

## Response to 'Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial Obligations Code' by The Publishers Association

July 2010

### Introduction

Publishing in the UK is the largest media sector, and the biggest creative industry. The Publishers Association (The PA) is the leading trade body representing consumer trade, academic and educational publishers in the UK. The PA's members represent approximately £4bn (80%) of the £5bn turnover within these parts of the overall publishing sector. Collectively the creative industries – of which the copyright industries form the dominant part – contribute over 8% of the UK's GDP.

### Overview

The PA welcomes the introduction of the Digital Economy Act and the support it provides to publishers and other creative industries. We welcome the provisions in the Digital Economy Act to tackle the issue of online copyright infringement and support the Government's ambition that these measures will result in a significant (70-80%) reduction in infringement.

We strongly support the overall direction of this Draft Code of Conduct produced by Ofcom, in consultation with stakeholders. There is, however, a broad feeling across the industry that the Draft Code of Conduct is far more onerous on rightsholders than on ISPs or infringers. There are a number of specific areas of concern which we would like to highlight in our response.

The measures laid out in the Draft Code of Conduct are of particular importance to our sector: in 2010 The PA reported that total UK publisher sales in the digital sector stood at just over £150m for 2009. Whilst this represents just 4.9% of the total £3.1bn of domestic sales reported by UK publishers in 2009, it is a significant increase of 20% from the previous year. Unsurprisingly, digital piracy has increased by a comparable amount and many publishers will be increasingly dependent upon the Act to defend their innovative yet vulnerable digital business models.

Analysis by The PA shows that whilst our members account for £4bn of the £5bn turnover deriving from our sector, nearly 60% of PA members have a turnover of less than £500,000. This is indicative of just how many smaller players there are in the market who will need to take a pragmatic approach to assigning resources to combat digital piracy. At present, cost, rather than business need, is the deciding factor for many publishers when allocating resources to counter-piracy.

### Access to the Code

We consider it critically important that the Code is made affordable and accessible for all wishing to participate. The percentage share of digital sales across the publishing sector is rising rapidly, but will remain in single figures for some time. The higher the total cost and the more complex the requirements for smaller publishers in detecting and notifying alleged

infringers, the less likely they will be able to engage in the notice-sending programme, which will in turn diminish Digital Economy Act policy outcomes and increase the likelihood of technical measures being implemented.

The PA feels strongly that the Draft Code of Conduct places too onerous a burden on rightsholders by requiring them to estimate their notice-sending requirements and pay the costs associated with that upfront for a full year. This is likely to restrict access to the DEA anti-piracy legislation to only the biggest players, effectively creating a barrier to fair competition between SMEs and large corporations.

### **Copyright infringement lists and legal action**

The PA believes that, if the Act is to be effective in its implementation, measures need to be put in place to enable joint actions from rightsholders against persistent copyright infringers. This will ensure that the most persistent infringers are brought to trial and that Court proceedings are not placed beyond the means of smaller rightsholders. By joining together in an action, the costs for each rightsholder involved will decrease and justice will become more accessible. In order to achieve this, all rightsholders should be able to view the full Copyright Infringement List displaying all the infringements committed by an individual against all rightsholders.

### **Wide application of the Code**

We also want it clarified that the Code of Conduct, as the Digital Economy Act, is designed to apply to all infringed online copyright content. We feel that references to 'filesharing' and 'downloading' should be replaced by the term 'online copyright infringement' as this brings services such as streaming into scope where the other definitions do not.

In addition, we believe that the Code should take into consideration as many different kinds of copyrighted content as possible. As one of our largest trade members observed: "The template letters don't even mention e-books as a potential copyright infringement." Digitally published content will be increasingly prevalent in terms of illegal activity and it is important that this content is taken into equal consideration alongside the Code of Conduct process.

### **Application of the Code to overseas users and ISPs**

Many of our members have been using our notice-and-take-down service, called The PA Portal, to notify ISPs of infringing material hosted on their network. This has resulted in infringing material being taken down from websites and has provided us with initial data on the distribution of infringements and the types of titles being infringed. It draws useful comparisons with the Ofcom proposals. For instance, a number of our members have expressed concern about the application of the Code to infringements originating outside of the UK. A large trade publisher expressed this opinion: "Does (the Code) apply to UK based ISPs only? This makes a big difference to the number of anticipated CIRs – we recently estimated that out of the first 1000 notices that have been checked which have been issued via The PA Portal, only 5 relate to UK websites. What will the reach be of this UK legislation – UK website addresses that subscribe to foreign ISPs? Foreign websites hosted on UK ISPs? UK IP addresses downloading from foreign websites?"

