

BBC Response to Ofcom consultation on the Online Infringement of Copyright and the Digital Economy Act 2010 Draft Initial Obligations Code

The BBC welcomes the Ofcom consultation on the draft initial obligations code. The BBC is committed to addressing online piracy in all its forms and believes that the Digital Economy Act anti-piracy measures have the potential to play a pivotal role in combating piracy in the digital age, particularly when combined with targeted and effective measures to educate users about the importance of copyright awareness and proposals to facilitate and promote legal services.

Accordingly, the BBC believes that the Ofcom Initial Obligations Code will be fundamental in supporting the implementation of the initial obligations placed on ISPs set out in the Digital Economy Act. It is therefore critical that the final code is both clear and comprehensive and that it provides a good indication of the quality and level of information that copyright owners need to include in a Copyright Infringement Report (CIR).

In the BBC's view, the draft code is reasonably comprehensive and is pragmatic in approach, although we have some detailed concerns about:

- a notifications process based on time elapsed rather than volumes of CIRs;
- the limitation of Copyright Infringement Lists to include only the CIRs submitted by the particular copyright owner;
- the proposed self certification process relating to standards for evidence gathering; and
- the lack of educational messaging in the draft notification letters.

Of more concern, however, and as outlined in our response to the recent BIS consultation, are the Government's proposals for cost sharing. In particular, we believe that BIS' proposals ignore the following issues:

- The benefits of the initial obligations on ISPs – for example, the potential impact that reducing online piracy will have on improving broadband speeds (assuming that a reduction in online piracy will not lead to a corresponding increase in consumption of legal services).
- The 'free-rider' effect of the proposals – rights holders will benefit from the legislation even if they themselves fail to issue CIRs, assuming that some subscribers infringe multiple rights holders' copyright.¹
- The costs to rights holders of using third parties to investigate the infringements and the costs of pursuing court action if the notification letters fail to reduce illegal file sharing.

¹ The free rider issue may be particularly relevant for small rights owners who are more likely to find the costs of issuing CIRs and their share of ISP notification costs prohibitively high.

As a result, many rights owners will be unwilling to issue CIRs (as doing so will mean that they are likely to bear a disproportionately high share of the costs of the notification obligations relative to the benefits) and this will fundamentally reduce the impact of the legislation. The BBC therefore believes that until these underlying problems are resolved, consultation about the code of practice is injudicious and we would urge the Government to reconsider its proposals. However, if the Government is minded to proceed, then the BBC has a number of specific comments on the Ofcom draft code. These are set out in the remainder of our consultation response.

Responses to the 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 when they have met their obligations under the Secretary of State's Order under section 124 of the 2003 Act? Please provide supporting arguments.

As we have stated in our response to the BIS consultation on the cost sharing proposals, the requirement on qualifying copyright owners to give an estimate of the number of copyright infringement reports (CIRs) they intend to issue to qualifying ISPs at the start of each notification period poses concerns because:

- The costs of the notification process is dependent on the volumes of CIRs that ISPs will be expected to process and rights holders will not be able to estimate how many CIRs they might issue in the absence of this information.
- The likelihood of any rights holder issuing CIRs might depend upon whether other rights holders also opt into system because of the free rider problem.
- Rights holders will also need to make assumptions about the number of CIRs that they will send to each ISP within any notification period. This requires rights holders to second guess which ISP individuals subscribe to or to incur the costs of extensive investigation through third parties prior to the notification².

In light of the above, we believe that many rights holders (particularly small ones)³ will not be able to estimate accurately the number of CIRs they intend

² This evidence is likely to be wasted given the strict time limits for CIRs and notifications in section 3 of the Act.

³ Only rights holders who are able to bear the cost of monitoring the internet on a continual basis to detect infringement are likely to be in a position to predict the number of CIRs they are likely to issue and therefore would be able to benefit from the online copyright infringement procedures set out in the DEA and the Code.

to issue during any a notification period and therefore few rights holders will be able to take advantage of the online copyright infringement procedures set out in the DEA and the Code. As a result, the BBC does not support a proposal which requires rights owners to provide information on the number of CIRs they anticipate issuing within a given notification period.

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 varies? Please provide supporting evidence of the benefits of an alternative lead time.

