

ONLINE INFRINGEMENT OF COPYRIGHT: IMPLEMENTATION OF THE ONLINE INFRINGEMENT OF COPYRIGHT (INITIAL OBLIGATIONS) (SHARING OF COSTS) ORDER 2012

RESPONSE FROM THE BPI (BRITISH RECORDED MUSIC) LTD.

Introduction

1. BPI welcomes the publication of the Draft Sharing of Costs Order as part of the process of implementing the Digital Economy Act.
2. BPI would note at the outset that the costs that the creative industries face in order to protect their rights are a significant burden on business – a burden that is created by activity that is infringing rights in law. The creative industries have always undertaken activities in the monitoring and defence of their rights, but the burdens of legal enforcement borne by rights holders should be minimised where possible.
3. This burden of enforcement under the Digital Economy Act in the UK is in contrast to similar measures taken in other countries, which do not impose similar costs on rights holders, and as such the Act represents a competitive disadvantage for encouraging investment in and production of original creative content in the UK.
4. Ofcom has engaged positively with BPI over the course of this process to explain the reasoning behind the costs model, which BPI is grateful for. BPI continues to work with Ofcom to ensure that the process of implementation is as timely and as efficient as possible. This is a complex process, and BPI welcomes the thoroughness of the discussions Ofcom has been willing to undertake to get to a common understanding of the way the system will operate.
5. However, BPI is still very concerned about three aspects:
 - **the absolute levels of cost;** which are very high and will act as a serious barrier to rights holders wishing to use the process, particularly small rights holders;
 - **transparency of costs;** in particular of Ofcom's costs, where there is no ability for rights holders to see how Ofcom has incurred the very high costs it is charging for its administration of the system; and
 - **equitable distribution of costs;** as rights holders participating in the initial notification period will be liable for all of the upfront costs of ISPs with no mechanism for adjustment as others begin to use the system.
6. BPI would also make the point that this process is evolving, and all of the parties involved in the implementation must work to introduce an efficient, effective and fair system for tackling copyright infringement through the implementation of the Act. As such, there should be adequate room for adjustments both prior to and during the first two notification periods to ensure that costs are minimised and distributed most equitably.

Section 3 – Costs sharing framework

Question 3.1: Do you have any comments on the principles set out above; if you consider there are other economic principles to which we should have regard in setting fees, please identify these?

7. BPI believes that Ofcom has identified the right principles that it should have regard to in setting fees. In particular BPI would like to emphasise the points in 3.7 and 3.9 that the costs should not debar small or large rights holders and that the ISPs should have an incentive to minimise the costs of processing.
8. However, the likely tariff per CIR is based on numbers that will be too high for small rights holders to participate. Artists self releasing albums or small independent labels outside of the BPI membership will not have the same access to enforcement as large rights holders. As an economic principle, this will have a distorting effect in the market. Both the absolute costs and the distribution of those costs, with very large upfront costs for rights holders, is likely to discriminate against small rights holders.
9. There is also a very significant first mover disadvantage. The process whereby Ofcom has decided there will be no redistribution of ISP costs
10. The practical application of the principles will be discussed further below, but it is important that the benchmark costs supplied by ISPs are carefully scrutinised. Ofcom should be mindful of the fact that ISPs have asymmetric information in the cost of networks and that the overwhelming cost of the system is borne by rights holders who rely on Ofcom to ensure that the costs of ISPs is minimised.
11. Ofcom states in 3.12 that the fee should only cover the costs which the efficient ISP should incur: most the costs Ofcom took into account are based on BWSC's study of 2011. The problem with this approach is that BWCS considered all ISP explanations to be reasonable without conducting a detailed audit to find out what the costs of an efficient ISP are. Also, BWCS emphasise that there is a lot of uncertainty about variable costs – nevertheless the study tends to treat ISP cost claims favourably.
12. For instance, one ISP submitted that it estimated fixed opex to be 5% per annum of system development costs, and declined to submit additional costs.¹ BWCS considered this not to be an example of efficient operation but rather as a case where legitimate costs had not been claimed.
13. Regarding ISPs costs, we are seeing a great divergence regarding ISP claims of cost for their participation in graduated response and similar notice sending schemes: most recently in a cabinet paper issued by the Minister of Commerce in connection with a cost review of the New Zealand graduated response scheme the Minister noted that “given the variance of estimates between the current five IPAPs [ISPs] operating the system, it is difficult to arrive at an average per notice cost, and thereby derive an average proportion of cost recovery”.²

¹ BWCS “Online Copyright Infringement Cost Study, p.19.

