



Federation Against
Software Theft

**Response by Federation Against
Software Theft to Ofcom's Consultation
"Online Infringement of Copyright and
the Digital Economy Act 2010 - Draft
Initial Obligations Code"
of 28th May 2010**

July 2010

Introduction

The Federation Against Software Theft (“FAST”) was set up in 1984 by the British Computer Society’s Copyright Committee. It was the world’s first software anti-piracy organisation working to protect the intellectual property rights of software publishers.

Initially concentrating on lobbying Parliament to revise the Copyright Act 1956, it followed with significant input into the Copyright (Computer Software) Amendment Act 1985, and in the Copyright, Designs and Patents Act 1988, it soon expanded its remit to provide an extended range of services to members.

FAST works on many fronts to combat software piracy and to defend its members’ digital rights. It does this through education, enforcement, policy initiatives and continuous consultation with like-minded bodies committed to seeing business prosper from intellectual property.

It has for some time been concerned about online infringement of copyright - particularly by unlicensed file-sharing. It has carried out various investigation exercises into sharing of business software: its Operation Tracker led to disclosure orders against 12 internet service providers and subsequent settlements and/or dealings with over 300 individuals.

FAST is fortunate in having the support of over 25 leading law firms known as the FAST Legal Advisory Group (FLAG), practising in the converging areas of IP, IT and e-commerce. A number of FLAG members have contributed to this response.

Response to 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.*

No

Neither FAST nor the relevant copyright owners can know in advance the likely number of copyright infringement reports which are likely to be made until such information is first made available to them. Each of FAST and its relevant members/copyright owners will, of course, adhere to their respective obligations under Section 124 Communications Act 2003 but it would be an impossible task - and probably a misleading exercise - to speculate in

advance on the number of copyright infringement reports that would be made.

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. 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.*

Yes

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?*

No

It is evident that there are significant problems with the definitions of 'internet service provider', 'subscriber' and 'internet access provider' in that:

- Businesses like Virgin Media and Sky may be excluded from the definition of 'internet service provider' because their subscribers typically take television, telephone and internet services (with internet access being very much a subsidiary product). Accordingly it cannot be said that such organisations are providers of a service which 'consists entirely or mainly of the provision of access to the internet' [See the definition of 'internet access service' in Section 124N]
- Further it is also evident that many intermediaries such as libraries, halls of residence, universities, coffee chains and other providers are not 'subscribers' because they are receiving the service as 'a communications provider' in that they are in turn making available internet access to individual users(see definition in Section 124N).
- We further point out there is a class of provider who is neither a 'subscriber' (because they receive the service as a communications provider) nor an *Internet Service Provider* (because they are not providing a service under 'an agreement').

This means that the structure for copyright infringement reports and notifications under s 124A may be nugatory in relation to such intermediaries. But the copyright owner has no

other means of accessing the details of the relevant infringer without the significant cost of a Norwich Pharmacal order without the provisions of the Digital Economy Act.

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?*

No

In relation to the unlawful sharing of business software, we suspect that much of the activity may take place by the downloading and/or sharing by:

- very small, small and medium size businesses; and
- sophisticated technology users.

In both cases it may well be that neither uses a standard (inexpensive) retail internet service provider preferring instead to take their internet service provision from either a business-to-business ISP or one which is dedicated to high usage and high download speeds.

FAST therefore believes that, effectively, limiting the ambit of the initial obligations to the seven ISPs which have been identified will inevitably mean that much infringing activity within the business community will simply be missed.

FAST however accepts that some sort of threshold is reasonable, in the first instance, and would recommend:

- i. The seven ISPs that have already been identified; and
- ii. The three internet service providers who have the greatest coverage in the business community on a B2B basis.

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?*

Please see our comments under 3.3 above

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?*

No

1. FAST is concerned that the unsatisfactory definitions in the Digital Economy Act 2010 may make the application of the Initial Obligations Code (and subsequently those relating to technical measures) susceptible to legal challenge. In particular we are concerned at the definition of "*subscribers*" and "*communications provider*" since:

- Section 124N defines subscriber in this way:

"In relation to an internet access service, means a person who:

(a) receives the service under an agreement between the person and the provider of the service; and

(b) does not receive it as "communications provider".

In our view there is a real concern that certain categories of business who might typically be expected to be a "*subscriber*" will be excluded from the definition because of their making available of an internet access service to employees, consultants, freelance and others.

2. Further, large corporates may be set up as groups of companies whereby the service to such group is delivered by a subsidiary service company which in turn makes available these services (including internet access) throughout the whole group.

3. There is a real danger here that uncertainty over the meaning of "*subscriber*" in this context may mean that the initial obligations code fails to realise and effect the mechanisms that are expected under it.

FAST requests OFCOM to identify clearly - and with better legal precision - those subscribers and communications providers caught by the Initial Obligations Code.

4. FAST would recommend that where infringement is identified and the apparent infringer is a customer of an ISP that service on such customer may be made of the notifications even where such customer is not in fact a 'subscriber' within the meaning of Section 124N. This must be the only way for the structure of CIRs and notifications to work where the end user is not a direct customer of the relevant ISP.