The BBC believes that a lead time of two months is too short, particularly during the first year that the obligations are in force⁴. This is because some rights holders may need to procure a third party to detect and review online infringing activity and public bodies may need to abide by the EU procurement procedures when procuring a supplier. This could take up to six months.

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 BBC agrees with Ofcom's approach as long as the qualification criteria are regularly reviewed. As more detailed information is gathered about infringing activity, the measure for ISP qualification should become self-evident.

However, it should be noted, that the Ofcom proposal implies that copyright owners will bear the costs of monitoring infringement undertaken by subscribers of ISPs who fall below this threshold, with no direct benefit to them. Therefore it is not entirely accurate to say that this reporting obligation gives rise to no additional burden, as we understand that that the costs charged by external monitoring suppliers increase on the basis of a number of factors, of which the number of ISPs being monitored will be one. (Note that this point is also relevant to questions 3.4 and 3.5).

It is also important that if monitoring is carried out in respect of ISPs which are presently outside the Code, this data must be compiled somewhere. We assume that Ofcom will do so?

⁴ It may take copyright owners at least a year to develop a real understanding of piracy trends – what type and genre of content is pirated most often, at what time of year and why (e.g. in broadcasting are the key triggers first transmission on TV/radio, promotion by the broadcaster, sale on DVD?)

We understand that Ofcom's research to date has indicated that 95% of copyright infringement is on fixed networks rather than mobile networks, and thus that mobile networks will be outside the scope of the Code. Whilst on the face of it this seems sensible, we would query what impact the advent of technology such as the iPad, which has a high quality screen and can be connected via a 3G network, has had to date and whether this will continue to be monitored and reviewed?

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?

The BBC believes that the 400,000 threshold for subscribers seems to be appropriate in light of the evidence. However, the BBC believes that ongoing monitoring of ISPs below the threshold will be critical to minimise the risk that subscribers switch to ISPs not covered by the code. Furthermore, as more detailed information is gathered about infringing activity, the measure for ISP qualification should become self-evident.

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?

The BBC does not have a view on this question, although it will be important to ensure that that if online infringers change their behaviour as a result of the code, any evasion is identified and addressed.

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 details and supporting evidence for these approaches.

The BBC agrees with Ofcom's proposed approach to the application of the Act to subscribers and communications providers. We would, however, recommend that the notification letters include information about the importance of respecting copyright and the role that it plays in fostering creativity as well as providing information about network protection.

Ideally the appeals process would take into account the fact that the ISP subscriber will not necessarily be the person who is infringing online copyright.

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 BBC broadly agrees with this list. As a general principle we believe that it is better to provide high standards of evidence to minimise the risk that people are incorrectly alleged to have infringed copyright.

However, we note that:

- The list of requirements does not reflect the different types of copyright infringement that might take place. For example, the BBC holds the rights to broadcast a programme, which typically might include contributions from writers, directors, composers, photographers etc. The code, in its present form, does not particularly reflect the complexity of the existing copyright legislation. For example, it is not entirely clear whether the Copyright Owner is the owner of the broadcast rights, or whether, it might also refer to the rights of underlying contributors.
- The extent of the requirements means that it is unlikely a copyright owner could produce such information without the assistance of a third party specialist, or without significant investment in building an internal team to report to the same level. This, again, would preclude small copyright owners from adopting the system.
- While agents currently working on behalf of Copyright Owners are well placed to assess the information to be included in a CIR, they also have incentives to 'gold-plate' that list for their own gain.

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.

The BBC has some reservations about the proposed 'self-certification' approach, as it is very 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. The BBC therefore believes that Ofcom should take a pragmatic approach to identifying standards of evidence during the first notification period and should take responsibility for setting the standards that are required, based on information provided by agents working on behalf of Copyright Owners and other stakeholders. If these standards end up being either too low or too high, then Ofcom could revise them at a later date.

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

We agree that it is important that CIRs are issued to ISPs in a timely manner. However:

- It is difficult to judge the appropriate time period required between identifying an alleged infringement and send a CIR to an ISP without knowing the levels of evidence gathering required.
- A shorter time period is likely to add to the costs of monitoring infringing activity – for example, it usually costs copyright owners significantly more to receive notices of infringements (from third parties) on a daily basis.
- A period of more than ten days may also be appropriate where Qualifying Rights Owners are acting on behalf of another person.

