

Consultation response

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TO: Campbell Cowie

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**RE: ONLINE INFRINGEMENT OF COPYRIGHT AND THE DIGITAL ECONOMY ACT
2010: DRAFT INITIAL OBLIGATIONS CODE**

Summary

- > The Initial Obligations Code is set in the context of the Digital Economy Act 2010 and the Ofcom duty to promote the interests of the consumer and the citizen.
- > The Which? response is set in the context of our customer protection principles and the three objectives we believe the new system should aim to achieve.
- > We set out six areas where we believe the IOC needs to be strengthened in order to meet our consumer protection principles and the objectives we think the new system should be aiming for. The six areas that need further strengthening are:



- Applicability of provisions of the IOC (definitions of subscribers and ISPs).
 - Evidence gathering
 - Processing of subscriber data (data protection)
 - Notifications
 - Liability
 - The appeals (adjudication) body.
- > We rely heavily on a legal opinion obtained by Which? from Roger Wyand QC on some of the provisions in the DEA and the IOC.
 - > The way subscriber, ISP and communications provider is defined does not correspond with the everyday understanding of these words. Consequently there is some confusion over who is to be liable for CIRs and notifications under the IOC.
 - > While the IOC proposals on the evidence gathering methods are important, they need to go further to ensure consumers have trust in the new system and the credibility of the evidence base on which accusations are made.
 - > The IOC makes some sensible suggestions around the methods and processes used by ISPs to match IP addresses and subscribers. However, in order to ensure their compliance with data protection rules and their credibility as a basis of notifications, they should be independently verified/ audited by the Information Commissioners Office (ICO).
 - > The IOC proposals on notifications are good but could be strengthened by mandating a notification template and requiring all notifications to be sent by mail and electronically.
 - > The issue of liability needs to be made clearer. The DEA could be accused of muddying the liability issue. It does not create a vicarious liability of copyright infringement but does create relatively low evidential thresholds for inclusion in the new system of notifications and Copyright Infringer Reports (CIRs), Copyright Infringer Lists (CILs) etc. The liability issue needs to be made very clear to subscribers receiving notifications.
 - > On the appeals body, the IOC proposals are very good. We welcome the idea that the appeals body should be based on an ombudsman model. However, there could be a wider range of grounds of appeal. In addition, we set out the key elements that any credible and trusted appeals body needs to have in place, including a key feedback and intelligence gathering role to ensure the integrity and credibility of the new obligations system.



Introduction

- 1 Which? is an independent, not-for-profit consumer organisation with around 700,000 members and is the largest consumer organisation in Europe. Which? is independent of government and industry, and is funded through the sale of Which? consumer magazines, other subscription services and books.
- 2 This consultation starts by setting out the background to the Initial Obligations Code (IOC) and the context in which the IOC is formulated. It then sets out the other factors relevant to our response, such as the consumer protection principles we co-authored, published earlier this year, and the outcomes we believe the Digital Economy Act 2010 (DEA) should be aiming for with these measures.

Background

- 3 We welcome this opportunity to respond to Ofcom's important proposals on the draft IOC. Which? understand that the DEA sets out the parameters within which Ofcom can formulate the IOC. Within that DEA context, the IOC should be framed with Ofcom's primary objectives (of promoting the interests of consumers and citizens) as the basis for the IOC proposals.
- 4 As Ofcom will know, in conjunction with other citizen and consumer bodies, Which? contributed to a set of consumer principles¹. We consider these vital in underpinning any IOC that purports to have the consumer at its heart. Therefore this response is rooted firmly in those principles.
- 5 Which? broadly welcome the IOC and more generally the new system for attempting to tackle online copyright infringement.
- 6 A system that moves away from the one currently faced by consumers i.e. where they are effectively defenceless against potential court action, is an improvement.
- 7 Which? consider that a any new system should aim to:

¹ Communications Consumer Panel, Consumer Focus, Which?, Open Rights Group and Citizens Advice Bureau (2010). 'Online Copyright Infringement - Customer Protection Principles', pub: Communications Consumer Panel, accessed at: http://www.communicationsconsumerpanel.org.uk/Online%20copyright%20infringement_customer%20principles_FINAL.pdf



- > Ensure as many rights holders use the new system as possible and do not immediately threaten court action, using the tactics being employed by some current rights holders and their legal representatives.
- > Bring about behavioural change among consumers (who currently unlawfully file share) through education.
- > Ensure the new system is robust and fair to consumers, whereby as few innocent consumers face false accusations as possible, with mechanisms in place to protect their innocence.

