

26 July 2012

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

Dear Campbell,

1) Film Distributors' Association Ltd. (FDA) welcomes the opportunity to respond to Ofcom's consultation on its proposed code for regulating the initial obligations relating to online copyright infringement and the Digital Economy Act 2010 (DEA).

2) About our sector

FDA is the trade body for UK theatrical film distributors, the companies that release feature films for cinema audiences. Most distributors are small- or medium-sized enterprises. The titles brought to market by FDA's membership – ranging widely from international blockbusters to classic revivals; and from British films to productions of 42 other countries in 2011 – account for 97% of UK cinema admissions.

Film distribution is a competitive, sophisticated and dynamic business that depends on product and the extent to which it connects with audiences. Theatrical distribution requires substantial investments in both product acquisition and bringing completed titles to market. Last year, distributors invested more than £330 million in film prints and advertising alone: they are the entrepreneurial innovators who take financial risks to help create and then release content, and they rely on IP protection to underpin their future investments.

With 1% of the global population, the UK generates 7% of global cinema box-office receipts (£1.12 billion from 171.5 million admissions in 2011). The sector delivers a significant contribution to the economy in terms of revenue and jobs, as well as the consequent cultural and creative impacts. An economic multiplier effect applies: for every £1 spent on cinema tickets, at least a further £2 are pumped into the economy on directly related expenditure.

3) Digital market developments

While advancements in media technologies may enable audiences to sample a greater range of out-of-home experiences in a variety of connected, big-screen venues in local communities, the current transitional period has thrown up particular challenges for the film distribution sector – which have a bearing on its overall capacity to engage with this proposed code.

Engaged in the transition from 35mm to digital, film distributors have effectively had to finance and run both formats simultaneously. With digital cinema installations now largely completed across the UK, the various funding arrangements will continue to be met largely by distributors for years to come.

FDA strongly supported the statement in the Hargreaves Review of Intellectual Property and Growth that "*Government should pursue an integrated approach based on enforcement, education and, crucially, measures to strengthen and grow legitimate markets in copyright and other IP protected fields.*" We hope that an effective step in the education process will be the notice-sending procedures set out in the DEA. Vast numbers of films are now available through legitimate online services, as distributors eagerly strive to experiment in, and embrace, an all-digital landscape. But with the industry in transition (to fully digital) mode for years to come, and with copyright infringement widespread, an appropriate regulatory framework is needed.

The UK's regulatory environment has played a vital role in the creation of one of the strongest creative sectors in the world, attracting billions of pounds in foreign investment annually. The UK film industry demonstrably 'punches above its weight' in terms of awards and contribution to the international film market – but this is all underpinned by a long-established, adaptable copyright framework. Any potential changes to copyright should not risk diluting clarity for investors or making funding harder to secure.

'Piracy' affects consumers and communities as well as the industry and its employees. Oxford Economics estimates that the UK audio-visual sector loses £0.5 billion a year to all forms of copyright theft, and the streaming of illicit content online is becoming an ever greater concern. While FDA has developed and funded a strategy for the UK that has markedly reduced illegal 'camcording', we naturally hope that key provisions in the DEA, once implemented, will help to address *wider* piracy issues.

4) Comments on the proposed Obligations Code

We welcome the implementation of the DEA to address the serious matter of online copyright theft and infringement. Your detailed code is a real move in the right direction.

The concerns that we have, and set out below, relate mainly to *practicalities* and *costs* in the context of UK market reality and the fast-evolving media and social environments. We feel there are some *gaps* in the proposed code, the broad consequences of which could undermine the reputation of UK content industries and their relationships with consumers. There is also a risk that the DEA will not meet its objectives because many UK film distributors may be excluded from its reach given the onerous costs.

Specifically, we would make the following points:

5) Mobile broadband/wi-fi

We believe that the decision to exclude mobile broadband from the code is a deficiency.

This risks undermining the effectiveness of the code at a time when increasing numbers of people are using tablets and other mobile devices to download films, both legitimately and otherwise. Ofcom has just (24 July) announced the process for auctioning 4G spectrum. The availability of this spectrum will result in significant increases in mobile broadband, thereby accelerating changes in the way consumers access films. We recognise that there are some difficulties with the current statutory framework which could cause any move to bring mobile operators within the scope of the code to trigger significant delays. We therefore look to Ofcom, and to Government, to find ways to address this. FDA would support the view of the Creative Coalition (of which we are a member) that this would be best achieved through the Review that Ofcom is obliged to carry out of the operation of the code after six months.

Similarly, Ofcom's intention to 'exclude wi-fi providers from the scope of the code on the basis that inclusion is likely to lead to them incurring substantial costs to achieve a minimal reduction in overall levels of online copyright infringement' (3.97) belies the fact that the ways people engage with content are constantly changing. It is possible, perhaps inevitable, that copyright infringement will be occurring via mobile broadband by the time the DEA is in force some two years hence.

The contention that the 'current threshold is a pragmatic approach intended to get the code scheme operational' apparently ignores the fact that, with the rapid developments in mobile devices, there is a real danger of a significant area of online activity that the DEA was designed to address falling outside its remit and the legislation being unfit for purpose.