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.

The BBC agrees with the approach for dealing with the treatment of CIRs if it keeps the costs of the initial obligations down.

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.

We agree with a process of self certification in the context of ISPs efforts to establish processes and systems that are robust and accurate in matching information provided in a CIR to a subscriber account, as long as ISPs are well placed to gauge whether the processes and systems they have in place are fit for purpose. In addition, Ofcom should ensure that ISPs' self certification approach is subject to audit by an independent party.

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 BBC understands the benefits of having a notification process based on time in so far as it allows individuals to change their behaviour. However, the disadvantage of this approach is that by implication the Copyright Infringement List (CIL) will comprise people who might have infringed online copyright three times over a 12 month period and those who may have infringed multiple times (e.g potentially hundreds of times within a 12 month period). As a result, the CIL is likely to include people who are unlikely to be the target of any litigation. The BBC would therefore prefer a notification process based on volumes of CIRs in addition to time elapsed between alleged infringements.

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.

The notification letters omit information about why copyright infringement can damage the creative industries. As we have outlined in previous responses to Government consultations on peer to peer file sharing, the BBC believes that legislative approaches to enforcing copyright legislation are likely to be most effective when combined with targeted and effective measures to educate users about the importance of copyright and the implications of piracy on innovation and creativity.

More generally the BBC is concerned about the tone of the letters which imply that the copyright owner has been monitoring internet subscribers' activities. It is important that the subscriber does not feel that the BBC is monitoring the subscriber, more that the BBC has been monitoring its content and the ISP has identified the subscriber as the person who has infringed the copyright in the content. The BBC is unable to monitor subscribers as we do not hold or control information about subscribers' identities.

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 provide supporting evidence for that approach, please provide supporting evidence for that approach.

Please see our response to question 5.3. We agree with that the CIL should comprise of people who have received a third notification as long as the third notification is also linked to volumes of CIRs as well as the time period between alleged infringements.

The BBC would like to understand more fully the rationale for allowing a CIL request from a copyright owner once every three months. For example, has the three month threshold been established in order to minimise costs of the initial obligations on ISPs?

We would also like to clarify whether ISPs will be required to destroy information about subscribers' infringements once the twelve month notification period has ended in the event of a court order and legal proceedings, particularly as the Statute for Limitation for copyright infringement is six years.

We consider that this 12 month period is too short for the retention of such data in any event. Copyright owners will inevitably need to prioritise who they take legal action against. On this basis, legal action might not be taken

against a repeat offender initially but would be envisaged if they continued to infringe or appeared to expand the scale of their infringement. In such a case, the copyright owner ought to be entitled to refer to, and the Judge to be made aware of, all acts of infringement by the subscriber which have been identified and not just those in the last 12 months.

The BBC considers that it is essential, if the legislation is to have the desired effect, that any legal action should be targeted at the most prolific online infringers. In order to do so, the CIRs must include information regarding all CIRs which have been submitted, not just those which the specific copyright holder has sent. Without this information it is impossible to identify the worst offenders, and copyright owners are unable to join together to take legal action, which would save costs on all sides. Further, there is a real risk that one alleged infringer might be the subject of separate legal action by more than one copyright owner. Since the CIRs will contain only anonymised data, there is no data protection issue in making this information available to all copyright owners individually, even if there is no adoption of an Entity in the Middle concept.

More generally, the BBC would be keen to see the formation of such an Entity in the Middle, if this would streamline administration and minimise duplication of actions. However, while it is possible that the market may provide a commercial solution, we would also like the Government to explore whether it would be possible for ISPs to provide this coordination role.

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 would like to clarify whether the appeals process will be time limited, as this is relevant to the issue of whether ISPs need to store CIRs beyond 12 months, discussed in our response to question 6.1.

We disagree with the proposal that a successful subscriber might be entitled to "compensation". Since no steps will have been taken to limit or curtail their online activity, they will have suffered no damage which it would be reasonable to compensate, over and above reimbursement of reasonable legal costs

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?

With regards to enforcement, at dispute resolution, Ofcom would have the power 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. Ofcom could also direct a fine of £250,000 as a penalty for breach of the code. These risks, along with the copyright owner bearing substantial costs identifying and infringers, makes it less likely that copyright owners would wish to take advantage of the initial obligations.