9.9 The BIS consultation closed on 25 May and it is possible that its outcomes may be known around July. If this is the case and the UK Government then lays the Statutory Instrument in Parliament, it would enable us to take forward a consultation on tariff setting and ultimately, to insert relevant detail on cost sharing into the Code.
- 9.10 Therefore, depending on the outcome of the BIS consultation on cost-sharing, we intend to issue our third consultation on online copyright infringement this year on tariff setting around September. It would set out approaches to sharing the costs of delivering the Code and meeting its requirements for relevant stakeholders within the framework defined in the Order – potentially including tariff(s) which a Copyright Owner may be required to pay an ISP for the processing of a CIR.

The code needs approval from a European Commission Committee and UK Parliament

- 9.11 There are two final steps in the overall process for bringing the initial obligations into effect. The first is approval from the European Union (Standards and Technical Regulations Committee).¹⁵ This is expected to take a minimum of three months. We are therefore aiming to publish our statement by the end of September so that EU approval can be obtained by the turn of the calendar year.
- 9.12 If this approval is given, the code will need final approval from the UK Parliament. It is possible that the UK Government could seek to obtain Parliament’s approval soon after EU has given its authorisation and if this transpires to be the case, the Code could come into force in early 2011.

¹⁵ We would aim to incorporate output from the Government’s current consultation on cost sharing in the code prior to it being notified to the EU Technical Standards committee.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 30th July 2010**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <https://www.ofcom.org.uk/consult/condocs/copyright-infringement/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email onlinecopyrightinfringement@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Campbell Cowie
Director, Policy Development
Strategy & Market Developments
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3406

- A1.4 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.5 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex X. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.6 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please send an email with your request to OnlineCopyrightinfringement@ofcom.org.uk.

Confidentiality

- A1.7 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.10 Following the end of the consultation period, Ofcom intends to publish a statement in September 2010.
- A1.11 Please note that you can register to receive free mail updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.12 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.13 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.14 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing Name/contact details/job title

Whole response Organisation

Part of the response If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Consultation 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.

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.

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?

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?

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?

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?

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.

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?

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.

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.

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.

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?

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.

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.

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.

Annex 5

Draft Digital Economy Act Initial Obligations Code

Contents

- 1. Definitions**
- 2. Coverage of Code**
- 3. Copyright Infringement Reports (CIRs)**
- 4. Receipt of CIRs and identification of Subscribers by ISPs**
- 5. Notifications**
- 6. Identification of repeated infringers and provision of copyright infringement lists**
- 7. Subscriber appeals**
- 8. Cost sharing**
- 9. Administration, information collection, enforcement and dispute resolution**

1. Definitions

“Appeals Body” means a person appointed by Ofcom in accordance with section 124K(2) of the Communications Act 2003 with the function of determining Subscriber appeals.

“Code” means the Online Copyright Infringement Initial Obligations Code.

“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.

“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.

“Electronic communications network” has the meaning given in section 32(1) of the Communications Act 2003.

“Electronic communications service” has the meaning given in section 32(2) of the Communications Act 2003.

“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 ISP” means an ISP 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.

“IP address” means an internet protocol address.

“ISP” means a person who provides an internet access service.

“notification period” has the meaning given in The Online Infringement of Copyright (Initial Obligations)(Sharing of Costs)Order.

“Qualifying Copyright Owner” means a Copyright Owner which meets the criteria set out in paragraph 2.1 of this Code.

“Qualifying ISP” means an ISP which meets the criteria set out in paragraph 2.4 of this Code.

“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.

2. Application of the Code

Application of the Code to Copyright Owners

- 2.1 A Copyright Owner is a Qualifying Copyright Owner to which this Code applies where:
- 2.1.1 the Copyright Owner has given an estimate of the number of copyright infringement reports it intends to make in a notification period to a Qualifying ISP in accordance with Articles 5, 6 and 7 of The Online Infringement of Copyright (Initial Obligations)(Sharing of Costs) Order; and
 - 2.1.2 has met its obligations in relation to the payment of costs in accordance with Articles 5, 6 and 7 of The Online Infringement of Copyright (Initial Obligations)(Sharing of Costs) Order.
- 2.2 An estimate under paragraph 2.1.1 must be provided in writing to the Qualifying ISP. Such estimate shall be sent at least 2 months in advance of the start of the notification period to which it relates.
- 2.3 A Qualifying Copyright Owner must comply with the applicable obligations set out in the Code. Any failure by a Qualifying Copyright Owner to comply with the obligations set out in the Code in respect of the issue of a CIR will render that CIR invalid and a Qualifying ISP receiving such a CIR will not be subject to the requirements of the Code in respect of that CIR.

Application of the Code to ISPs

- 2.4 An ISP is a Qualifying ISP to which this Code applies where:
- 2.4.1 it is a fixed ISP; and
 - 2.4.2 it provides a fixed internet access service to more than 400,000 Subscribers.
- 2.5 Ofcom shall publish from time to time a list of Qualifying ISPs.
- 2.6 A Qualifying ISP which provides both a fixed internet access service and an internet access service provided by other means shall only be subject to the provisions of the Code where a CIR received by it relates to a Subscriber receiving a fixed internet access service from that Qualifying ISP.
- 2.7 Ofcom shall keep under review the criteria set out in paragraph 2.4.

3. Copyright infringement reports

Production of copyright infringement report

- 3.1 A Qualifying Copyright Owner may issue a copyright infringement report (“CIR”) under this Code to a Qualifying ISP if it appears to the Qualifying Copyright Owner that:
- 3.1.1 a Subscriber to the Qualifying ISP’s internet access service has infringed the owner’s copyright by means of the service; or
 - 3.1.2 a Subscriber to the Qualifying ISP’s internet access service has allowed another person to use the service, and that other person has infringed the owner’s copyright by means of the service.
- 3.2 The Qualifying Copyright Owner must send the CIR to the Qualifying ISP within 10 working days of the day on which the evidence required under paragraph 3.3 is gathered.