² Office of the Minister for Commerce: Copyright (Infringing File Sharing) Regulation – Review of Notice Fee, para 18; <http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/cabinet-paper.pdf>

Section 4 - Process and Timetable

Question 4.1: Do you have any comments on the proposed process for establishing CIR estimates and costs; do you have evidence which would suggest that a different process should be adopted?

14. BPI agrees with Ofcom (4.5) that the DEA process will necessarily be iterative and BPI has expressed its willingness to be as open as possible with Ofcom in advance about the volumes and estimated costs in order to ensure that the implementation is as speedy as possible. In particular, BPI has incentives to ensure that costs are minimised and the system is robust.
15. However, even within the iterative process the costs per CIR as expressed will be a very high barrier to maximising access to the system. The Relevant Costs will be distributed most efficiently through the widest participation in the first notification period, however rights holders may not enter the iterative process if they believe that they will bear a disproportionate amount of the entry costs of the system and that by delaying their entry they can avoid those costs.
16. BPI also agrees (4.6) that revealing a demand curve would be too complex and that the process should be through repeat estimation. BPI wishes to cooperate with Ofcom as much as possible in advance of this process to ensure there is reasonable certainty about the likely volumes from the music industry at estimates of CIR tariff.
17. Ofcom should set a number of indicative CIR tariffs based on much wider participation to encourage more rights holders to use the system in the first notification period.

Question 4.2: Do you have any comments on the proposed process or timetable for establishing the appeals body

18. BPI believes that the appeals body timetable is manageable and understands the tender requirements would make it difficult to bring forward that process. BPI is concerned at the intimation in 4.22 that the potential for no satisfactory or credible appeals body might delay the process further. BPI understands that Ofcom has done due diligence on potential suppliers but if it becomes clear at any point that the OJEU process would not bring forward a credible supplier Ofcom should act quickly to ensure an alternative.
19. BPI understands that Ofcom has to allow the body to draw up its own procedural rules, guidance on approach to appeals and reporting framework to Ofcom. However, given that Ofcom must approve rules and reporting framework, Ofcom might potentially save valuable time from the process by working with the ISPs and the rights holders to draw up what it might see as best practice guidance in all of these areas for any appeals body.
20. This might also reduce uncertainty in the appeals tendering process and provide greater clarity for ISPs and Rights Holders in ensuring they have systems in place that would minimise the likelihood of appeals. BPI would be willing to participate in such a process.

Question 4.3: Do you agree that Qualifying ISPs should have 9 months from the point at which estimates are finalised to prepare for the operation of the DEA scheme?

21. In 4.23 onwards, Ofcom explains the challenge of ISP capital expenditure. BPI believes that ISPs should be anticipating this capital expenditure and ensuring that all system specification has been undertaken. If Ofcom is correct, and ISPs will not start to build the systems that are required for large scale processing of CIRs, they should be in a position to be “spade ready” at the moment that the requirement is placed upon them.
22. All delay is a further cost to rights holders, both in costs of the system and in cost of lost sales, and ISPs should not reasonably be able to slow down the process, in particularly given the lengthy delay to implementation to which some have contributed through their appeal against the Act.
23. BPI welcomes Ofcom’s decision in 4.29 not to choose the outside estimate of time taken for ISPs to build systems, however Ofcom has indicated that some ISPs have suggested that a period of 6-9 months would be reasonable. By choosing a shorter period, of 6 months, it is more likely that Ofcom will be ensuring the implementation would work at the speed of the most efficient operator. It will also be much more likely that ISPs will undertake all necessary preparatory work in advance of their legal obligations.
24. BPI recognises the potential agreement in 4.30 and would welcome early investment by ISPs and would be happy to enter into such a voluntary agreement. This would, of course, have to be on the basis of estimates of cost that are consistent with Ofcom’s own estimates.

