

# UKTV Response to Ofcom's consultation on the draft Online Infringement of Copyright and the Digital Economy Act 2010 initial obligations Code

## Introductory Comments

UKTV welcomes and supports the broad aim of the Online Infringement of Copyright and the Digital Economy Act 2010 in addressing the issue of copyright infringement. We recognize that the form of this consultation has been largely shaped by the underlying legislative framework and that for those subject to regular mass infringement of copyright, this may represent a reasonably pragmatic alternative to individual disclosure orders. We are however concerned about whether it represents any progress for those creative businesses, in general the small to medium sized concerns at the heart of creative production in the UK, which are not subject to regular mass infringement of copyright but never the less may encounter specific business critical instances of infringement.

The qualifying regime relies on predictable volumes of infringement, allowing advance costing and notice of likely levels of requests to the ISP. It does not allow for unpredictable infringements which can also pose the threats to the creative capital the Act was seeking to protect. We understand a balance must be struck between the needs of rights holders and the impact on ISPs but at the moment believe the regime will only serve the needs of a certain type of creative business, namely those based on volume distribution of copyright material, and does not represent progress for the smaller creative businesses who rely on generating high value creative material.

UKTV does encounter occasional copyright infringement of its original programmes through uploading of its copyright material on to file sharing websites. When we become aware of any such infringements, in common with other broadcasters, we send a take down notice to the relevant web site. The level of infringement we encounter at present however would rarely justify the audited detection regime envisaged as a qualifying obligation under the Act. It is also not at a level which could allow a reliable estimation of future infringements upon which the Code's obligations are based. However as the media landscape develops with new digital delivery systems for content, we cannot be complacent over whether this current level of threat will continue.

The on-line community, of its nature, forms an unpredictable environment. The mechanics of the framework, specifically the qualifying and infringement prediction and pre-payment qualification regimes, represent a very inflexible regime for businesses such as ours.

We believe other creative businesses, such as independent production companies, small to medium size design houses etc which are not subject to regular mass infringement of copyright may similarly encounter these limited but still business critical instances of infringement.

For example, as outlined above, whilst at present uploading of our broadcast content is comparatively rare, UKTV's business model provides for the occasional release of DVD originations, such as UKTV's stand out comedy drama commission in 2009 of "Red Dwarf;Back to Earth". If we had become aware of its release onto file sharing networks we would need rapid access to the request and notification system outlined in the Code, but would be held back by the qualification requirements. Our only option would be to pursue our current take down requests, followed up with a court order. We can imagine similar scenarios across the creative landscape, such as the uploading of a bespoke copyrighted font created by a design agency which is with core to its profitability; or the undermining of the secondary rights of a medium sized independent television producer looking to recoup its format investment through the foreign territories rights it holds. It would be disappointing if the regime could not offer any route to accommodate these business needs as we believe this was precisely what the legislation sought to cover.

With this in mind we are concerned that the regime envisaged does not provide for any "fast track" flexible system that could allow a rights holder to qualify for access to the ISP's enforcement process on the basis, not of predicted volume infringement, but of business critical unpredictable infringement.

We also note that the Code does not indicate what measures will be introduced to achieve the wider education of ISP users in the economic and creative damage unauthorized copying can lead to. As this must form part of any successful anti-piracy strategy we would look to Ofcom to address this in future iterations of the Code. We believe that there is potential to harness the communications strategies of ISPs participating within the regime beyond the sending of the notification letters envisaged under the Code. We also believe that implementation of the Code will place obligations on Ofcom's shoulders to create wider literacy from all parties, but most importantly consumers, about what forms of copyright exist, and how they may be breaching then in their activities. We detail this further in our individual question responses below.

## 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.*

As outlined above we believe that the qualification regime is unlikely to be attractive or pragmatic for businesses not subject to regular mass infringement of copyright. Those subject to irregular individuated instances of copyright infringement could not meaningfully predict or plan a bid under the regime.

Ideally the Code should provide for a fast track process that would allow a rights holder, with audited instances of serious infringement, to access the ISP's notification and identification processes without having to participate in the notification estimation and pre-payment process. This would be a useful introduction of a degree of managed flexibility.