Form and content of copyright infringement reports

- 3.3 The CIR must contain the following information:
- (a) the name and registered address of the Qualifying Copyright Owner;
 - (b) where relevant, name and registered address of the person on whose behalf the Qualifying Copyright Owner is authorised to act and evidence of authorisation;
 - (c) identification of the work in which copyright in the UK is said by the Qualifying Copyright Owner to subsist (the “Relevant Work”), including the title of the Relevant Work and a description of the nature of the Relevant Work;
 - (d) a statement that there appears to have been an infringement of the owner’s copyright in the Relevant Work;
 - (e) a description of the apparent infringement, including the filename, a description of the contents of the file, and (where appropriate) hash code of the infringing content;
 - (f) a statement that, to the best of the Qualifying Copyright Owner’s knowledge, no consent has been given by the owner of the UK copyright in the Relevant Work for the acts described in the preceding paragraph to have occurred;
 - (g) the date and time using Universal Coordinated Time (UCT) on which the evidence was gathered, including both the start and end time of the relevant session;
 - (h) the IP address associated with the apparent infringement;
 - (i) port number used to conduct apparent infringement;
 - (j) the website, or protocol, via which apparent infringement occurred;
 - (k) a Unique infringement identifier (UII) allocated to the CIR by the Qualifying Copyright Owner; and

(l) the date and time of issue of the CIR.

3.4 A CIR which a Qualifying Copyright Owner issues under paragraph 3.1 must be in its standard form and must comply with any directions as Ofcom may give from time to time.

Quality assurance of evidence gathering process

3.5 In order to ensure that the evidence gathering processes used by a Qualifying Copyright Owner are robust and accurate, a Qualifying Copyright Owner must, before submitting their first CIR under the Code (and from then on an annual basis), provide Ofcom with a Quality Assurance report. This report must:

- 3.5.1 detail the processes and systems used by the Qualifying Copyright Owner (or any party acting on its behalf) to gather evidence;
- 3.5.2 detail steps taken to ensure the integrity and accuracy of evidence;
- 3.5.3 detail the processes the Qualifying Copyright Owner has put in place to audit its systems (or those systems used by any party acting on its behalf);
- 3.5.4 identify any examples of quality assurance issues, such as failed CIRs, occurring during the year and measures taken to assure their resolution;
- 3.5.5 include a certification that, in the reasonable opinion of the Qualifying Copyright Owner, the processes and systems described are effective in gathering robust and accurate evidence;
- 3.5.6 include a statement of compliance with relevant data protection laws; and
- 3.5.7 any other information as directed by Ofcom.

3.6 A Qualifying Copyright Owner must make changes to its processes and systems as directed by Ofcom in order to maintain and enhance the evidence gathering procedures. Ofcom may require that these processes and systems are subjected to audit by an appropriate independent party.

3.7 A Qualifying Copyright Owner must comply with the procedures that it has set out in the above documentation.

Delivery of copyright infringement reports

3.8 A Qualifying Copyright Owner will send CIRs only to a Qualifying ISP and by electronic means in a standardised format.

3.9 In relation to each CIR sent to a Qualifying ISP, the Copyright Owner will keep any evidence additional to that required under paragraph 3.3 on which it may seek to rely in the event of a Subscriber appeal. This will be accessible by the relevant Subscriber

on request, and made available to the Subscriber in an electronic format free of charge and within 10 working days of the request having been received.

4. Receipt of CIRs and identification of Subscribers by ISPs

Receipt of CIRs by ISPs

- 4.1 On receipt of a CIR the Qualifying ISP must acknowledge receipt to the Qualifying Copyright Owner. This may be by automated response.

Identification of Subscribers

- 4.2 A Qualifying ISP which receives a CIR from a Qualifying Copyright Owner notify the Copyright Owner as soon as is practicably possible and in any event within 10 working days of receipt of the CIR if:

- 4.2.1 the information contained within the CIR does not relate to one of its Subscribers;
- 4.2.2 the CIR does not comply with the requirements of the Code; or
- 4.2.3 there are grounds for not processing the CIR in accordance with section 5 of the Code.

- 4.3 For the purposes of paragraph 4.2.3, grounds for not processing a CIR include:

- the IP address was not allocated to the ISP at the time of the alleged infringement;
- the IP address was not used by one of the Qualifying ISP's Subscribers at the relevant time;
- the Subscriber using the IP address at the time of the alleged infringement cannot reliably be identified;
- the CIR refers to an account that is no longer active;
- the Subscriber cannot be notified because the Qualifying ISP does not hold an electronic or postal address for the Subscriber and it is not reasonably practicable for the Qualifying ISP to obtain this information;
- the IP address relates to a Subscriber which does not receive a fixed internet access service from the Qualifying ISP;
- there is some other reason why, in the reasonable opinion of the Qualifying ISP, the CIR should not be processed.

- 4.4 A notice under paragraph 4.2 must specify the relevant grounds for not processing the CIR.