Question 4.4: In light of the evidence above, do you agree that the first notification period should start on March 1st 2014 and end on March 31 2015; do you have evidence which would suggest that different dates are feasible and preferable?

25. BPI is disappointed that the notification period will not begin until March 2014 (4.13), nearly 4 years after the passage of the Act, but recognises that legal challenge has caused this unnecessary and expensive delay. BPI would still urge the ISPs to bring forward their planned build in anticipation of the implementation of the Act and would be happy to enter into discussions to ensure this is done. Ofcom recognises this possibility (4.14) and BPI would ask all responsible ISPs to enter into discussions on ensuring an earlier start date.
26. BPI believes that if despite all possibilities for bringing forward build of systems, March 2014 is still the defined start date; the period end of 31st March 2015 might still be too short a period for reasonable recovery of Relevant Costs.
27. The upfront costs of ISP build in the DEA are borne by those rights owners that participate in the first round. This provides a potential incentive for rights owners to delay their participation until after the Relevant Costs have been recovered. We understand Ofcom’s constraints on this aspect but would like to ensure that all potential options under the Act have been considered to allow ex-post adjustment of Relevant Costs.
28. In particular, adjusting the Relevant Costs and Initial Costs of the DEA over two notification periods, as with the Qualifying Costs would potentially spread the Relevant Costs amongst a wider base of rights holders.
29. Although readjusting over two notification periods would add a further layer of complexity in tariff setting, Ofcom has outlined later (5.5) that adjustments could be made retrospectively to reimburse those rights holders that overpay for initial CIR estimates.

30. Ofcom should apply exactly the same principle to Relevant Costs that it has to its own costs, to ensure that rights holders entering in the first notification period do not bear all of the Relevant Costs.
31. By readjusting Relevant Costs over two notification periods, it will reduce the incentives to wait for the second notification period as well as ensuring a more equitable distribution of Relevant Costs amongst rights holders.

Question 4.5: Do you agree with the proposed industry payment schedules for fees in respect of Initial and Qualifying Costs.

32. BPI agrees with the proposed industry payment schedules for fees in respect of Initial and Qualifying Costs.

Section 5 - Qualifying Costs and Initial Costs

Question 5.1: Do you have any comments on the activities which we anticipate carrying out under the DEA amendments which will give rise to Qualifying Costs in the First notification period?

33. In 3.23 Ofcom states that “it will not be a complex task either to determine what costs Ofcom has already incurred in setting up the scheme or to project the costs likely to be incurred by Ofcom in overseeing the scheme”. This might be true, however, there is no simple way for rights holders to determine Ofcom’s costs or to understand how they have been incurred. It must also be said that these costs are exceptional to the UK in comparison to measures internationally, and that the unnecessary delay to the Bill caused by the Judicial Review has increased these costs to rights holders.
34. In 5.9 Ofcom outlines the activities funded by its expenditure but there is little detail under these budget headings. Ofcom should supply a greater granularity in its costs so that rights holders can examine, for instance, the amount of expenditure Ofcom has applied to general administration costs. Better transparency would both give greater incentive to Ofcom to minimise its administration costs and allow Rights Holders to benchmark those administration costs against comparable public and private sector institutions.
35. In 5.12 Ofcom outlines costs it will incur of £3.3m during the first notification period. BPI understands that this is at the lower end of Ofcom estimates made when the DEA received Royal Assent, but in both cases there was no breakdown to support this amount.
36. The only breakdown offered is that there is provision of £1.3m for external spend covering research for Ofcom’s reporting duties. By contrast, the DCMS expenditure on external consultants in 2011-12 was £115,581.³ The complex research commissioned by Broadband Delivery UK to investigate the costs and delivery of a high speed broadband network only cost £1,039,235 in external consultancy.