The PA strongly supports the detailed comments made in the submissions by the Alliance Against Intellectual Property Theft and the Creative Coalition Campaign.

## Response to questions

### Section 3: Application of the Code

***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.***

The Publishers Association agrees that copyright owners should meet some obligations which will enable them to take advantage of the procedures set out in the DEA. However, we are extremely concerned that the current proposals effectively create a barrier to smaller or medium sized enterprises having access to the procedures laid out in the Act.

Section 2.1 of the Draft Code of Conduct requires all copyright owners to estimate the number of infringements they expect to detect and pay the costs associated with those upfront to the ISPs. Only those with prior experience of concerted notice and take down programmes will be able to make true estimations and this therefore does not increase the scope of those able to take action against copyright infringers. Initially, it may be more appropriate to have a 3-4 month long period in which rightsholders are able to send notices to ISPs and pay per notice, so that rightsholders may accurately judge the volume of CIRs which they will require and ISPs can preview the demand for CIRs within their systems.

Paying costs upfront, particularly if these are at the rates proposed in the Cost-Sharing Consultation, would bar most SMEs from the process on the basis of financial risk and this therefore creates an unequal commercial playing field. The existence of both of these barriers will not only have a negative impact on publishers, but also on the Government target to reduce online piracy by 70-80% through these measures.

Clearly it is unacceptable for any legal provisions to be placed financially or administratively beyond the reach of SMEs, when larger companies may still be engaged in the process. We feel strongly that the needs of SMEs should be taken into consideration throughout this process.

One of our largest educational publishers provided the below contribution, demonstrating the problems which even some of the biggest players in our industry may face: "To put some figures to this – in a recent three month trial we carried out, tracking online piracy of 30 selected titles, just over 4,000 infringements were found. Multiplying that figure to reflect the size of our publishing list means the cost could be huge – far greater than the cost of piracy to us in the first place. Clearly our focus will be on our biggest-selling titles where the cost to us of any infringement will be higher – this also seems to defeat the intention of the legislation, as if the costs were more significant that our losses we would not act on them, which does not help the 'attitudinal change campaign'."

We are also concerned that there should be an established process to reimburse costs if a rightsholder does not issue as many notices as they initially estimated – all of these should either be carried over by the ISPs into the following year or returned to the rightsholder. ISPs should not be in a position to make a profit from these regulations at the expense of rightsholders.

**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.**

The Publishers Association agrees with a lead in time of two months for the initial notification period. However, lead in times for subsequent notification periods, given that systems will be up and running, should be one month. This will allow publishers to be far more accurate as to the level of infringement (and therefore number of CIRs that will be issued) they expect to detect – taking into account upcoming release schedules.

We would also draw your attention to our suggestion in response to Question 3.1 that the initial 3-4 months be operated on a payment-per-notice basis, to enable ISPs and rightsholders to become accustomed to the volume of CIRs moving through the system.

The consultation document currently recommends that the period of notification should be one year. This is too long for a number of reasons:

- It would be prejudicial against smaller copyright owners who may have content requiring protection for a short period i.e. in the immediate weeks surrounding a new release. Such release dates can commonly be moved, therefore making it necessary for such an owner to sign up for a whole notification period that they may not actually take part in, purely to qualify for the Act.
- Not all publishers will know up to a year in advance whether they have content they wish to protect. This will particularly be the case if the proposed fixed fee is too high; it would mean such owners having to be highly selective as to which of their content they sought to protect.
- One year is too long to wait to bring an ISP into scope if significant levels of infringement have moved onto its network.

**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 Publishers Association strongly supports the inclusion of all internet providers within Section 2.4 of the Code of Conduct – this would ensure that all companies providing consumers with access to the internet would come under the regulations within the Code (including mobile and smaller ISPs), but could begin with the largest ISPs initially 'in scope', with this being reviewed regularly to bring other ISPs into scope.

This would enable the initial process to begin with the seven fixed line ISPs already identified in Section 3.14 of the Draft Code, but would enable other providers to be brought in easily in the future without the need to resubmit the code to Europe under the terms of the Technical Standards Directive each and every time. This amendment to the Draft Code would enable a more rapid response to the challenge of 'ISP-hopping' or infringers moving onto networks not previously included within the scope of the Code.