Quality assurance of subscriber identification process

- 4.5 In order to ensure that the processes used by the Qualifying ISP to match information provided in CIRs to Subscriber accounts are robust and accurate, each Qualifying ISP must, before issuing their first Notification (and from then on an annual basis), provide Ofcom with a Quality Assurance report. This report must:

- 4.5.1 detail the processes and systems used by the Qualifying ISP to match information provided in CIRs to Subscriber accounts;

- 4.5.2 detail steps take to ensure the integrity and accuracy of this process;
 - 4.5.3 detail the processes the Qualifying ISP has put in place to audit its systems;
 - 4.5.4 identify any examples of quality assurance issues, such as failed CIRs, occurring during the year and measures taken to assure their resolution;
 - 4.5.5 include a certification that the Qualifying ISP has done what it is reasonably practical to do to ensure that the processes and systems described are robust and accurate in matching information provided in a CIR to a Subscriber account; include a statement of compliance with relevant data protection laws; and
 - 4.5.6 any other information as directed by Ofcom.
- 4.6 The Qualifying ISP must make changes to its processes and systems as directed by Ofcom in order to maintain and enhance its subscriber identification procedures. Ofcom may require that these processes and systems are subjected to audit by an appropriate independent party.
- 4.7 The Qualifying ISP must comply with the procedures that it has set out in the above documentation.

5. Notification process

- 5.1 Unless a notice under paragraph 4.2 has been sent to the Qualifying Copyright Owner, by the Qualifying ISP, the Qualifying ISP must keep for 12 months after receipt of a CIR:
- 5.1.1 a record of the CIR, including all the information contained in the CIR; and
 - 5.1.2 a record of any notification sent, which includes the identity of the Subscriber to which the notification was sent and the date on which it was sent.
- 5.2 As far as is reasonably practicable, the Qualifying ISP must retain this information for no longer than 12 months after receipt of the CIR in question.

Notifying Subscribers

- 5.3 Unless a notice under 4.2 has been sent to the Qualifying Copyright Owner, on receipt of a CIR the Qualifying ISP must comply with the applicable requirements of paragraphs 5.5 to 5.16.
- 5.4 A notification under paragraph 5.5, 5.6, 5.7, 5.8 or 5.9 must be sent within 10 working days beginning with the day on which the Qualifying ISP receives the CIR.
- 5.5 If the Qualifying ISP has no record of a previous CIR being made against the Subscriber, the Qualifying ISP must send a notification as set out in paragraphs 5.11 and 5.13 ("First Notification"). The First Notification can be sent either to the Subscriber's electronic or postal address.
- 5.6 The Qualifying ISP must send to the Subscriber's electronic or postal address a notification as set out in paragraphs 5.11 and 5.14 ("Second Notification") if:
- 5.6.1 the Subscriber has been sent a First Notification within the previous 6 months; and
 - 5.6.2 a further CIR has been made against the same Subscriber (although not necessarily by the same Qualifying Copyright Owner) more than one calendar month since the sending of the First Notification.
- 5.7 The Qualifying ISP must send a notification (as set out in paragraphs 5.11 and 5.15) ("Third Notification") to a Subscriber if:
- 5.7.1 The Subscriber has already been sent a First Notification and a Second Notification;
 - 5.7.2 A further CIR has been made against the same Subscriber (although not necessarily by the same Qualifying Copyright Owner) more than one calendar month since the posting of the Second Notification; and

- 5.7.3 The CIR referred to in paragraph 5.7.2 was received by the ISP no more than 12 months after the receipt of the CIR in relation to which the Qualifying ISP sent the Subscriber the First Notification.
- 5.8 The Third Notification must be sent by recorded delivery to the subscriber's postal address, unless the Qualifying ISP does not have and cannot reasonably obtain the Subscriber's postal address, and to the Subscriber's electronic address.
- 5.9 The ISP must send an "Update Notification" (as set out in paragraphs 5.11 and 5.16) to a Subscriber if:
- 5.9.1 the Subscriber is on the Copyright Infringement List;
 - 5.9.2 a further CIR has been made against the same Subscriber (although not necessarily by the same Copyright Owner) in the period since they were last sent a notification (either a Third Notification or an Update Notification); and
 - 5.9.3 the Subscriber has not been sent a notification within the previous 3 calendar months.
- 5.10 Update Notifications can be sent either to the Subscriber's postal or electronic address.

Content of notifications

- 5.11 All notifications must include:
- (a) a statement that the IP address allocated to the Subscriber has been identified in connection with an allegation of online copyright infringement;
 - (b) a statement that the notification is sent under Section 124A(6) of the Communications Act 2003 in response to a copyright infringement report;
 - (c) a copy of the information contained in the CIR as specified in paragraph 3.3(a) – (l) of the Code.
 - (d) information about Subscriber appeals, the grounds on which they may be made and the process by which a Subscriber may appeal;
 - (e) information about copyright and its purpose, including the ability of a Qualifying Copyright Owner to bring a legal action for damages in relation to an infringement;
 - (f) advice, or information enabling the Subscriber to obtain advice, about how to obtain lawful access to copyright works;
 - (g) advice, or information enabling the Subscriber to obtain advice, about reasonable steps that the Subscriber can take to protect an internet access service from unauthorised use and prevent online copyright infringement in the future;
 - (h) a statement that the Subscriber has the right under data protection legislation to any information, including CIRs, held on them; and

(i) a statement that the Qualifying ISP will, as far as is reasonably practicable, destroy information it holds in relation to the notification 12 months after receipt of the CIR.

5.12 A Qualifying ISP must have standard form First, Second, Third and Update Notifications, which take account of any guidance which Ofcom may issue from time to time on the form and content of such notifications and which comply with any directions as Ofcom may give from time to time.

Additional content of the First Notification

5.13 The First Notification must also contain:

- 5.13.1 a statement that information about further reported infringements attributed to the Subscriber will also be retained for 12 months from receipt of the relevant CIR;
- 5.13.2 that such information, may lead to further notifications and potentially legal action by Qualifying Copyright Owners; and
- 5.13.3 that such information is available on request from the Qualifying ISP.