8 We consider that the proposed IOC goes some way to meeting our consumer protection principles and the aims for the new system (set out in paragraph 7). However, there are weaknesses in the IOC. Which? consider there are six areas where the IOC can be strengthened. These areas are:

- > Applicability of provisions of the IOC (definitions of subscribers and ISPs).
- > Evidence gathering
- > Processing of subscriber data (data protection)
- > Notifications
- > Liability
- > The appeals (adjudication) body.

Below we set out in more detail how the IOC can be improved in these six areas.

Applicability of the Provisions of the IOC

- 9 Section 1 of the IOC sets out the relevant definitions of the various parties covered by the IOC. Which? recently commissioned a legal opinion² on parts of the DEA and the draft IOC. One area examined by Roger Wyand QC was around the definitions in the IOC and the DEA and the implications of these definitions. He argued the definitions at lead to *'...results that do not accord with what members of the public would understand by those terms [subscriber, ISP and communications provider]...or indeed what Parliament thought they were saying'*. Which? concur with his general view and set out Roger Wyand QC's argument in more detail below.
- 10 In the IOC consultation document it states that *'The critical question, in relation to subscribers, is the position of an individual or undertaking which both receive internet access as an end-user, and also makes it available to*

² Wyand, R QC (2010). 'Opinion for Which? on Aspects of the Digital Economy Act 2010 and the Ofcom Draft Initial Obligations Code'. Not yet published.



others...We consider that a person or an undertaking receiving an internet access service for its own purpose is a subscriber, even if they also make it available to third parties'. Roger Wyand QC states that he does not believe this is a supportable view '...where the individual or undertaking is providing internet access through a wi-fi network they are clearly providing an electronic communications network and service. The two requirements of the definition subscriber are clearly cumulative and both must be satisfied...'. A person may be, through their wi-fi network, providing others with internet access. These are receiving the internet both as a subscriber and as a communications provider. Yet the definition of subscriber excluded communications providers. Roger Wyand QC sees no justification for reading 'solely' into the definition here, as is done in the consultation document.

- 11 Under the definitions in the consultation document someone supplying wi-fi through an implicit or an explicit agreement may fall within the definition of an ISP. As Roger Wyand QC points out: *'...in a household where there are several people who are allowed by the owner of the network to access the internet...the owner is receiving the service as a communications provider and is not a subscriber but may be an ISP'*.
- 12 A similar situation prevails in businesses, where an employer allows staff to use the internet for their own purposes. The employer *'...may well be an ISP providing an electronic communications network or service and not a subscriber'*. If internet access is supplied purely for the business of the company, then *'...it could be argued that the company receives the service as a subscriber'*.
- 13 Roger Wyand QC points out that *'...a communications provider does not have to be providing the network or service under an agreement. It would seem that a person may be a communications provider without being an ISP and so there is a class of person who is neither a subscriber...nor an ISP'*. This situation applies to open access wi-fi services. As Roger Wyand QC stated in his opinion, *'The mere fact that the communications provider does not have an agreement with users does not make the provider of open access a subscriber'*. If there is an agreement then the provision of open wi-fi comes under the definition of an ISP, if there is no agreement it comes under the definition of a communication provider. *'In neither case is it a subscriber...[the] apparent insertion of the word solely in the definition of subscriber...does not cure this problem'*.



- 14 The implications of this definitional confusion are important. It could mean those not meeting the definition of subscriber will be caught up in the new system. Leaving the DEA and IOC open to legal challenge. But if they are not, then this might undermine the aim of the DEA in terms of reducing copyright infringement.
- 15 It could undermine another public policy objective of enabling greater access to broadband, by reducing the amounts of open wi-fi available to consumers.