³ <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120516/text/120516w0001.htm>

37. BPI's own experience of research into online infringement is that a comprehensive report, based on a large, nationally representative consumer sample, into behaviours online for accessing music content, including all different forms of infringing access and file sharing, costs in the region of £50,000. Detailed monthly tracking of visitor numbers to 60 specified pirate websites from a leading provider such as Nielsen costs around £10,000 per annum. There therefore appears to be some considerable discrepancy between the likely costs of a thorough external report and the Ofcom provision in the consultation.
38. One example of commissioned research is the BWCS report attached to the costs schedule, BPI is not clear why the technical and statistical expertise for this document was not available in house in Ofcom as it is an appraisal of ISP's own submissions rather than a root and branch technical document such as BPI commissioned by Sweet Consulting in 2009.
39. The Sweet Consulting report cost BPI in the region of £25,000 and was a thorough study of the technical aspects behind building systems that could process CIRs under a DEA type process. The statistical content of the BWCS report should be well within the capability of Ofcom's own in-house team.
40. Ofcom's income and budget is based on the principle of that in economic and consumer regulation industries should pay for the regulator. This is not the case with the Digital Economy Act, where the main costs fall on industries that are trying to enforce their rights in law. Rights holders are not being regulated, they are paying for enforcement of property rights within law. As such, Ofcom should understand that the burden it places on copyright industries should not be considered as equivalent to its normal regulatory activity.
41. Central Government is capable of breaking down expenditure to individual budget lines and it would be helpful if Ofcom published a complete breakdown of its expenditure on the Digital Economy Act, apportioned to budget headings, so that they can be properly scrutinised and benchmarked against comparable organisations.

Question 5.2: Do you agree with our proposed approach to the costs incurred by the appeals body during a notification period?

42. On appeals body set up costs, BPI believes that the £700,000 figure is too high. BPI has conducted expressions of interest for an appeal body to sit alongside a notification process. The responses assumed a small set up cost, of less than £50,000 with a case fee in the region of £100-£150. Ofcom may find significant savings below its assumed figure on appeals. We can provide detail on this to Ofcom if necessary.
43. Whilst Ofcom may argue that it is being cautious with these estimates there are obvious problems with putting in estimates that are significantly higher than expected. In particular: it sends a market signal to potential tender companies of an expected value which might lead to inflated tenders; and it leads to an indicative CIR tariff that is higher than expected which acts as a deterrent to entry of rights holders in the first notification period.

44. BPI agrees that the proposed approach of Ofcom to recover the full costs of the appeals body from the case fee. However, BPI would ask that the costs that (5.16) Ofcom “does not consider ... will attract material costs” are fully accounted for and transparent so that Ofcom can ensure that unacceptably high administration costs are not hidden in the case fee.
45. Ofcom confirms that there will be a refundable fee of £20 to make an appeal against a report of infringement. BPI strongly welcomes this as a sensible measure to ensure that the appeals system is deters vexatious claims but does not penalise successful complainants. In both cases, of course, rights holders bear considerable costs.
46. BPI is aware that there will be some pressure to remove the appeals fee, on the grounds that a person wrongly accused of infringement should have free access to justice. BPI would emphasise that Rights Holders do not have free access to justice to defend those rights. The costs of the Digital Economy Act are mainly borne by rights holders to enforce rights they clearly hold in law. The fee is less than the monthly cost of telephone line rental with a broadband package from BT and is fully refundable when the Copyright Infringement Report is established to be in error.
47. An unsuccessful appellant would face no penalty, despite their appeal being dismissed, save for the £20 fee. All of the additional costs of the appeals system are borne by rights holders. Without the fee, the system would have the perverse effect of placing significant costs on rights holders for an unsuccessful appeal whilst the appellant would bear no costs at all.
48. Even with the fee, the process under the Digital Economy Act means that significant additional costs can be passed onto rights holders by subscribers who have clearly found to be using their connection to download infringing content through choosing to appeal in full knowledge of that infringement. In this context, it would seem a balanced measure to have a cost hurdle to enter the appeals process, particularly as that fee is returnable.
49. There is a similar process in the USA, where the voluntary notice-sending scheme has provision for subscribers to pay a \$35 “filing fee” on requesting an independent review of a copyright alert they have received.
50. The fee also mirrors other measures the Government takes to ensure that some administration costs are borne by an appellant – e.g. parking or speeding fines can increase if there is an unsuccessful appeal. The Ministry of Justice applies fees to a number of appeals processes including widely used Court Fees in the Court of Appeal.
51. It is common in UK justice for there to be a cost to an appellant, the Digital Economy Act is not unique in this regard. What is unusual is that there is no ground for rights holders to recover costs from unsuccessful appeals. This is, again, a strong reason why the £20 fee should remain in this instance.
52. BPI would ask that Government looks again at the principle that Rights Holders bear the cost of unsuccessful appeals against valid and correct notices of copyright infringement. It should also consider whether there is a means of redress for rights holders in appeals arising because of problems with ISP processing, given that rights holders will still bear the costs.