The migration of infringers to ISPs initially out of scope would need to be closely monitored. The criteria applied to bring ISPs into scope should take into account the percentage increase of infringements taking place on that ISP's network as well as the percentage of CIRs sent compared to the number of subscribers a provider has. Ofcom should review these criteria on an ongoing basis and ensure that the time period between an ISP coming

into scope and being able to accept and process CIRs is as short as possible. This is important in order to stop the creation of infringement 'safe-havens'.

In addition, as one of our largest trade members observed: "The argument that mobile technologies are less conducive than fixed for copyright infringements might hold for larger files, but not for eBooks. And if this regulation goes into force, then infringers will migrate to mobile networks in order to avoid detection."

We do not believe that 'costs and feasibility of requiring those ISPs to comply with the obligations' should be a factor as to whether they are required to comply with the Code (Section 3.18). If infringement is happening over an ISP's network to such a scale as to bring them into scope, they should be required to abide by the Code.

***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?***

As stated above, we believe that the Code should apply to all internet providers, with certain types of ISPs out of scope until the position has been reviewed by Ofcom – initially, those with fewer subscribers and mobile ISPs, as suggested in the Draft Code.

We do not believe that a year-long notification period is appropriate, as detailed in Question 3.2.

***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?***

We agree with this approach, subject to our response to Question 3.3 and the observation below.

To avoid confusion there should be clearer reference within the Code to those ISPs more commonly known as 'white board' or 'virtual ISPs' e.g. The Post Office. The Qualifying ISP should provide details to Ofcom of those ISPs to whom they provide downstream access including IP address allocations available to those downstream providers of internet access.

***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?***

We agree with the approach laid out in the Draft Code subject to the observations below.

We would like to highlight our concern that these definitions may not be clear enough to enable everyone to establish which conditions apply to them. We note that it is also possible to be both a subscriber and an ISP simultaneously, if you offer a Wi-Fi connection under a verbal or implicit agreement. Consumers must be provided with detailed information to enable them to establish which of the categories they fit into and what obligations come with that.

We appreciate the perceived challenges around definitions of ‘subscriber’ and ‘communication provider’ particularly in relation to wi-fi networks provided by shops, hotels, museums and education establishments. However, these issues can be easily resolved, as they have already been by establishments such as Leeds University and other higher education establishments, with owners of the network simply blocking access to certain protocols. This would greatly reduce, if not stop, infringements taking place over their network and would mean CIRs would not be issued against them.

## Section 4: Copyright Infringement Reports

***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?***

We agree with the proposed content for the CIRs, subject to the point below.

As drafted, Copyright Owners are required to list a filename. Whilst we recognise that CIRs need to include clear identification of how the infringement is occurring, it would frustrate the purpose of the legislation (which is to reduce online copyright infringement) to require a filename to be listed in every case. Therefore, we recommend 3.3 (e) of the draft Code be amended to read “a description of the apparent infringement, including the filename **or other appropriate identifier**, a description of the contents of the file, and (where appropriate) hash code of the infringing content”.

This will enable the requirements of the CIRs to be flexible enough to allow Copyright Owners to specify appropriate identifiers for infringing content other than filenames. However, Copyright Owners should not be tied in to having to use any particular identifier since technologies will inevitably adapt and future infringements will not necessarily occur in the same ways as they do now. More general (and future proofed) language, as recommended above, is needed that will allow Copyright Owners to identify all types of infringement whilst recognising the need for an appropriate degree of precision in that identification.

***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 Publishers Association believes that the proposed Quality Assurance Reports are a sensible way of providing the necessary reassurance as to the robustness of the industry’s detection methods. However, these reports should not be overly onerous for rightsholders, or used to develop set standards or promote one detection method over another. There would also need to be appropriate safeguards to protect commercial sensitivities and proprietary information.

One of our largest educational publishing members provided this comment on the quality insurance process: “What will constitute “credible evidence, gathered in a robust manner”? Does this mean we need to identify, for example online, the infringed intellectual property or would we need to be in possession of a copy? This would mean ‘test purchasing’ a high number of publications from the internet. There is no clear indication of what a quality control process for evidence gathering should be e.g. should this be to a PACE (Police &

Criminal Evidence Act) standard, which could be onerous for some IP owners, or is there another standard that could be implemented?”