We understand that achieving a satisfactory definition of such a "serious infringement", which we also describe as a "business critical" infringement in this submission is difficult. We understand the need to balance vexatious or insignificant applications under the process with the consequent cost and disruption to the ISPs but at present the real need of smaller creative business will not be met by the regime so some attempt seems worthwhile.

We believe reasonable parameters could be set up to define these individuated instances based on the commercial impact of the act of uploading. For example taking two of the example instances outlined in our introductory comments, the value of a bespoke design font is lost irretrievably once it is published, as it would be impossible for the design agency to then track and claim royalties for all instances of its use. If the UK based fans of a long running show such as Red Dwarf (who are all avid users of fan forums and would inevitably learn if the material was available on the net) learn it has been uploaded, its value as a piece of merchandise, both in terms of profitability and marketing usage during the period of broadcast is almost entirely wiped out. In comparison the publication of an image of an art work, when the physical art work its self is still available for sale, is clearly less damaging to the fundamental value of the art work, and to business model of the creator. We would welcome an opportunity to discuss this further if such a fast track process is accepted as a possibility for development by Ofcom.

Failing that possibility would Ofcom envisage that it would be possible for interest groups to band together to form rights holder's groupings which could qualify with collective notification bids in to the ISPs? If this were a possibility we would be keen to engage in any discussion of how such groups might form, possibly through existing interest groups such as PACT or the SCBG.

*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.*

As above we believe the current regime would be too inflexible for pragmatic use by smaller creative industry practitioners. Whether the time is sufficient for the detection regime envisaged under the regime will be best addressed by those software detection designers who will be creating the code to track infringers.

*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?*

The qualification criteria may need to be reviewed in the light of any significantly changed user behaviour as discussed at 3.4 below. We cannot predict what additional burden the information required to track the movement of users across ISPs in response to the implementation of the Act would be. The Code does not state at whose cost such monitoring will be, and so it would inevitably fall on the copyright holders as they will be the only party aware of continued infringement outside of the Ofcom regime. Is any mechanic envisaged to factor these costs into any further costs of the regime to participating rights holders, ie to make costs validly incurred from supporting the overall copyright enforcement system recoverable against the costs being charged from participating ISPs ( who will benefit from the monitoring to the extent it generally reduces the number of illegal downloaders) ?

*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?*

We can see that the Code has to take a pragmatic start for the first notification period, 400,000 fixed line users is not unreasonable as a

base. However the Code does not set out what will be the frame work if infringers then migrate to ISPs just below this threshold, or mobile ISPs with the subsequent damage to those ISPs of the decreased bandwidth that is usually consequent on increased file sharing usage, and the total avoidance of the regime by the infringers.

*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?*

It will be important to ensure that the online community's behaviour is monitored in response to the introduction of this Code, such as flight to IPS under the threshold referred to at 3.3 above. Pragmatically as it will be impossible to contemporaneously track all infringers to all ISPs and draw them under this process regime we believe that wider education by the ISPs of their entire community on the benefits of observing the copyright regime in creating new works and nurturing new talent will be as important in addressing future piracy as the implementation of this process defined regime.

We appreciate that data protection concerns may limit the degree of information sharing possible between rights holders, but would envisage a separate working group should be set up to see what forms of common database could be set up with anonymised data at minimum allowing confirmation of which IP addresses are significant in the uploading of illegally copied material.

*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?*

The Code does not outline what wider education is planned to accompany the introduction of this regime. As outlined in our introductory comments we believe such education is crucial for the regime to have a reasonable chance of public support and success. Copyright is a complex regime, covering many forms of holders from producers, to performers to authors and photographers. Some forms of copyright breach, such as copying entire films are well understood, others, such as the copying of say a joke or the creation of a parody are not.

Indeed there are grey areas in terms of what is protected and what is not even for legal profession, and these grey are not obscure unlikely areas to arise but are often at the heart of UGC. For example some forms of use are offered different degrees of protection according to

the territory they emanate from - in the United States "Fair Use" doctrines go well beyond the UK's fair dealing concepts and thus parody, which is a frequent form of UCG commenting on contemporary culture, may be protected in the U.S. under these doctrines but will be illegal copying in the UK. If the first encounter a subscriber has with such difficult issues is in the form of a notification letter then many potential supporters of the copyright regime may be lost through what will be viewed as over assertive tactics about a mistaken breach.