Evidence Gathering

- 16 Sections 3.5 to 3.7 set out the measures required from rights holders in relation to ensuring the evidence gathering process is rigorous. Which? consider the transparency requirements in the IOC commendable and worthwhile. However, we believe the provisions in the IOC need to go further to guarantee a high quality of evidential standard.
- 17 The customer protection principles we co-authored stated that ‘...*evidence must connect the customer to the alleged copyright infringement*’ and ‘*The systems used to collect this evidence must be independently verified by Ofcom or bodies authorised by Ofcom and meet a prescribed high standard of accuracy and reliability*’³. This is akin to the position we took in our 2009 response to BIS⁴, where we stated that the credibility of the new mechanism partly stands on guaranteeing a high quality of evidential standard.
- 18 Ensuring a rigorous and high evidential standard can be ensured in one of two ways:
- > Either evidence gathering methods can be pre-vetted through a system of testing and certification by expert bodies, authorised by Ofcom.
 - > Building on the powers Ofcom takes in section 3.6 of the IOC, Ofcom could require independent auditing and testing of the evidence gathering methods once the systems are up and running.

³ Communications Consumer Panel, Consumer Focus, Which?, Open Rights Group and Citizens Advice Bureau (2010). ‘*Online Copyright Infringement - Customer Protection Principles*’, pub: Communications Consumer Panel, accessed at: http://www.communicationsconsumerpanel.org.uk/Online%20copyright%20infringement_customer%20principles_FINAL.pdf

⁴ Which? (2009). ‘*Consultation on Legislation to Address Illicit Peer-to-Peer (P2P) File Sharing: Consultation Response*’, pub: Which?: London.



- 19 It is important that the error rates of the evidence gathering methods are known. This is so the appeals body can make more considered and better judgements in the cases they are deciding on.
- 20 A rigorous and officially certified method will enhance the credibility of the system in the eyes of consumers and give a high degree of confidence as to whether the internet connection concerned had been involved with online copyright infringement. It will mean less chance of problems and false accusations (especially in the early days of the scheme), reducing the instances of stress anxiety of those falsely accused.

Processing of Subscriber Data (Data Protection)

- 21 Sections 4.5 to 4.7 set out how ISPs should ensure that their processing of Copyright Infringement Reports (CIRs) and their customer data is done robustly and in accordance with the law. IP addresses are personal data and should be treated as such. As Roger Wyalnd QC describes: *'...in most cases the IP addresses are personal data in the hands of the IPS's since they will usually be able to identify the user of that IP address'*. Even in the hands of the rights holder there is a strong case for the IP address to be considered personal data *'...there is a good argument that the list of IP addresses are personal data within the meaning of the Act in the hands of copyright owners'*.
- 22 In light of this, it is vital to ensure that the processes rights holders and ISPs have in place are robust and protect the personal data of the consumer. Similar to the methods of ensuring high evidential standards, this can be ensured in two ways:
- > Through pre-approval of the systems and processes for handling the data. This could be arranged in agreement with the Information Commissioners Office (ICO) and or any other bodies that would have expertise to evaluate such systems and processes. Those without a high level of accuracy or who did not meet data protection requirements would have to be improved. In section 4.6 of the IOC, Ofcom takes the power to direct ISPs to make any changes to their systems as required. This could be employed in the wake of any negative assessment by the bodies who evaluate the processes and systems.
 - > Ofcom could require all systems and processes are audited independently once they are up and running. In section 4.6 Ofcom say that they may require the systems and processes to be audited. We



believe the IOC should say that methods used for processing IP addresses should be audited by the ICO for efficacy and data protection compliance.

- 23 A key reason this needs to occur is that the error rate in relation to matching IP addresses and customer details needs to be known by the appeals body so that it can be factored in to their deliberations. In fact, all case officers should as a first step of any appeal require an ISP to double check the data matching of IP address to customer details. This too should be a requirement in the code.
- 24 Rigorous auditing or certification of these systems and processes will also leave them less vulnerable to challenge. This will add to the credibility of the system, not only by helping prevent mis-matching, but also by preventing systems and methods potentially being tied up in legal wrangling.