In addition, where a CIR has been issued using the method set out, and approved, in the Quality Assurance Report, this should create a rebuttable presumption that the evidence gathering was carried out in accordance with the appropriate standard.

***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?***

A balance needs to be struck between ensuring the CIR, and therefore any subsequent notification, gets issued as soon after the infringement occurred as possible, and enabling copyright owners to conduct detection in a cost-effective manner.

An educational publisher member of The PA noted that: “When a file is available for download, momentum can build quickly with several thousand downloads a possibility within hours.” It is clearly of critical importance to the good function of the legislation that the notifications are carried out in as timely a fashion as possible.

## **Section 5: Identifying subscribers and making notifications**

***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.***

We have a number of concerns about the proposed treatment of invalid CIRs, believing the list of reasons to be too ill-defined, the turnaround time for the notice of invalidation to be too long, and the basis for some of the grounds for invalidating a CIR severely questionable. It is of the utmost importance that notice is given for an invalid notice as quickly as possible, to enable rightsholders to correct any information necessary whilst the information is still current. We therefore believe that the proposed turnaround time of 10 days for the notice to be sent is far too long.

To deal with each of the points in Section 4.3 individually:

- *The IP address was not allocated to the ISP at the time of the alleged infringement:* We believe this would be a valid reason for an ISP not to process a CIR.
- *The IP address was not used by one of the Qualifying ISP’s subscribers at the relevant time:* We believe this point seeks to address the issue of an ISP acting as a ‘virtual’ ISP for another supplier. If this is the case, this **should not be a ground for not processing a CIR**. If an ISP has such a business relationship with another ISP, it should be their duty to ensure the correct procedures are in place for this CIR to be forwarded to the correct ISP. In addition, 3.27 of the consultation document makes it clear that in situations regarding retail providers buying an IP address from a wholesale provider, it is dependent on the retail provider to ensure they have the correct processes and contracts in place with the wholesale provider to enable them to access relevant information.

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- *The Subscriber using the IP address at the time of the alleged infringement cannot reliably be identified:* We have concerns over a potentially broad interpretation of the term 'reliably'. Given the use of a universal time stamp, the Code must specifically state that, for an IP address to be deemed to be unreliable, it must have been reallocated to another subscriber within two minutes of the infringement taking place.
- *The CIR refers to an account that is no longer active:* This **should not be a ground for refusing to process a CIR**. Even if the subscriber has subsequently left the ISP, they were a customer when the infringement occurred and therefore the ISP must be required to process the CIR, and where appropriate, issue a notification. To do otherwise would create a situation in which people realised they could avoid CIRs and notifications by simply switching ISP. This is something the ISP should also support given their concerns over the notification process encouraging their customers to switch to other suppliers. ISP-hopping would generate huge problems for the system for all concerned.
- *The subscriber cannot be notified because the Qualifying ISP does not hold an electronic or postal address for the subscriber and it is not reasonably practicable for the Qualifying ISP to obtain this information:* This **should not be a ground for not processing a CIR**.
  - The Communications Act states that if ISPs are providing telephony services they need to maintain billing records. Given that at the end of Q1 2009, nearly half of UK homes bought communications services in 'bundles'<sup>1</sup> it is increasingly unlikely that ISPs will not have the information necessary to send a notification.
  - The EU Data Retention Directive also requires ISPs to keep customer records for up to a year<sup>2</sup>, making an ISP in breach of the Directive if they do not have the required information.
- *The IP address relates to a subscriber which does not receive a fixed internet access service from the Qualifying ISP:* We believe this point refers to those ISPs who provide fixed internet access and mobile internet access or some other form of wireless access. We **do not believe this should be a reason to refuse a CIR**, further to our comments at Question 3.3 above. All ISPs should be within the Code, but IP addresses relating to those ISPs not considered within the initial scope would obviously not be held to the Code's processes.
- *There is some other reason why, in the reasonable opinion of the Qualifying ISP, the CIR should not be processed:* The language of this final reason not to process a CIR is completely unacceptable, potentially gives ISPs the ability to reject CIRs on totally spurious grounds and **should not be a ground for not processing a CIR**. The grounds on which ISPs may rely on not to process a CIR must be exhaustive and well defined in order to give all parties the high degree of certainty which is necessary to ensure confidence in the system. Surely, Copyright Owners cannot be expected to submit CIRs and incur the associated costs in the knowledge that an ISP may reject them for an as yet undefined reason.