Additional content of the Second Notification

5.14 The Second Notification must also contain:

- 5.14.1 a statement that it is the second notification sent to the Subscriber in the last 6 months;
- 5.14.2 a statement that a further notification within 12 months of the First Notification will result in information being made available to a Qualifying Copyright Owner on request which discloses the copyright infringement reports made by that Qualifying Copyright Owner from which the Qualifying ISP has identified the Subscriber;
- 5.14.3 a statement that the information so disclosed to the Qualifying Copyright Owner will not reveal the identity of the Subscriber; and
- 5.14.4 a statement that the Qualifying Copyright Owner may use that information to obtain a court order for the disclosure of the Subscriber's identity with a view to bringing proceedings against the Subscriber for copyright infringement.

Additional content of the Third Notification

5.15 The Third Notification must also contain:

- 5.15.1 a statement that this is the third notification sent to the Subscriber in the last 12 months;

- 5.15.2 a statement that information will be available to a Qualifying Copyright Owner on request which discloses the copyright infringement reports made by that Qualifying Copyright Owner in the last 12 months from which the Qualifying ISP has identified the Subscriber; and
- 5.15.3 a statement that, following such a disclosure, 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.

Additional content of the Update Notifications

5.16 The Update Notifications must also contain:

- 5.16.1 A statement that this is an Update Notification, sent to the Subscriber as a result of CIRs having been received by the Qualifying ISPs in the period following the issuing of the previous notification;
- 5.16.2 a statement that information will be available to a Qualifying Copyright Owner on request which discloses the copyright infringement reports made by that Qualifying Copyright Owner in the last 12 months from which the Qualifying ISP has identified the Subscriber; and
- 5.16.3 a statement that, following such a disclosure, 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.

6. Identification of repeated infringers and provision of copyright infringement lists

- 6.1 A Qualifying ISP must maintain a database of Subscribers who have received a Third Notification within the previous 12 months. The Qualifying ISP must ensure that information relating to a Subscriber is deleted from this database when it deletes in accordance with paragraph 5.2 the records that it holds which relate to the Third Notification sent to that Subscriber.
- 6.2 A Qualifying ISP must provide a Qualifying Copyright Owner with a Copyright Infringement List on the request of that Qualifying Copyright Owner and for a period of time as requested by the Qualifying Copyright Owner, up to a maximum of 12 months prior to the date of the request.
- 6.3 A Qualifying ISP must include in a Copyright Infringement List requested by a Qualifying Copyright Owner the information set out in paragraph 6.4 in relation to a Subscriber included in the database referred to in paragraph 6.1 if the Qualifying Copyright Owner has issued no more than 12 months prior to the request at least one CIR identified by the Qualifying ISP as relating to that Subscriber.
- 6.4 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 ISP in the absence of an appropriate court order.
- 6.5 A Qualifying Copyright Owner may request from the Qualifying ISP a list in electronic format.
- 6.6 A Qualifying Copyright Owner may not make more than one request for a Copyright Infringement List to each Qualifying ISP within any period of 3 months. The Qualifying ISP shall provide the Copyright Infringement List to the Qualifying Copyright Owner within 5 days from the request.
- 6.7 At any time a Subscriber may request information about alleged infringements that relate to their account in accordance with applicable laws and regulations, including the Data Protection Act.

7. Subscriber appeals

Appeals Body

- 7.1 In accordance with section 124K(2) of the Communications Act 2003 Ofcom shall appoint an independent person with the function of determining Subscriber appeals (“the Appeals Body”).
- 7.2 Any Subscriber directly affected by an act or omission by a Qualifying Copyright Owner or a Qualifying ISP under the Code may submit an appeal to the Appeals Body (“a Subscriber Appeal”).
- 7.3 The Appeals Body shall determine all Subscriber Appeals in accordance with the provisions of the Code.
- 7.4 The Appeals Body shall establish procedures for the determination of Subscriber Appeals in accordance with the Code (“Appeal Procedures”). Any Appeal Procedures shall be subject to approval by Ofcom and Ofcom may require the Appeals Body to amend the Appeal Procedures before granting approval.
- 7.5 Ofcom may require the Appeals Body to provide it with all such information as it considers necessary for the purposes of carrying out its functions under the Communications Act 2003.
- 7.6 In carrying out its functions under this section, the Appeals Body may request such information and assistance from Ofcom as it considers appropriate.

Anonymity

- 7.7 The Appeals Body and any Qualifying ISP to whom a Subscriber Appeal relates must ensure, to the greatest extent possible, that the identity of a Subscriber which has submitted a Subscriber Appeal is not disclosed directly or indirectly to a Qualifying Copyright Owner without the express written consent of the Subscriber.

Notices and Periods of Time

- 7.8 The Appeal Procedures shall set out the form and service requirements of any notices or other communications that may or are required to be given under this section.
- 7.9 The form of appeal notice set out in the Appeal Procedures shall be a standard form which shall provide the opportunity for the Subscriber to set out, in particular:
 - 7.9.1 details of the act or omission set out in paragraph 7.2 against which the Subscriber is appealing;
 - 7.9.2 the grounds of appeal which he/she is putting forward;
 - 7.9.3 any steps taken by the Subscriber to prevent other persons from infringing copyright by means of the relevant internet access service;

- 7.9.4 any additional information which the Appeals Body considers appropriate;
- 7.9.5 a statement of truth confirming that the information in the appeal notice and any evidence submitted with it is true to the best of the Subscriber's knowledge and belief.

7.10 The Appeal Procedures shall set out time limits for the submission of any notices or other communications that may or are required to be given under this section. Any time limit set out in the Appeal Procedures may be extended by the Appeals Body where it considers it appropriate to do so, taking into account all relevant circumstances.

Grounds of appeal

7.11 A Subscriber Appeal may relate to:

- 7.11.1 a CIR;
- 7.11.2 a Notification;
- 7.11.3 the inclusion or proposed inclusion of an entry in a Copyright Infringement List; or
- 7.11.4 any other act or omission by a Qualifying ISP or Qualifying Copyright Owner under the Code.

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 ISP 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.