Notifications

- 25 Section 5 of the IOC deals with the notification process to subscribers whose internet connection has been found to be connected with an incident of unlawful file sharing. In our consumer protection principles⁵ and our 2009 consultation response to BIS⁶, we set out that notifications should aim to change behaviour and be as educational and consensual as possible⁷. With this objective in mind our consumer protection principles set out: *'...customers will best be served by receiving uniform information on the nature and consequences of being included on a 'copyright infringer list'...If different customers receive a different letter from their respective ISP, there will be legal uncertainty. It is important letters...are clear, short and to the point'*.

⁵ Communications Consumer Panel, Consumer Focus, Which?, Open Rights Group and Citizens Advice Bureau (2010). 'Online Copyright Infringement - Customer Protection Principles', pub: Communications Consumer Panel, accessed at:

http://www.communicationsconsumerpanel.org.uk/Online%20copyright%20infringement_customer%20principles_FINAL.pdf

⁶ Which? (2009). 'Consultation on Legislation to Address Illicit Peer-to-Peer (P2P) File Sharing: Consultation Response', pub: Which?: London.

⁷ Research published by SABIP on IP infringement shows the importance of psychological and sociological drivers of online copyright infringement and that changing these behavioural dynamics is key to reducing the incidents of online copyright infringement. A punishment approach is unlikely to yield widespread changes of behaviour. The implications here are that education and behavioural change are possibly the key factors that need to come out of the new obligations system of tackling copyright infringement. As Which? has argued for a long time. Source: CIBER (2009). 'Copycats? Digital Consumers in the Online World', pub: Strategic Advisory Board for Intellectual Property Policy (SABIP): London, accessed at: <http://www.sabip.org.uk/sabip-ciberreport.pdf>



- 26 In light of this we consider that the code should set out a template letter that all ISPs have to follow. This approach will eliminate any room for uncertainty e.g. around the giving out of wrong or misleading information by ISPs. Not only is this a sensible end in itself in terms of fairness to those receiving notifications, but it also reduces the opportunities for challenges to the letters by those who might be looking to ‘clog-up’ the system with appeals. If this is not possible then at a minimum a tonal requirement in the IOC should be set out, in order that ISPs know what type of tone to set in their letters. Strident and accusatory wording will not bring about the behaviour change that is required and aimed for.
- 27 We are disappointed and concerned that the IOC does not set out proposals for a standard brochure/ insert in the notifications, setting out in more detail some of the key aspects of the new system. This was a key point in our customer protection principles document: *‘Letters...should...be accompanied by a standard information pack that explains the details of the notification and appeals process’*. In order for consumers to read the letters and absorb the information much detail will have to be left out of the covering letter. Therefore it will need to be set out simply and clearly elsewhere. A standard insert/ brochure would play a vital role in this. It would enable the subscriber to access:
- > Greater detail on the issues behind and around copyright infringement
 - > More information on key aspects of the new system such as the appeals body.
- 28 Which? is also concerned that ISPs will not be mandated to both send a hard copy (postal) of a notification and an email as copy. The danger of relying on just one is the recipient will not receive the notification. All the notifications are important documents. There might be a tendency to look at the first two as less important than the third one. This should not be allowed to be the case for the following reasons:
- > Firstly, copyright owners should be keen for potential infringers to receive the first letter and read it. The earlier a notification is acted upon by a subscriber the less potential infringement will take place, benefiting rights holders.
 - > Secondly, in terms of fairness it is important that all efforts are made to ensure the subscriber receives the notification. The subscriber potentially faces serious consequences (court action) once they reach the Copyright Infringer List threshold. In order for it to be a fair process



for subscribers, they need to receive all notifications. They may not receive a notification for a number of reasons e.g. the email address the ISP holds may be out of date or never used. This means a subscriber could be building up CIRs when - had they known about the previous one - may have successfully appealed against it and been exonerated from any connection with infringement.

- 29 Which? are concerned the IOC does not look to establish any kind of official helpline for subscribers receiving notifications, delivering interactive and real-time advice. This was a key point in our 2009 response to the BIS consultation⁸ and our customer protection principles⁹, when we stated that: *'The notification...should advise the customer of an Ofcom nominated information provider that can provide further independent information and advice on the appeals process'*.
- 30 Many consumers will have a number of questions that may not be answered fully by the notification they receive. Others may be panicked by a notification and need (or prefer) to speak to a human being who can give advice. This is a perfectly reasonable desire in this type of situation. We consider that the IOC should make provision to set up an official helpline for those receiving notifications. This could be run by Ofcom (who already have their own call centre). Or it could be contracted out to an organisation like Consumer Direct who have growing experience in delivering important and sometimes complex advice about potentially very stressful situations, over the telephone.
- 31 Merely providing established advice organisations with a 'script' of some kind in case they receive calls from concerned consumers is not good enough. Those dealing with these issues need to be well trained in the issues at stake. The liability points set out below are clear examples of why some specialism will be required.