6) ISP subscriber identification processes

We feel that the refusal of the code to subject the ISP processes for matching IP addresses with subscribers to scrutiny is a significant flaw. If the ISPs' subscriber identification processes are not subject to Ofcom approval, then surely no standard of reliability can be established. The code requires that the evidence-gathering processes used by rights-holders be approved by Ofcom; but not extending this principle to the other side of the mechanism risks undermining the credibility of the entire mechanism. It is also potentially unfair to consumers.

Errors made in identifying IP addresses may be a major ground to be addressed by the appeals process, which participating rights-holders will have to fund. So merely to require an ISP to 'provide Ofcom with details of how it identifies the customer from the IP address' and 'how it determines that the customer is a subscriber' seems out of balance.

The suggestion that 'a failure to comply with the requirement for accurate address matching is likely to be considered a material breach of the code', triggering potential penalties from Ofcom, does not take into account the potential damage to rights-holders' relationships with their consumers. Unfortunately these can't be remedied by a retrospective enforcement action at a later date.

And the suggestion that ISPs already have the appropriate incentives to ensure they identify the correct subscriber (5.36) raises the question of what is the current failure rate for matching IP addresses with subscribers in criminal investigations? If this consideration is enough to remove ISP processes from Ofcom's approval, then surely similar principles should be applied to rights-holders, as incorrect notifications will likely impact on their relationships with film consumers.

FDA supports the proposed 'development by an independent body of a standard for ISPs in relation to the identification of subscribers from an IP address and time and date stamp given in the Copyright Infringement Report (CIR)' (5.38). However, in order to instil consumer confidence in the integrity of the mechanism, we urge Ofcom to ensure that such a standard is mandatory from the outset.

7) Content of notifications

We do not feel it is reasonable to preclude qualifying rights-holders, who are funding the notice-sending, from participating with ISPs on the content of the notices. Consistency of approach and tone in these lines, and absolute clarity about their purpose, is essential to the effective functioning of the code. Any confusion among consumers risks undermining the objectives set out for the DEA by Parliament. We urge Ofcom to continue to consider the best ways to achieve such clarity.

We ask Ofcom to include rights-holders in the process alongside 'consumer and user groups to ensure that the contents of notifications are appropriately clear' (5.89).

8) Sending notices

The point that all notifications should be posted using first class mail again suggests that the code is out of step with consumer behaviour – and surely counter-intuitive, too, at a time when many suppliers and service providers are embracing paperless account management systems. Is it really the case that postal deliveries are less likely to be 'intercepted'? Surely ISPs should have accurate email addresses for their own subscribers? If and where they don't, the investment called for by the DEA provides a perfect opportunity to carry out the necessary updates, so we ask Ofcom to reconsider this point.

9) Appeals fee

FDA appreciates that the £20 cost of appeals is refundable and may deter unwanted frivolous claims. Yet, in many walks of life, consumers generally appreciate that a right of challenge exists, fairly to assert misidentification or error. An up-front payment for that right in this case may raise many concerns, and possibly prevent people without financial means from pursuing merited appeals. An alternative solution may be to levy a charge in the event of an unsuccessful appeal, as a contribution towards the appeal costs, and we ask that further consideration be given to such mechanisms.

In any event, we feel the indication in the code that the appeals fee is financing the appeals process, rather than merely contributing towards it, is misleading, and ask that it be redrafted. Clearly no distributor would wish to be made to *appear* to be trampling over the rights of its own consumers.

10) Qualifying rights-holders

As pointed out above, most film distributors in the UK are unlikely to have the financial resources to enable them to take advantage of the DEA as qualifying rights-holders. The market performance of film releases (or any intellectual properties) is very hard to predict accurately. Likewise, in many cases, the level of internet infringement on a given title is impossible to predict far enough pre-release – within the timeframe envisaged by the code – to be able to estimate CIR numbers.

In our view, Ofcom's suggestion that it will 'engage with trade bodies' in order to make commitments to CIR volumes is unlikely to be workable in our sector.

On the basis of the code as presented, the distributors of hugely successful recent releases such as *The King's Speech*, *The Inbetweeners Movie* and *The Woman in Black* could not have qualified as rights-holders. Yet ironically, these are the very "British films" that are (quite reasonably) championed by the BFI and others as fine, often Lottery-supported, examples of the UK's vibrant creative industries.

Using Ofcom's projected costs of the scheme to rights-holders, for example:

- If 100,000 CIRs were issued per month by large-group ISPs costing £12.10 per CIR, then to a film distributor each individual CIR would represent the sale of 4 tickets at the UK cinema box-office;
- Were a similar number of CIRs issued per month by small-group ISPs costing £31.70 per CIR, then to a film distributor each individual CIR would represent the sale of 10 cinema tickets!

We believe the effect of this cost structure, together with the requirement for an upfront commitment to a quantity of CIRs, is to render the scheme impractical for many UK film distribution companies.

11) Conclusion

FDA continues strongly to support the DEA. We hope that the sending of notices in due course will serve to reduce online infringement, to benefit all parties.

But we ask for a fair copyright framework on which the industry can rely to secure the return on investment vital for further content creation and distribution. We ask that some alternative ways to regulate infringing online activity be considered, with ISPs, search engines, advertisers and payment processors all playing their parts alongside rights-holders.

Yours sincerely,

Mark Batey

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Chief Executive, Film Distributors' Association Ltd.