*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?*

The list of required content seems comprehensive.

*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.*

It may prove difficult for a single rights holder to identify the appropriate levels of accuracy and robustness of evidence gathering if they have had little past experience in monitoring ISPs' networks to identify online infringement of copyright. Ofcom should take initial responsibility for setting the standards that are required, based on existing information provided by agents working on behalf of Copyright Owners and other stakeholders.

*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?*

This does not seem inappropriate.

*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.*

These seem reasonable but again we believe Ofcom has a role in setting the standards that are required. This would be to prevent ISP's setting unreasonably administrative burdens on smaller copyright holders.

*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.*

Again we believe Ofcom should take responsibility for setting the standards that are required, based on a review of the accuracy and robustness standards currently in place in those ISPs under the regime. This will ensure consistency across ISPs under the regime and allow audit thereafter.

*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.*

The notification process at present concentrates on instances of copyright infringement noted across a period of time. It thus catches the low level copyright infringer who operates across a year, but will not catch a mass infringer who perhaps sets up new identities within the time period to avoid detection. As noted in our introductory comments, this approach seems to better serve those distribution businesses subject to regular infringement than companies reliant on a few high value creative content models which may need to address infringement within a much more limited time scale before the value to their business will have been lost before the notification period ends. To this end we believe an alternative process based on volumes of CIRs, a fast track process, should also be considered.

*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?*

We understand that notification letters will be phrased in style of the ISP's corporate communications. We agree its important the language of the notification is of a style that communicates clearly and directly to the users, but the letters should contain nothing to denigrate the right of the rights holders to pursue their copyright and should preferably indicate the benefits to the creative economy of the copyright regime outlined at 3.5 above.

We believe the more the letters explain the enforcement options against the infringer in the context of the rights and needs of the talent who created the copyright material, with an appropriate explanation

of the legal regime of copyright education the more likely they are to succeed. For example if the infringer parodying Britney Spears latest release receives a notice, without understanding why he cannot do this, even though he has seen similar parodies from US u-tube, he will be less than likely to observe it.

*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.*

As at 5.3 above, we believe the regime should allow for a fast track process if one ISP subscriber is identified as being engaged in a high volume attack on a rights holder's copyright material.

*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.*

We believe that education on the rights and responsibilities of subscribers, particularly those seeking to benefit their local communities with free open access to the web should be clearly explained in any notification process. If a subscriber can show they adhered to all possible protections within their network, and took efforts to educate users of their networks about copyright, as opposed to being reckless about its abuse, then this should be material to the appeals process.

*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.*

We have already set out our doubts over whether this process will benefit many creative practitioners in the UK. We would have thought it likely that Ofcom's proposed powers to issue a direction of indemnity by a copyright owner to an ISP in regards to any loss or damage resulting from a party's failure to comply with the Code makes it even less likely that copyright owners participate in the regime. Given the obvious benefits of concerted action against piracy we would hope that the threshold for fining of any body for administrative failures would be set very high and at minimum require a degree of deliberate damaging or significantly misleading process manipulation.

In summary

We can see that this regime will be of benefit in creating a climate where infringement is addressed directly by the provider of the web service, the ISP, to its customer. This direct relationship should do much to shift the mind set of users to understand that copyright protection is a valid part of their internet experience. We welcome this introduction of "ownership" of the solutions in the notification processes into the hands of the ISPs but believe the ideas behind the Act offer a greater opportunity than this that will be hampered by the prohibitive nature of qualification to access for the smaller creative concerns we have outlined

We are mindful that the solutions proposed in this document such as the fast track process or group qualification described or volume based CIRs triggers raise their own areas of debate in terms of definitions and practicality but UKTV would welcome participation in working groups or other forums to reach robust definitions if they can bring the benefit of the regime to more copyright holders than the big distribution players.

Finally we do believe that the education of the user community, copyright holders and other interested parties is key to achieve proportionate enforcement with a consensus on which abuses, as well as which abusers, warrant the attention of the regime.

yours faithfully

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