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?*

In principle, yes.

However we are concerned at the ambiguities around the definitions of "*copyright owners*" and '*qualifying copyright owners*' where it is evident that, in different places, these expressions may mean:

- A "*copyright owner*" within the definition of Section 124N Communications Act 2003; and
- A copyright owner within the meaning of the Copyright, Designs and Patents Act 1988.

See our comments on this under the **General Comments** below

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.*

No

FAST does not accept the need for a quality assurance report to be provided to Ofcom.

1. There is no reference or facility in the Digital Economy Act 2010 for the requirement by OFCOM of such quality assurance as pre-condition for the involvement of copyright owners in the mechanisms available to them under the Act and the Initial Obligations Code. To the extent that there have been errors in identification of infringers, most of these errors have in any case been traceable to the ISP's identification of the subscriber following a Norwich Pharmacal order, and not to the raw IP address data which has been used for file-sharing

which is submitted to the ISP (which courts will have scrutinised in considering the Norwich Pharmacal order).

2. FAST acts for many software owners, many of whom are comparatively small businesses but nevertheless have valuable copyrights. They would wish to take advantage of the facilities within the Digital Economy Act and the Initial Obligations Code in order to identify and seek to limit infringements of their copyrights.

The position of business software owners is very different from the major rights owners in, for instance, the music industry where infringements may be counted in the hundreds of thousands or millions.

It is quite possible that business software owners may only identify a handful of infringements (perhaps only 10 - 20) each year. Such infringements may still be extremely damaging because of the distribution of that material.

FAST maintains, therefore, that the creation, approval and delivery of a quality assurance report to Ofcom is completely disproportionate to the facility that is being offered to copyright owners to make use of the Initial Obligations Code.

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?*

Yes

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.*

Yes

FAST would however recommend that any rejection by an ISP also include an invitation to the copyright owner to comment on any defect that might be apparent in the response by the ISP.

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.

No

Please see the comments in answer to question 4.2 above.

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.*

Severe damage can be caused where high-value business software is shared online. With multi-user versions of say a business product such as Microsoft Exchange Server 2010 software retailing for example at £1,150 it will be seen that simply a single sharing to a restricted group could cause high financial losses to the software owner.

For these reasons, we oppose the idea that infringing subscribers should only be identified after the third copyright infringement report. We request that is reduced to one or at most two.

See also: General comment - confusion over meaning of 'copyright owner' (below)

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?*

See: General comment - confusion over meaning of 'copyright owner' (below)

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.*

FAST does not agree with the threshold of three reports in the previous 12 months. Please see our answer to Question 5.3.

See also: General comment - confusion over meaning of 'copyright owner' (below)

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.

See: General comment - confusion over meaning of 'copyright owner' (below)

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.*

See: General comment - confusion over meaning of 'copyright owner' (below)

General comment - confusion over meaning of 'copyright owner'

One of the considerable uncertainties with both the Act and the Initial Obligations Code is the confusion as to the meaning of "*copyright owner*". Under the Act copyright owner means both (a) the actual copyright owner; and (b) someone authorised on their behalf.

This polysemy means that in various places in the Act (and in the Initial Obligations Code) there is use of the same expression - copyright owner - meaning the copyright owner or their agent; or the true copyright owner alone - but in different ways. As an example:

Section 124A: Obligation to notify subscribers of copyright infringement reports

'This section applies if it appears to a copyright owner that...'

The idea here is that the copyright owner can either mean the actual copyright owner or someone acting on their behalf e.g. FAST.

However, two lines down there is reference to a subscriber or another person who "*has infringed the owner's copyright*". Clearly the agent (FAST) does not own the copyright and its copyrights cannot have been infringed.

What the section means here is reference to the true copyright owner rather than the restricted definition within the Act.

As a further example 124 A(8)(b): "*a statement that the copyright owner may require the provider to disclose ...reports*": this, we assume, is intended to apply both to the real copyright owner and the authorised agent. In other words it correctly follows the (wider) definition of 'copyright owner' meaning either the owner or their agent.

But in the next paragraph: (c) there are the words: "*a statement that, following such a disclosure, the copyright owner may apply to a court to learn the subscriber's identity and may bring proceedings against the subscriber for copyright infringement*".

This can only refer to the true owner - it cannot apply to the agent since they are unable, at least at the present time, to bring representative actions in the English courts. So reference to 'copyright owner' is misleading.

The question then arises about what is then meant by a "*copyright owner*" when considering whether a relevant subscriber is a relevant subscriber in 124B(3).

If "copyright owner" means either the owner or its agent would this mean that an organisation like FAST would then be classified as one owner - but one who was making multiple reports?

On the other hand if "copyright owner" is being used in the limited legal sense (i.e. the person who actually owns the copyright) then this changes the threshold completely.

FAST recommends that the Initial Obligations Code (and the recommended form notifications) are scrutinised so that references to 'copyright owner' are meaningfully utilised and replaced where appropriate by eg '*the legal owner of the copyright*' or '*the copyright owner or their authorised representative*'.

Federation Against Software Theft (FAST)

30th July 2010