Liability

⁸Which? (2009). 'Consultation on Legislation to Address Illicit Peer-to-Peer (P2P) File Sharing: Consultation Response', pub: Which?: London.

⁹ Communications Consumer Panel, Consumer Focus, Which?, Open Rights Group and Citizens Advice Bureau (2010). 'Online Copyright Infringement - Customer Protection Principles', pub: Communications Consumer Panel, accessed at:

http://www.communicationsconsumerpanel.org.uk/Online%20copyright%20infringement_customer%20principles_FINAL.pdf



- 32 In our customer protection principles¹⁰ and our response to the 2009 BIS consultation¹¹, we argued that it is crucial for the notification to ‘...acknowledge that the recipient may not be personally responsible for, or even aware of, the alleged copyright infringement...[that]...notifications should explain clearly that legal liability rests with the infringer...’. The provisions of the DEA can be seen as muddying the waters around liability for copyright infringement. Roger Wyand QC points out in his opinion that ‘The DEA has certainly imposed a potential liability on subscribers to CIRs in respect of infringements carried out by third parties using their equipment’. The requirement (section 13(5) of the DEA) on an individual to take action to protect their internet connection puts a duty on the individual that has never existed before in law. However, as Roger Wyand QC points out, the DEA does not establish a vicarious liability: ‘where a third party does manage to use the internet connection of a subscriber without his or her knowledge or consent and infringes copyright the subscriber will not be liable...there can be no question of liability for copyright infringement...[however]...that does not mean the subscriber is immune from the procedures created by the DEA enabling copyright owners to serve CIRs and obtain CILs’. Roger Wyand QC goes on to state that the thresholds for being put on a CIL are ‘...not the test for infringement of copyright’ and importantly that in the DEA or in copyright law more widely ‘There is no requirement that the subscriber should take reasonable steps to prevent infringement’. However, in the IOC and DEA ‘...the burden of proof is shifted to the subscriber, rather than on the claimant...as would be the case in a copyright infringement case’. Therefore DEA creates a ‘..lower evidential hurdle for the copyright owner’. These important legal points (especially on liability) need to be clearly and simply stated to the subscriber in the notification.
- 33 Many of those receiving these notifications will be worried and concerned about what may or may not have been happening over their internet connection. Those who have been file sharing, possibly through ignorance of copyright law, need to be educated in what is and what is not permissible.

¹⁰ Communications Consumer Panel, Consumer Focus, Which?, Open Rights Group and Citizens Advice Bureau (2010). ‘Online Copyright Infringement - Customer Protection Principles’, pub: Communications Consumer Panel, accessed at: http://www.communicationsconsumerpanel.org.uk/Online%20copyright%20infringement_customer%20principles_FINAL.pdf

¹¹ Which? (2009). ‘Consultation on Legislation to Address Illicit Peer-to-Peer (P2P) File Sharing: Consultation Response’, pub: Which?: London.



Subscriber Appeals

34 Section 7 of the IOC deals with subscriber appeals and sets out the framework in which the appeals will take place. In our 2009 consultation response to BIS¹² and in our customer protection principles¹³ we set out the key aspects of an appeals body. Such a body must ensure those receiving notifications are dealt with fairly and receive due process. In that vein, in our 2009 consultation response we argued that an ombudsman type system was the best solution to balancing the objectives of fairness, due process and minimal cost to the consumer.

- > Ombudsmen have a proven track record in dealing with not dissimilar problems.
- > Ombudsmen are good at delivering relatively inexpensive but rigorous decisions on contentious issues for large numbers of people.
- > Ombudsman schemes are much more consensual and less intimidating than formal court action.
- > Ombudsman schemes can be weighted in favour of the consumer.
- > They are relatively inexpensive compared to court action.
- > An accused would be able to defend themselves without incurring large costs.
- > The case officers would have an intimate knowledge of the issues and those involved - examining the evidence from both sides and able to question the claims made by all parties.