Section 6 - Relevant Costs: Capital and Fixed Operating Costs

Question 6.1: Do you agree that all initially Qualifying ISPs will face the same model of efficient costs in carrying out the Initial Obligations and hence should be treated as having the same model of Relevant Costs for the purpose of setting a notification fee? If not, please provide your reasons for that view.

53. BPI agrees with Ofcom that all initially Qualifying ISPS will face the same model of efficient costs, and that as a consequence Ofcom should treat the lowest cost as the most efficient price.
54. Rights holders pay 75% of the value Ofcom sets, not actual costs incurred by ISPs. Given the way the Digital Economy Act works, ISPs have an incentive to ensure that the price Ofcom sets for Relevant Costs is as high as possible but that the actual costs incurred by ISPs are as low as possible (as their share is merely an internal transfer payment).
55. This makes it absolutely crucial that Ofcom is bearing down on ISP costs as otherwise ISPs will not be paying their fair share under the Act, and that Ofcom requires the ISPs to provide adequate audit of their actual costs, including receipts, to allow for a readjustment downward of costs if ISPs have spent less than that allowed under the Digital Economy Act.
56. ISPs should not, through such a readjustment mechanism, be incentivised to inflate the costs of the building of systems. Otherwise rights holders would be penalised for the inefficient build of systems.

Question 6.2: Do you agree that we should apply the full automated cost model to all Qualifying ISPs for the full range of monthly activity from 2,500 to 200,000 CIRs per month? Do you have evidence that an alternative approach to costs should be adopted for any levels of CIR activity; and any evidence about what costs should be for those levels?

57. BPI believes the principle applied should be that of the most efficient costs of processing. Given the availability of low-cost automation, this is therefore the relevant cost model to use.

Question 6.3: Do you agree that the Relevant Costs for the first notification period should include 100% of ISP relevant capital expenditure?

58. In 6.30 Ofcom outlines that it only has certainty that the capital assets will be used for a single period. BPI does not agree that the risk outlined by Ofcom in 6.32 is outweighed by the possibility that there will not be a second notification period.
59. For Ofcom to front load the Relevant Costs onto rights holders committing to the first notification period, it must have a very clear indication that the system will only run for one period. BPI does not believe this is a reasonable assumption.
60. As stated above (paras 27-29) BPI believes Relevant Costs should be readjusted over two notification periods to ensure a more equitable distribution of up-front costs.
61. One option would be to survey rights holders on their likelihood of using the Digital Economy Act in the first three years of operation.

62. Ofcom should also consider the case that a content owner not wishing to use the Digital Economy Act could enter into a commercial deal directly with an ISP to provide information on infringing subscribers. Such a deal could free ride off the capital investment made by rights holders using the Digital Economy Act.

Question 6.4: Do you agree with our assessment of the fixed costs which will be reasonably and efficiently incurred by a Qualifying ISP in carrying out the Initial Obligations? Do you have evidence to suggest amounts attributed to these costs may be incorrect?

63. BPI understands that it would be difficult to get accurate figures of ISP costs. At the time of passage of the Digital Economy Act, BPI commissioned an external consultancy, Sweet Consulting Ltd. to advise on the costs of a bottom up build of ISP systems to deal with a potential notification system. BPI shared this document with Government and the ISP costs would appear to be in line with this report.

64. In light of this, BPI would question the commissioning of the BWCS external consultancy report. The report takes a rudimentary statistical approach to the costs supplied by the ISPs to find mean and median estimates, after applying some common sense tests to the information supplied. Given that the report does not rely on independent expertise in ISP system build and operation costs, as stated above there is little case to warrant an external report in this matter.