Response by a Qualifying ISP and/or Qualifying Copyright Owner

7.13 Where the Appeals Body has received a Subscriber Appeal, it must send a copy of the Subscriber Appeal to a Qualifying ISP and/or any relevant Qualifying Copyright Owner,

as appropriate, within 5 days of receipt of the Subscriber Appeal. Where a Subscriber Appeal is sent to a Qualifying Copyright Owner, the Appeals Body must ensure that the anonymity of the Subscriber is maintained in accordance with paragraph 7.7.

7.14 Where the Appeals Body considers it appropriate to do so, a Qualifying ISP or Qualifying Copyright Owner may be given the opportunity to make written submissions on the grounds of appeal contained in the Subscriber Appeal in accordance with the Appeal Procedures.

7.15 Where a Qualifying Copyright Owner has been invited to make additional submissions in response to a Subscriber Appeal, any such information or evidence shall be provided with the written submissions in accordance with the Appeal Procedures. Such information or evidence must include a statement sworn by an individual authorised by the Qualifying Copyright Owner, confirming that the information is true to the best of his or her knowledge and belief, and may include:

- 7.15.1 evidence that copyright subsists in the Relevant Work in the UK;
- 7.15.2 evidence that the Qualifying Copyright Owner owns copyright in the Relevant Work in the UK, or is authorised to act on behalf of a person which owns copyright in that work in the UK;
- 7.15.3 evidence that the Subscriber has infringed the copyright of the Qualifying Copyright Owner in the Relevant Work in the UK;
- 7.15.4 evidence that the Qualifying Copyright Owner did not authorise the Subscriber to carry out the relevant act in relation to the work which gave rise to the infringement of copyright in the work ;
- 7.15.5 reasons why this information or evidence was not included with the CIR; and
- 7.15.6 any additional information which may be specified in the Appeal Procedures

7.16 Where a Qualifying ISP has been invited to make additional submissions in response to a Subscriber Appeal, any such information or evidence shall be provided with the written submissions in accordance with the Appeal Procedures. Such information or evidence must include a statement sworn by an individual authorised by the Qualifying ISP, confirming that the information is true to the best of his or her knowledge and belief, and may include::

- 7.16.1 information or evidence as to the measures taken by the Qualifying ISP to determine that the relevant CIR related to an IP address used by the Subscriber at the time of the alleged infringement; and

- 7.16.2 any additional information which may be specified in the Appeal Procedures

Power to require information

- 7.17 The Appeals Body may require a Qualifying ISP or Qualifying Rights Owner to provide it with such information as it may require for the purposes of determining the Subscriber Appeal.

Additional Representations

- 7.18 If the Appeals Body has invited submissions from the Qualifying Copyright Owner or Qualifying ISP pursuant to paragraphs 7.15 or 7.16 above, it shall consider whether it is just in the circumstances to take such submissions into account in determining the Subscriber Appeal. If it decides that such submissions should be taken into account, it shall provide those submissions to the Subscriber and afford the Subscriber an opportunity to make additional written submissions in response.

Hearings

- 7.19 Save in exceptional circumstances where the Appeals Body considers it appropriate, no oral submissions will be accepted and no oral hearings will be held in determining a Subscriber Appeal.

Determination of Appeal

- 7.20 Subject to paragraph 7.18, the Appeals Body shall determine all Subscriber Appeals on the basis of the submissions and evidence received by it from Subscribers, Qualifying Copyright Owners and Qualifying ISPs.
- 7.21 In reaching its determination, the Appeals Body shall take due account of the technical knowledge of the Subscriber and the extent to which a particular Subscriber may have been aware of his/her ability to control access to his/her internet access service.
- 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.
- 7.25 A determination of a Subscriber Appeal must be in writing and include all reasons on which the Appeal Body relies for the purposes of the determination.
- 7.26 A determination of a Subscriber Appeal must be sent to the Subscriber, the Qualifying Copyright Owner and the Qualifying ISP in accordance with the Appeal Procedures, subject to the requirement of anonymity set out in paragraph 7.7.

Remedies

- 7.27 In addition to the powers set out at paragraph 7.20, where a Subscriber Appeal is determined in accordance with paragraph 7.22.1, the powers of the Appeals Body shall also include power:
- 7.27.1 to secure so far as practicable that a Subscriber is not prejudiced by an act or omission in respect of which a Subscriber Appeal is determined;
 - 7.27.2 to make an award of compensation to be paid by a Qualifying ISP or Qualifying Copyright Owner to a Subscriber affected by such an act or omission; and
 - 7.27.3 to direct a Qualifying ISP or Qualifying Copyright Owner to reimburse the reasonable costs of the Subscriber.
- 7.28 The Appeals Body shall make a determination in accordance with paragraph 7.27.3 unless it is satisfied that it would be unjust to give such a direction having regard to all the circumstances including the conduct of the parties before and during the proceedings.
- 7.29 Where the Appeals Body has made a determination in accordance with 7.27, the Qualifying Copyright Owner or Qualifying ISP shall pay to the Subscriber such amount as determined by the Appeals Body within such time as indicated in the determination.

8. Sharing of costs

Qualifying Copyright Owners and Qualifying ISPs shall be responsible for the payment of costs to each other and to Ofcom in accordance with any Order made by the Secretary of State under section 124M of the Communications Act 2003.

[In the absence of any Order, costs shall fall where they lie.]

9. Administration, information collection, enforcement and dispute resolution

Administration

9.1 Ofcom may make such directions as it considers are necessary to give effect to the requirements under this Code.

Information collection

9.2 Qualifying Copyright Owners and ISPs must provide Ofcom with such information, assistance or both that Ofcom reasonably requests within such period as Ofcom may specify for the purpose of administering and enforcing the Code.