35 Therefore, in general, we welcome the proposals in this section. However, it has to be an effective appeals body. To achieve this end a number of key points need to be taken into account in its development:

- > The grounds of appeal need to be clear, unambiguous and fair.
- > The appeals body needs to be easily accessible and consumer friendly.
- > The appeals body needs to incorporate expertise and understand that the average consumer is at a disadvantage in this situation, both technically and in terms of resources.
- > The body needs to be independent, open and accountable.

¹² Which? (2009). 'Consultation on Legislation to Address Illicit Peer-to-Peer (P2P) File Sharing: Consultation Response', pub: Which?: London.

¹³ Communications Consumer Panel, Consumer Focus, Which?, Open Rights Group and Citizens Advice Bureau (2010). 'Online Copyright Infringement - Customer Protection Principles', pub: Communications Consumer Panel, accessed at:
http://www.communicationsconsumerpanel.org.uk/Online%20copyright%20infringement_customer%20principles_FINAL.pdf



- > It needs to be an integral part of the new system. The appeals body has to be effective and efficient and it also has to play its part in ensuring the new system for tackling online copyright infringement works effectively and efficiently.

36 In our 2009 BIS consultation response¹⁴ and in our customer protection principles¹⁵, we stated that appeals should be allowed to be brought on ‘...any reasonable grounds’. We considered this to include when the subscriber to an internet connection (who had alleged to have infringed) had in fact not been the infringer. This is consistent with current copyright law. We still consider this should be a valid grounds for appeal. It is not a ground for appeal set out specifically in the DEA, but we believe that the IOC should make it so. As Roger Wyand QC stated in his opinion ‘*It seems manifestly unjust that someone should be branded as an infringer when they are not. They can, of course, appeal...but if they fail, the CIR will stand even though they would not be found to have infringed if sued*’. This has two serious implications:

- > People could face the stress and anxiety of going to court when they have done nothing wrong and there is no prospect of a guilty verdict. Consumers do not have the resources (time, money and expertise) to contests infringement accusations in court. Ofcom, with its duty to promote the interests of consumers and citizens should clearly therefore consider this when drafting the final version of the IOC.
- > If it comes to ‘technical measures’, this low evidential threshold will mean a raft of new consequences that inhibit the consumer going about their lawful business. Subscribers could find themselves receiving serious punishments, on the basis of an evidential threshold that would not meet the evidential burden in a court. This will have to be revisited if ‘technical measures’ are contemplated.

37 The DEA sets out that if certain criteria are met, then an appeal has to be determined ‘*in favour*’ of the subscriber making the appeal. We consider that wording akin to this should be included in the IOC to bring some clarity at this early stage to the way decisions might be made by the appeals body.

¹⁴ Which? (2009). ‘*Consultation on Legislation to Address Illicit Peer-to-Peer (P2P) File Sharing: Consultation Response*’, pub: Which?: London.

¹⁵ Communications Consumer Panel, Consumer Focus, Which?, Open Rights Group and Citizens Advice Bureau (2010). ‘*Online Copyright Infringement - Customer Protection Principles*’, pub: Communications Consumer Panel, accessed at: http://www.communicationsconsumerpanel.org.uk/Online%20copyright%20infringement_customer%20principles_FINAL.pdf