65. Although the BWCS report asked for (p44) “invoices, business cases approved or submitted, supplier quotations and/or documented costs of similar implementations in the past?” it is not clear from the report that all the ISPs surveyed supplied such information. In order to ensure that costs are minimised and reflect actual expenditure Ofcom should consider an ex-post adjustment on presentation of evidence of expenditure down to the cost of the most efficient operator.

66. This, coupled with the potential enforcement action on ISPs that have spent significantly in excess of the most efficient operator, would provide a mechanism for constraint on ISPs and support Ofcom’s duty to ensure efficiency.

67. Staff training costs have returned disparate figures from each ISP, but BPI would note that the fact that one ISP put in no charge for customer training reflects the probability that any additional training cost is marginal or zero as part of the ongoing training needs of an ISP customer service operation. The figure of zero might, therefore, be appropriate.

68. Additionally, whilst some ISPs have attempted to capture spill-over costs to their operations, there has been no benefit applied to the ISPs modelling. So whereas, for example, there are ISPs that have apportioned switching costs to the DEA, there has been no attempt to apportion the potential reduced costs of traffic management and congestion on networks that will be relieved by either modified behaviour or switching by subscribers involved in high volume copyright infringement.

69. It is important that Ofcom has a process for ensuring that ISPs use the systems paid for by the Digital Economy Act only for the purpose of processing CIRs under the Act. It is possible that ISPs might otherwise use the systems to provide commercial services – for instance to Rights Holders not wishing to use the Digital Economy Act process.

70. If Ofcom disagrees, and allow ISPs to gain commercial revenue using systems built through the DEA process and paid for through CIRs, such revenues should be used to reduce the capital costs for rights holders. This might need Ofcom to ensure that there is a system to claw back over-payments by rights holders to ISPs.

Question 6.5: Do you agree the proposal that we set two notification fees, one for O2 and Everything Everywhere and the other for the larger Qualifying ISPs?

71. BPI agrees with Ofcom's conclusion that there should be two notification fees, one for O2 and Everything Everywhere and the other for the larger Qualifying ISPs. This is in line with BPI's understanding of the different costs applicable.

Section 7 – Relevant Costs: Variable Costs

Question 7.1: Do you agree with the proposals for the ISP cost items to be counted as part of the Relevant Costs; do you have evidence to support alternative approaches?

72. BPI agrees with Ofcom's assessment of the ISP cost items that should be counted as part of the relevant costs. However, when it comes to specific amounts allocated there is a high potential for gaming by ISPs to attribute costs to the Digital Economy Act.
73. For instance, in the course of a general customer service call a customer may ask about the Digital Economy Act. ISPs could use its customer management services to attribute the cost of all of that call to activity under the Act, when the inquiry was not the substance of the call.
74. As such, as part of Ofcom's general duties over regulation of ISPs, it should ensure that their systems for apportionment of cost are reasonable. This should not be a Digital Economy Act cost but part of Ofcom's general regulatory duties.

Question 7.2: Do you agree our proposals in relation to the activities which give rise to variable Relevant Costs and the proposed values of those relevant cost items? Please provide reasons and evidence to support any different assessment of the variable cost element of Relevant Costs and/or alternative values?

75. BPI is again concerned that the proposals it has set out for ISP variable Relevant Costs relies too heavily on information supplied by the ISPs themselves. As outlined above, the BWCS report is an assessment of the ISPs own information. BPI believes that Ofcom should have enough technical expertise in house to be able to assess the likely costs of an efficient ISP.
76. BPI would also note that the information provided by BWCS is now out of date and as a consequence Ofcom has applied inflators to the costs. Without information on actual costs – e.g. call handling, staffing costs, infrastructure costs, the costs may no longer be accurate and may be lower than Ofcom is predicting. In particular, some of these costs might more sensibly be deflated given trends in storage and technology costs and wage deflation in the UK economy.

77. The use of the Services Producer Price index as a cost of providing services is not the relevant indicator. This is an experimental price index and it covers the following industries, none of which are relevant to the provision of technical services in ISPs:⁴

- accountancy services
- legal services
- architecture and engineering services
- cargo handling services

Three additional categories were only added in June 2012. As such this they are not factored into the calculation Ofcom uses.