Enforcement and resolution of Copyright Owner-Internet Service Provider (Owner-Provider) disputes

9.3 Where Ofcom determines there are reasonable grounds for believing that any person subject to an obligation under the Code has contravened that obligation, Ofcom may take enforcement action against that person in accordance with the following provisions.

9.4 Ofcom may also take enforcement action where there are reasonable grounds for believing that any person which has received a direction from Ofcom in accordance with paragraph 9.10 has breached that direction.

9.5 If Ofcom considers that there are reasonable grounds for undertaking enforcement action against any person under the Code, Ofcom will issue a Notice of Enforcement to such person.

9.6 A Notice of Enforcement will include:

- (a) the name of the recipient of the Notice of Enforcement;
- (b) the date of issue of the Notice of Enforcement;
- (c) the code obligation(s) that is the subject of the enforcement action;
- (d) the relevant time period that is the subject of the enforcement action;
- (e) a summary of the basis for the reasonable grounds for believing that the obligation(s) has been contravened; and
- (f) the date by which any representations should be made to Ofcom; and
- (g) contact details for the Ofcom investigating team.

9.7 Where Ofcom has issued a Notice of Enforcement, any person which is the subject of such Notice of Enforcement may make representations to Ofcom regarding the alleged infringement within 5 working days of the issue of the Notice of Enforcement or such other period as may be specified in the Notice of Enforcement.

- 9.8 Ofcom will consider any representations made in respect of the Notice of Enforcement and may issue a Draft Enforcement Notification setting out Ofcom's provisional decision in respect of the alleged breach of the Code and any proposed remedy.
- 9.9 Any person which is the subject of a Draft Enforcement Notification may make representations to Ofcom within 10 working days of receipt of the Draft Enforcement Notification or such other period as may be specified in the Draft Enforcement Notification.
- 9.10 Following receipt of any representations, Ofcom may issue a Final Enforcement Notification containing Ofcom's determination in accordance with the powers set out in paragraph 9.11.
- 9.11 Ofcom's powers in deciding upon the appropriate enforcement action against any person found to have breached the Code include:
- (a) the issuing of a direction requiring a person to comply with the relevant provisions of the Code and such conditions as Ofcom considers appropriate;
 - (b) the imposition of a financial penalty on any person found to have breached the Code;
 - (c) the issuing of a direction requiring the payment of compensation from such person to any other persons.
- 9.12 A Draft Enforcement Notification under paragraph 9.8 and a Final Enforcement Notification under paragraph 9.10 may be given in respect of more than one contravention.

Dispute Resolution

- 9.13 Ofcom may make a determination for resolving an Owner-Provider Dispute subject to this Code.
- 9.14 Ofcom may accept a reference of a dispute from either a Copyright Owner or an ISP if it is satisfied that:
- (a) It is an Owner-Provider dispute as defined in section 124E(9) of the Communications Act 2003;
 - (b) the party making the referral has submitted the reference in any required form as specified by Ofcom from time to time;
 - (c) the parties have made reasonable attempts to resolve the issue(s) in dispute themselves;
 - (d) there are no alternative means to resolve the issue(s); and
 - (e) there is evidence of breach of the Code by at least one party to the dispute.

- 9.15 Where Ofcom has accepted a dispute for resolution, it will notify the parties to the dispute of its decision and will invite the parties to provide representations on the matters in dispute within 5 working days of the notification or such other period as may be specified in the notification.
- 9.16 Ofcom will consider any representations made by the parties and may issue a Draft Dispute Determination setting out Ofcom's provisional decision.
- 9.17 Parties to the dispute may make representations to Ofcom on the Draft Dispute Determination within 10 working days of receipt or such other period as may be specified in the Draft Dispute Determination.
- 9.18 Following receipt of any representations, Ofcom will issue a Final Dispute Determination containing Ofcom's determination in accordance with the powers set out in paragraph 9.19.
- 9.19 Ofcom's powers in relation to the resolution of disputes between Copyright Owners and ISPs include:
- (a) the issuing of a direction requiring a party to the dispute to comply with the relevant provisions of the Code and such conditions as Ofcom considers appropriate;
 - (b) the issuing of a direction requiring the payment of compensation from one party to the other party;
 - (c) the issuing of a direction requiring the payment of costs from one party to the other party in respect of costs incurred as a result of a breach of the Code by such party; and
 - (d) the issuing of a direction to a Copyright Owner which is party to the dispute to indemnify any ISP which is party to the dispute for any loss or damage resulting from any failure by that Copyright Owner to comply with the Code.
- 9.20 Nothing in this section prevents Ofcom from taking enforcement action in respect of any of the issues arising in the course of a dispute.

Penalties

- 9.21 Ofcom may impose a penalty on an ISP and/or Copyright Owner for a contravention of the Code.
- 9.22 A financial penalty of up to the statutory maximum of £250,000 may be imposed by Ofcom in respect of any breach of the Code by any person.
- 9.23 Where a penalty relates to more than one contravention, act or omission under this Code, a separate penalty may be imposed in respect of each contravention, act or omission.
- 9.24 Where a penalty relates to a continuing contravention, act or omission, no more than one penalty may be imposed in respect of the contravention, act or omission specified.

- 9.25 Where Ofcom impose a penalty on an ISP and/or Copyright Owner, they shall fix a reasonable period after it is given as the period within which the penalty is to be paid.
- 9.26 In making a determination of a financial penalty, Ofcom must have regard to any representation made to them by any person subject to a financial penalty.
- 9.27 A financial penalty imposed under the Code:
- (a) must be paid to Ofcom; and
 - (b) if not paid within the period fixed by Ofcom, is to be recoverable by Ofcom accordingly.

Annex 6

Template notifications

FIRST LETTER – for illustrative purposes only

Dear #####

Notification of suspected online copyright infringement linked to your internet connection

As a valued customer, we are sorry to have to bring you this news.