- 38 Further, we believe that leaving ‘reasonable steps’ (section 7.12.3 of the IOC) entirely undefined at this stage could cause confusion and uncertainty for those bodies providing advice to consumers receiving notifications and for consumers who might be thinking about grounds for subscriber appeals needs greater definition in the IOC. Reasonable steps is an evidential standard as Roger Wyand QC points out ‘...*goes further than they did not allow someone to use their equipment to infringe*’. Therefore, while we see the benefits in having a subjective test so the particular circumstances of a case can be taken into account Which? consider there is scope for some firming up of the definition of ‘reasonable steps’. This should help create some greater certainty for those delivering advice on securing internet connections and those consumers wondering what they can do to avoid these accusations, notifications etc.
- 39 The caveat set out in section 7.21 of the IOC, requiring case officers to take into account the technical ability of the subscriber is a welcome addition to the subjective approach. In that vein we also consider that requiring actions both before and after the receiving of a notification to be taken into account would be a positive step. It would give a better chance to those who have modified their behaviour in light of an unauthorised use of their internet connection (by others to unlawfully infringe) to stay outside the system.
- 40 Section 7.12.5 of the IOC states that appeals can be made on ‘...*any other ground on which a subscriber chooses to rely as to why the act or omission should not have occurred*’. It is unclear to Which? exactly what this means for those who feel that they have a case to take to appeal. This requires further clarity before we can decide whether it is a sensible ground for appeal. In the final IOC we would hope to see less vague wording.
- 41 A further point identified by Roger Wyand QC is ‘...*the proposals...if adopted, would result in people who were not subscribers within the definition in the DEA being the subject of CIRs and CILs*’. *The proposed appeals procedure does not provide for the possibility that the ‘subscriber’ indentified in the CIR is not a subscriber*’. We concur with Roger Wyand QC, this ‘...*would be a sensible provision to add*’.



- 42 In our 2009 submission to the BIS consultation¹⁶ and in the customer protection principles¹⁷ we set out that *'The appeals body should make it as easy as possible for customers to appeal'*. This is indeed a key component of a good ombudsman service. This will mean consumers having easy access through a number of avenues, covering consumers in a range of circumstances. Therefore:
- > Jargon must be kept to a minimum e.g. auditing of published material and the work of case officers, for plain English.
 - > Consumers should be able to make their complaint in person, by telephone or in writing, either by letter, email or an online form.
 - > Consumers should be able to get detailed and real-time advice on negotiating the appeals process.
 - > The accused should incur very few costs in the process.
- 43 In our 2009 BIS consultation response¹⁸, Which? argued that the appeals body must incorporate expertise and knowledge. An ombudsman scheme with well trained case officers would be able to achieve this relatively straight forwardly. It is only by having this technical capability that clear and robust decisions can be made in individual cases. This is the only way of delivering fairness and due process.
- 44 We believe that the confidentiality requirement set out in the IOC is crucial and a key element in any effective ombudsman type scheme. The consumer must have complete confidence in this otherwise more sensitive cases may not be brought forward leading to injustices. All contact with the appeals body should be anonymous in relation to the rights holder not being able to know the personal details of those who are using it to defend themselves against accusations of file sharing.
- 45 In our customer protection principles we set out some general criteria as to how the appeals body should be set up to engender trust among consumers. It should be *'independent and impartial, transparent, expert, representative and accountable'*.

¹⁶ Which? (2009). *'Consultation on Legislation to Address Illicit Peer-to-Peer (P2P) File Sharing: Consultation Response'*, pub: Which?: London.

¹⁷ Communications Consumer Panel, Consumer Focus, Which?, Open Rights Group and Citizens Advice Bureau (2010). *'Online Copyright Infringement - Customer Protection Principles'*, pub: Communications Consumer Panel, accessed at:
http://www.communicationsconsumerpanel.org.uk/Online%20copyright%20infringement_customer%20principles_FINAL.pdf

¹⁸ Which? (2009). *'Consultation on Legislation to Address Illicit Peer-to-Peer (P2P) File Sharing: Consultation Response'*, pub: Which?: London.



- 46** Independence is vital to the credibility of the adjudication body and the esteem it will be held in. Those accused need to trust that the body will make judgments based entirely on the merits of the case and not for any reasons of financial necessity or bias in its governance arrangements:
- > The adjudication scheme must be seen to be independent, as well as actually being independent.
 - > There should be formal procedures that ensure independence. Information on these should be made publicly available.
 - > This should include a route for complaints about the handling of a case e.g. review of the handling of the case by someone independent from the person who originally dealt with it.
 - > Appointments should be made according to Nolan principles and in a transparent way. The adjudication body must have an independent budget outside the money it may receive from those taking their case to adjudication.
 - > The terms of reference of the body must be publicly available and agreed in an open and transparent manner. Changes to these should only be allowed after widespread consultation.
 - > A majority lay membership on the governing board, including a lay Chairman.
 - > Expertise in copyright and technology on the board.
 - > Impartiality measured through the publication of an annual report, bulletins and case reports.
- 47** One guarantor of independence is transparency. To help ensure independence the adjudication body has to operate in an entirely transparent way. In addition, transparency will lead to a more effective adjudication body in terms the decisions they make. The ‘light’ of publicity and accountability will help ensure fairness for consumers. Therefore we suggest that the appeals body should include the following:
- > A defendant challenging an accusation of illicit file sharing should be able to comment on the evidential submission from the accuser.
 - > Both sides should have equal access to information and be able to see the case officers decision and report, including reasons for the decision.
 - > A case officer should also provide transparent reasons for a decision.
 - > There should be a procedure for complaints against the case officer themselves.
 - > A consumer satisfaction monitoring in an annual report.