In summary the only reasons why an ISP should not process a CIR are the following:

- The IP address was not allocated to the ISP at the time of the alleged infringement

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<sup>1</sup>The Communications Report 2009 <http://www.ofcom.org.uk/research/cm/cmr09/keypoints>

<sup>2</sup>[http://www.opsi.gov.uk/si/si2009/draft/ukdsi\\_9780111473894\\_en\\_1](http://www.opsi.gov.uk/si/si2009/draft/ukdsi_9780111473894_en_1)

- The subscriber using the IP address at the time of the alleged infringement cannot reliably be identified (but note comments above)
- The CIR does not comply with the requirements of the Code

Given the grounds listed under Section 4.3, it is unclear as to the relevance of 4.2.1 and we therefore recommend it is deleted for clarity.

***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 are supportive of the quality assurance process and believe that this should be applied equally to rightsholders and ISPs in order to ensure the robustness of information provided as part of the process.

***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.***

We are very supportive of the proposals for the creation of a notification process which sees a time-linked, graduated response to the issue of copyright infringement. We have the following specific comments:

- Given the sheer volume of online copyright infringement it may prove difficult to identify the same infringer twice in a 6 month period; this is not to say that the individual has not been infringing, just that this infringement has not been detected, as a result of limited rightsholder resources and targeted approaches from rightsholders. This is particularly the case with smaller rightsholders who may not have the infrastructure, staff or financial resources to conduct searches for their material with consistent frequency. If this was the case, the process would be logging people as first time infringers who are in reality repeat infringers. This, once again, would place a barrier to access against smaller rightsholders when it may not disadvantage larger ones to the same extent. **We recommend that the subscriber must, therefore, be sent a Second Notification if they have received a First Notification within the previous 12 months**, not 6 months as proposed in 5.6.1 of the draft code.
- The suggested 'grace period' in 5.6.2 of one month is too long. This gives infringers a whole month of continuing an illegal activity without any check on their behaviour. **We recommend the time delay between the sending of a first and second notification is 21 days.** This has clear comparisons across the legal and regulatory system. For example, an appeal to a Crown Court must be made 21 days after a conviction. 21 days is also the discount period for parking tickets and the time in which you have to appeal a penalty fare with most train companies. This would have limited bearing on people, for example, not having time to make necessary security arrangements because of being on holiday as research shows that the average length of the British holiday is 8.3 days<sup>3</sup>. We strongly object to a system being developed to accommodate the lowest common denominator – in this case the very small percentage of people who take three week holidays.

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<sup>3</sup> <http://www.holidayextras.co.uk/news/destination/top-summer-holiday-hotspots-named-3367.html>

- The system must make some acknowledgement of the fact that the subscriber has already been given time to improve their security, find legal services etc but has chosen not to. Therefore, **the length of the 'grace period' between notifications should operate on a graduated scale.** As stated above, the time delay under 5.6.2 should be 21 days with the time delay under 5.7.2 (the 'grace period' between the sending of the second and third notifications) should be more like 14 days.

***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 agree with all the areas for inclusion listed in 5.11 of the draft code.

However, we believe further provisions are required:

- It must be made clear in the code that ISPs may include information in their notifications relating exclusively to wi-fi and computer security and the availability of legal content services. It would be highly inappropriate to include general marketing material which may detract from the important message the notification is designed to communicate and, given the likely split of costs, is not something Copyright Owners should be subsidising.
- Given the flexibility the code provides for ISPs to formulate their own notifications (which we support, so long as these follow general standard guidance) there should be a clause which states that nothing in the tone or content of the notification should undermine the initial obligations process.
- As an additional safeguard, ISPs should be required to get approval from Ofcom of their notifications.

We do not agree with the proposed content of the First, Second and Third Notifications. We believe that once a Subscriber has received a Second Notification they are a repeat infringer and as such should be placed on the Copyright Infringement List. Therefore, the statement contained in 5.15.2 in the draft Code telling the Subscriber that they are now on a Copyright Infringement List accessible by Copyright Owners, needs to replace 5.14.2. A new statement would need to be included in the Third Notification which highlights the increased likelihood of legal action being taken.

The reasons for this proposed change are explained in the response to Question 6.1 below.