78. CPI is a measure which relates to consumer prices and not the cost of business inputs. Given the consumer facing nature of the indexes used, the use of CPI may lead to an unreasonably high inflation change due to the imposition of a higher rate of VAT in the UK. Applying CPI in this way would give a return to the ISPs of the differential VAT rate's impact on CPI and service costs data.

79. Given that wages are likely to be one of the more important inputs to the cost of handling a call, the wage inflation rate in the service sector would seem to be more relevant than the Consumer Prices Index.⁵

80. BPI would also ask that Ofcom revisits these cost estimates from ISPs to populate the tariff with up-to-date information and apply input costs and wage data

Question 7.3: Do you with agree the proposed values for the operational ratios? Can you provide evidence to support alternative values?

81. Given the element of uncertainty it is difficult to estimate proposed values for the operational ratios. However, there are some experiences internationally that might be considered.

82. BPI would agree that from comparative data of experience internationally, the ratio of 45% CIRs that Ofcom applied is reasonable. However, in France, recent numbers show that only approximately 42 % of identifications received by HADOPI resulted in a letter.⁶ In Ireland, only 25 % of notices result in a notice sent to an Eircom identified customer.

⁴ <http://www.ons.gov.uk/ons/rel/ppi2/services-producer-price-indices/the-development-of-price-indices-for-professional-business-services-and-cargo-handling---quarter-2-2012/experimental-sppis-q22012-article.html#tab-Introduction>

⁵ <http://www.ons.gov.uk/ons/key-figures/index.html>

⁶ This is based on the recent numbers published by HADOPI on 5 September 2012, http://www.hadopi.fr/sites/default/files/page/pdf/Point_presse.pdf. In France, rights holders send notices of infringement to administrative body HADOPI. HADOPI selects a certain amount of notices and passes them on to ISPs ordering them to reveal the identity. Between October 2010 and 1 July 2012, approximately 3,000,000 identifications have been received by HADOPI, of which 1,256,617 resulted in a notice sent to alleged infringers.

83. Regarding the calls per letter ratio: In its recent press release HADOPI states that only 6% of subscribers having received a first notice contact HADOPI, and 23% of subscribers have received a second notice.⁷ As stated in the consultation paper, Ofcom is aware that most of the contacts are related to the content that has been downloaded as this information is not contained in the initial notice. This is indeed confirmed by HADOPI in its latest press release stating that 61.5% of contacts are mere requests regarding the content.
84. Ofcom sets costs per call at £6.39. However, BPI would suggest that Ofcom should take the lowest cost stated by an ISP in the BWCS study, £5.00.⁸ In addition, it must be clear that ISPs cannot charge both rights holders and customers for this service – i.e. they are not also recovering the costs from call centre charges.
85. In New Zealand, BPI's understanding is that only 3% of notices resulted in a call. We cannot confirm this at this point but will supply information when it is available. As to the appeal-rate, RIANZ reports that only 2.95% of notices are challenged.
86. Given the differences in the system we do not agree with Ofcom's assumption that 15% of letters will result in a call. BPI believes that in light of the evidence elsewhere that the correct figure to use for the call-to-notices ratio should be 5%. BPI would at least request that the ratio is regularly reviewed and adapted as necessary.

Conclusion

87. BPI recognises the difficulty of the task Ofcom faces in building up a costs system and acknowledges the work that has gone into the document. BPI has long argued that the Digital Economy Act is a sensible measure to protect UK economic interests in developing a legal online market for content.
88. BPI will continue to argue that the processes for rights holders to assert their rights should be easy to use, that costs should be minimised and that costs should be distributed equitably. BPI recognises that the Digital Economy Act needs oversight to ensure that the system is effective and efficient, but will continue to press that the reporting part of the system, the ongoing obligations of Ofcom, should be undertaken with a very light touch to minimise cost to UK businesses.
89. BPI hopes that Ofcom recognises that the need to provide transparent information about its costs is part of a wider obligation to ensure that the Digital Economy Act has resources focused on detection and notification of Copyright Infringement. The system must allow small and large rights holders alike to take advantage of the opportunity to defend their rights, a necessary aspect of ensuring that creators can earn a living from their work.

⁷ http://www.hadopi.fr/sites/default/files/page/pdf/Point_presse.pdf.

⁸ BWCS report, page 32.