- > It is vital that someone using the appeal body is kept informed of the progress of their case, who is dealing with it and where it is being handled.
 - > There should be a duty to liaise with ISPs to ensure that those receiving notifications are told of the existence of this adjudication body in a meaningful way and where further information can be found.
 - > The appeals body should be obliged to make publicly available the following types of information:
 - An introduction to the body and its work.
 - A statement explaining the scheme is independent from the industry concerned.
 - The types of cases the scheme can consider and those it can't (with contact details of other organisations where consumers could get help).
 - Who can bring a case and when.
 - How the case should be made and a guide to the kinds of information the consumer is likely to need.
 - What happens when a case is received.
 - How the case will be handled.
 - An idea of the time scale involved including when the consumer can expect a response.
 - What happens after the case has been investigated.
 - The steps to take if the consumer is still not happy.
- 48** The appeals body needs to be effective, both in terms of reinforcing the credibility of the new system as a whole and as a body that will preserve innocence when cases are unfounded but not let off the guilty.
- 49** In relation to the former the appeals body needs to have a key and officially recognised role in feeding back data on the methods and processes employed by rights holders for gathering evidence and ISPs for processing IP addresses and other personal data.
- 50** In relation to the latter, parameters need to be put in place in terms of what of the consumer can expect such from the body. Therefore we believe that:
- > The appeals body needs an initial contact system and expert case officers to deal with each case brought by an accused consumer.



- > Case officers need the resources and expertise to be able to deal with cases speedily and fully. The total numbers required and levels of expertise should be reviewed annually.
- > The system must be regularly monitored. Appealers' needs and experiences of the system should be assessed. They should be fed into the process and distributed widely to industry (rights holders and ISPs) to help drive improvements in their systems and so they are aware where failings might be occurring. There should be a senior manager in charge of this aspect of the appeals system. They should work to:
 - Track the source of problems
 - Allow comparisons between years and months to identify trends
 - Be circulated internally and fed into reviews of the system
 - Stimulate research and further investigation
 - Be open to detailed analysis by other organisations
 - Be publicly available, at least in summary form.

51 The appeals body will likely be the most expensive aspect of the new system. The distortionary effects of the new system need to be minimised. Too expensive a system will dis-incentivise participation by rights holders. Also consumers will end up bearing some if not most of final costs of the system as costs are passed through into prices. Therefore the body needs to be as efficient as possible. This efficiency has to be consistent with a robust and independent approach to decision making on cases. Part of that efficiency will be dealing with cases expeditiously. To do this, time frames for dealing with cases should be set out in the founding articles of the appeals body. This will bring certainty to both those appealing and those defending against an appeal.

52 Another guarantor of efficiency will be the setting and close monitoring of performance targets (agreed with Ofcom in an open and transparent manner). They should be made known to consumers, particularly in the following areas:

- > Response times to letters, phone calls, emails.
- > Appointments
- > Case turnaround times
- > Informing consumers of delays
- > Providing contact details
- > Cost per case
- > Number of cases per staff member
- > Satisfaction, both with the outcome of cases and service levels.



- 53** Which? also consider that the body should not be called the appeals body. We have used the term because that is the wording used in the DEA and the IOC. However, the public facing name should be different. The term appeals body might give the consumer the idea that they are already guilty of infringement, when in law they are not and no offence has been proven against them. In order for trust to be invested by the public in this body, the name needs to suggest that it is concerned with helping a subscriber defend themselves against an accusation rather than deciding on an already made decision.