## **Section 6: Copyright infringement lists**

***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.***

We have a number of changes which we would like to see made to the copyright infringement list process:

- **The receipt of a second notification should result in that subscriber being placed on the Copyright Infringement List.** In Section 5.13 of the consultation document when explaining its reasoning for advocating a repeat notification system based on time as opposed to number of CIRs Ofcom states that the proposed system ensures there are ‘no “free-hit” CIRs. The same argument must apply to the Copyright Infringement List. Under the current proposals, individuals would only be added to the Copyright Infringement List after receiving three notifications – this effectively makes the second notification a ‘free hit’ as no action can be taken against the infringer after those two notices.
- All rightsholders should have access to the complete Copyright Infringement List, bearing the IP address and alleged infringements from subscribers who have infringed that rightsholder’s copyright. **They should be able to see a full list of the content that the subscriber in question has been accused of infringing, not just their own copyright content.** This is important for the following reasons:
  - The Initial Obligations provisions in the Digital Economy Act do not introduce any new offences but are designed to make the enforcement of existing law easier. The ability to take joint legal action is a significant part of this and to do this, Copyright Owners need to be able to see who else’s content a potential target for litigation has been infringing.
  - This ability to take joint legal action will make it less likely that subscribers are sued by more than one copyright owner.
  - It makes the production of the list easier and cheaper for ISPs as they do not have to filter infringement lists for each individual copyright owner.
- Section 6.6 of the draft code should be amended to allow Copyright Owners to request the List once a month. This is important to provide for a constant ‘flow’ of legal action as opposed to it being initiated in three month ‘lumps’. Implementing point two above would make this a less onerous and costly requirement on ISPs.

## Section 7: Subscriber appeals

***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.***

The Publishers Association believes it is in the interest of all parties – subscribers, ISPs and Copyright Owners – for the appeals system to be clear, open, robust and transparent. In order for it to meet these criteria, it needs to have a high degree of certainty so all parties can have confidence in it. The Appeals Body referred to in Section 7.1 should create confidence in the process by being formed of an independent tribunal panel, rather than the ‘independent person’ currently referred to in Section 7.1 of the Draft Code. In addition, **the grounds of appeal need to be tightly defined and the list at Section 7.12 in the draft code made exhaustive.**

To this end, Section 7.12.5 which includes ‘any other ground on which a Subscriber chooses to rely as to why the act or omission should not have occurred’ needs to be deleted,

particularly given that this is not a ground required by the Digital Economy Act (unlike the others listed).

We also do not believe that a decision on the length of time a Subscriber has to appeal should be left to the Appeals Body. For reasons of certainty, this should be set out in the Code. We recommend a period of 21 days. As stated earlier, this is the length of time used in many other appeals systems and as such is one with which consumers are very familiar.

We do not agree with the inclusion of Section 7.21 in the draft code which allows the Appeals Body to take into account the technical knowledge of the subscriber. Again, this is not in the Act and, we believe, ignores the central purpose of the notification process which is to educate consumers and provide them with exactly such technical information. Given this, there should be no circumstances where this should be a factor.

With regards to the awarding of costs and compensation under Section 7.29, given the subscriber is only appealing the fact they have been sent a letter there should be very little or no loss incurred on their part. Therefore, we believe Ofcom should stipulate a cap on the compensation the Appeals Body can award and create a tariff for costs.

## **Section 8: Administration, enforcement, disputes and information gathering**

***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 would highlight the following points in relation to Sections 9 and 10 of the Draft Code:

- The timelines proposed in Section 9.7 and Section 9.15 of the draft Code may be too short. We recommend these are increased from 5 days to 10 days.
- Similarly, we propose the timelines in Sections 9.9 and 9.17 be increased from 10 days to 15 days.
- We are concerned with the inclusion at the end of Section 9.11(a) of the statement "...and such conditions as Ofcom considers appropriate". This is not contained in the DEA and it is difficult to see any need for Ofcom to do anything other than to compel compliance with the Code.
- The indemnity Copyright Owners are required to provide to ISPs under Section 9.19(d) should be limited to any **direct** loss or damage.

We would welcome the guidance referred to in Section 8.6 of the consultation document. Additionally, we would also welcome guidance on whether notice and take down systems operating outside of the Code will be drawn in to any of the proposals contained within the Code.

For further information please contact Emily Cleevely, Head of Policy and Communications, on 020 7691 1409 or [ecleevely@publishers.org.uk](mailto:ecleevely@publishers.org.uk).