We have recently been sent a report from a copyright owner which suggests your internet connection has been used illegally to share copyright material (such as a movie, game or music) on a peer to peer network.

New UK laws mean we now have to send you a notification when we get a report like this which we match to your internet account.

We appreciate that this may take you by surprise as you may not know this activity took place over your connection or who was responsible. Even if are aware that you or someone else shared copyright material in this way, you may not know that this is illegal.

To help you and to try and answer some questions you may have, we enclose a factsheet, which:

- Highlights what online copyright infringement is, what can happen to those who continue to engage in this activity after receiving notification letters and the action copyright owners can take against subscribers who repeatedly share copyright material online; and
- Provides links to sources of advice and notes that you can consider steps to prevent your connection being used to share copyright content illegally.

We also enclose information about the report we have received. It sets out:

- The copyright owner who has reported the suspected activity;
- The copyright material which the owner believes was unlawfully shared; and
- The evidence gathered by the copyright owner (including the internet protocol address and its date/time, which we have linked to your account).

[We have also received x further CIRs against your account. If you would like information on these additional CIRs (including details of the copyright owner making them), then please contact us on #####.]

You do have the right to appeal this letter and any copyright infringement reports held against your account, so our factsheet contains information on how you could do this.

You can also call a helpline on ##### if you have any questions about this letter.

Please take time to read the enclosures carefully so that you can consider whether you should take any action. We hope this information is helpful and that you are able to address the issue.

Thank you.

Second Notification – for illustrative purposes only

Dear ####

Please do not ignore this letter

- Second Notification of online copyright infringement associated with your internet connection

We sent you a notification on [*insert date of first notification*] following a report that your internet connection had been used to illegally share copyright material on a peer to peer network.

Since then, we have been sent a further report from a copyright owner about the unlawful sharing of copyright material, which again matches to your internet account.

If we receive another report like this [between x date and y date], we will have to send you a third notification. If this happens, you may then be included in a “**copyright infringement list**”.

Information on how this copyright infringement list is generated is set out in the enclosed factsheet. But please note the main implication of being included on such a list – the prospect that a relevant copyright holder may use it, apply to court to find out your identity and then take legal action against you to seek damages.

The factsheet also highlights sources of advice on steps you can take to prevent your connection being used to share copyright content illegally.

We also enclose information about the recent report we have received which sets out:

- The copyright owner who has reported the suspected activity;
- The copyright material which the owner believes was unlawfully shared; and
- The evidence gathered by the copyright owner (including the internet protocol address and its date/time, which we have linked to your account).

[We have also received x further CIRs against your account since your last notification (bringing the total we hold about you to y). If you would like information on these additional CIRs including details of the copyright owner making them, then please contact us on #####.]

You do have the right to appeal this letter and the report, so our factsheet contains information on how you could do this. You can also call a helpline on ##### if you have any questions about this letter.

We strongly encourage you to take time to read the enclosed materials carefully.

We hope the information helps you to take action so that we won't have to write to you again.

Thank you.

Third Notification – for illustrative purposes only

Dear ####

PLEASE DO NOT IGNORE THIS LETTER - YOU MAY BE ADDED TO A COPYRIGHT INFRINGERS LIST AND RISK LEGAL ACTION BEING TAKEN AGAINST YOU:

Third notification of online copyright infringement associated with your internet connection

We sent you a second notification on [*insert date of second notification*] following a report that your internet connection had been used to illegally share copyright material on a peer to peer network.

Since then, we have been sent a further report from a copyright owner about the unlawful sharing of copyright material, which again matches to your internet account.

This is now your third notification. **This means you may now be included in a “copyright infringement list”.**

Information on how this copyright infringement list is generated is set out in the enclosed factsheet. Being included on such a list would raise the prospect that a relevant copyright holder may use it, apply to court to find out your identity and then take legal action against you to seek damages.

It is very important you give this matter urgent and full consideration.

As before, we have enclosed a factsheet on online copyright infringement which includes information on:

- What can happen to subscribers who are sent a third notification and then end up being included on a copyright infringement list; and
- Further sources of advice and the action you could take – such as steps to prevent your connection being used to share copyright content illegally.

We also enclose information about the recent report we have received which sets out:

- The copyright owner who has reported the suspected activity;
- The copyright material which the owner believes was unlawfully shared; and
- The evidence gathered by the copyright owner (including the internet protocol address and its date/time, which we have linked to your account).

[We have also received **x** further CIRs against your account since your last notification (bringing the total we hold about you to **y**). If you would like information on these additional CIRs including details of the copyright owner making them, then please contact us on #####.]

You do have the right to appeal this letter and the report, so our factsheet contains information on how you could do this. You can also call a helpline on ##### if you have any questions about this letter.

We sincerely hope that you are now able to resolve the issue by taking swift and appropriate action.

Thank You

Information Sheet on Online Copyright Infringement and Notifications

1. Why have I received this notification?

A copyright holder believes that the internet connection (that we provide to you) has been used to infringe their copyright. They reported this to us within 10 working days of gathering their evidence.

As we are your ISP, we must send you this notification under new laws – section 124A(4) of the Communications Act.

2. What is online copyright infringement?

Copyright exists in creative works such as films, books, songs, games, and TV programmes. It is owned by the person who created the work or the person who has bought the copyright.

Online copyright infringement takes place when a person uses the internet to exploit a copyright work without the owner's permission - for example by downloading a copy of a music track without the owner's permission or by making the music track accessible over the internet to others without the owner's permission.

3. Who has alleged that I have infringed their copyright?

This is in the separate attachment, which has details about the apparent infringement and the person whose report triggered this recent notification. That person may be the copyright owner of the work or the person who is authorised to act on their behalf.

4. What evidence has been used to make this allegation?

The key evidence was the IP address linked to the time and date of the suspected unlawful sharing of copyright material.

Generally, copyright owners (or their agents) go online to look for material in which they own copyright and identify sources making that material available without their consent. In order to identify the source, they download a copy of the material so that they obtain the 'IP address' from which it was being made available - IP address stands for internet protocol address and is a unique identifying number given to each device connecting to the internet.

The copyright owner will be able to tell from the IP address that we allocated the IP address to one of our customers - but the IP address does not tell them your identity.

As your ISP, we hold information about IP addresses which we allocate to you while you are accessing the internet. So when a copyright owner gives us an IP address and the time/date it downloaded copyright material, we are able to match it to one of our customers. We have looked into the IP address the named copyright owner gave us and can verify that it does match your IP address at the time of their evidence.

5. What should I do?

- a) Establish whether you have used your internet connection to infringe copyright or whether you have allowed someone – such a member of your household – to use the internet service and they have used it to infringe copyright.
- b) **If so, consider taking steps to prevent your connection being used to share copyright content illegally as this may stop further notifications or legal action.**
- c) If you believe the allegation of copyright infringement is false, then you can appeal the copyright infringement report(s). Also see the answer at question 8.

6. What triggers these notifications and what will happen next?

If this is your **first** notification from us:

We received a report that links your internet connection to the suspected illegal sharing of copyright material. We will take no further action if we receive no new reports which link your internet connection to the suspected illegal sharing of copyright material.

However, if we receive further reports of infringements which match to your account, we will have to send you additional notifications.

If this is your **second** notification from us:

This means that we have received another report that links your internet connection to the suspected illegal sharing of copyright material and that we have received this report more than one month since the date of our first notification to you.

Again, we will take no further action if you can take swift steps to ensure your internet service is not used again to infringe copyright.

If this is your **third** notification from us:

This means that we have received yet another report that links your internet connection to the suspected illegal sharing of copyright material and that we have received this report more than one month since our second notification. You are now at risk of being placed on a 'copyright infringement list' – see Question 7 below.

7. How is the copyright infringement list produced - how might I be included in it?

- We are required to produce this list after a request from a copyright owner or a person acting on behalf of a copyright owner
- We would only send them the list if we held reports (**received in the last 12 months**) from that copyright owner (or a person acting on behalf of a copyright owner) which matched to your account
- The list would only show reports that we held from that copyright owner or the person acting on behalf of a copyright owner
- Copyright owners need our help to create this list as only we hold information about the various IP addresses allocated to your internet account
- The list enables the copyright owner (or a person acting on behalf of a copyright owner) to see which of the reports they have made are linked to a single subscriber

- The list would be anonymous so your name would not be revealed. It would only give copyright owners a list of matched reports/IP addresses against your account.
- But the list is invaluable to copyright owners as it helps them to pinpoint the most serious offenders of their copyright and target legal action against them
- **Copyright owners can go to court and require us to identify suspected offenders – and if you fell into this category, copyright owners would then consider taking legal action against you in order to obtain financial damages against you.**

8. Will the copyright owner only take legal action if I am included in a copyright infringement list?

The copyright infringement list is intended to enable copyright owners to focus their legal action against those suspected of the most (serious) infringements of their copyright. However, you should note that the copyright owner can apply to court at any time, using its *own* evidence, in order to identify a subscriber and take legal action against them – in other words, they can do this before a subscriber has received a third notification/is including on a copyright infringement list.

9. But I believe this allegation is incorrect/false - my internet service cannot have been used to infringe copyright. What can I do about this?

If you believe this to be the case, you can appeal the decision to the independent subscriber appeals body. The grounds for appeal are #####.

More information and contact details for the subscriber appeals body is at #####.

10. If the copyright owner goes to court, will I be found liable?

It will be up to the court to decide whether to identify a subscriber, whether they are liable for the suspected infringement and whether they should pay financial damages.

11. Does the copyright holder have my personal details?

No – they only have your IP address. We will not provide them with your personal details unless they obtain a court order which requires us to identify who you are.

12. Can I ask the copyright owner directly for more information about the alleged infringement?

You have the right under Data Protection legislation to request any information – including copyright infringement reports – held by us (free or charge) or from the copyright owner. However please note that if you contact the copyright owner directly, you would clearly lose your anonymity (and you should remember that if you did not contact them, they would need to obtain a court order before they were able to identify who you are).

13. How long will details of the alleged infringement be held and who will hold the information?

We will hold information on a copyright infringement for a period of 12 months (after the date we receive the report from a copyright owner). After this time period, the information will be deleted from our systems.

However, copyright owners can keep information about infringements that they obtain themselves or from us by requesting a copyright infringers list for a longer period.

14. Where can I access online content legally?

There are a variety of legal ways to obtain and share online content such as music, games and videos etc. For more information, please see #####

15. I think someone used my (wireless) internet connection without permission and did the copyright infringement and want to stop this happening again – what can I do?

You can take measures to make your internet connection more secure. Please see #####

16. I'm an open wireless network provider – what steps can I take to prevent the broadband service I provide being used by others for online copyright infringement?

You can take a number of measures. Please see #####

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

No.

18. But I've read reports that this kind of disconnection could happen in future?

We understand the Government will be keeping an eye at levels of online copyright infringement. If they decide the current system is not reducing those levels, they may take action to require ISPs like us to take technical measures (such as suspending or slowing down the broadband service) against those suspected of repeatedly engaging in this activity. If the Government decides to do this, it would require further legislation, approved in Parliament.

It will also be for Government to set out in further legislation *any criteria* which will be used for the application of technical measures against a subscriber. Until the Government does so, we will not know whether infringement reports we hold against your account could trigger any technical measures the Government may introduce. Again, the legislation setting out the criteria for technical measures would be subject to Parliamentary approval.