

Verizon Business, Colt, Global Crossing and ATT response to Ofcom Consultation - Online Infringement of Copyright and the Digital Economy Act 2010 – Draft Initial Obligations Code

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Introduction

Verizon Business welcomes the opportunity to respond to the consultation on how Ofcom proposes to give effect to measures introduced in the Digital Economy Act 2010 (“DEA”) aimed at reducing online copyright infringement.

This response is on behalf of Verizon Business, Colt, Global Crossing and ATT.

Consultation

Ofcom is consulting on a draft Code of practice to underpin the initial obligations imposed on internet service providers (ISPs) to reduce online copyright infringement by the Digital Economy Act 2010. The Act requires ISPs to notify their subscribers if their internet protocol (IP) addresses are reported by copyright owners, in a copyright infringement report (CIR), as being used to infringe copyright. It also requires them to provide copyright owners, on an anonymous basis, with copyright infringement lists (CIL) about subscribers to whom the number of CIRs has exceeded a certain threshold. Ofcom proposes that the draft Code will initially cover only fixed-line ISPs with over 400,000 subscribers, that is, the seven largest ISPs: BT, Talk Talk, Virgin Media, Sky, Orange, O2 and the Post Office. Ofcom will, however, review evidence of online copyright infringement and extend the scope of the Code if appropriate. The draft Code proposes that notifications be sent to subscribers on receipt of the first CIR, on receipt of a second CIR a month or more later, and on receipt of a third CIR received a month or more after the second. A subscriber would be included in a CIL if they receive three notifications within a year, and the copyright owner requesting the CIL has sent at least one CIR relating to that subscriber within that year.

Background

To date discussions have primarily focussed on copyright holders and residential consumer communications providers (fixed and mobile), with the outcome that mobile communications providers are now out of scope.

This response focuses on the requirements of services provided to the large business sector in the UK by fixed business communications providers. In terms of this, our main focus is on Ofcom’s proposed scope for inclusion, which we agree should include the proposed 400,000 subscriber threshold for participation in the Code, but which we also propose should include a specific exemption for business communication providers who provision Internet access services to large business customers.

Application of the Code

1. Business ISPs Should Not Be Covered Under the Code

a. Preliminary Discussion

The explanatory notes to the Digital Economy Act states that the obligations under the Act should fall on all ISPs except those who had demonstrated a very low level of online infringement, and that the Code should set out a qualifying threshold criteria, based on the number of CIRs an ISP received over a set (rolling) period of time. The government anticipated that most small and medium-sized ISPs and, possibly, the mobile networks would fall under the threshold. We believe that most if not all business communications providers will also fall under this threshold.

Notwithstanding the discussion in the explanatory notes, no CIRs have been issued to date and Ofcom reports that it does not have information about CIR volumes. Accordingly, Ofcom is not able to set a CIR-based threshold for qualifying ISPs which is objectively justifiable, non-discriminatory or proportionate, as the Code is required to be. Therefore, it proposes that the Code should initially cover only fixed-line ISPs who have a subscriber base of more than 400,000 subscribers. This would mean that the seven largest fixed residential consumer ISPs - BT, Talk Talk, Virgin Media, Sky, Orange, O2 and the Post Office - will be covered by the Code from the outset. Among other things, Ofcom considers this to be proportionate because the relevant ISPs together account for 96.5% of the residential and SME business broadband market and information obtained from copyright owners suggests that there is a broad correlation between the number of subscribers an ISP has and the level of alleged copyright infringement activity on their service.

We agree that Ofcom must clarify the scope of the Code, and we agree the 400,000 subscriber limit is an appropriate threshold. However, in line with the exclusion of mobile providers, for the reasons stated below, we strongly encourage Ofcom to similarly exclude Business Communications Providers¹ from the Code as well.

b. Rationale for Exclusion of Business ISPs from the Code

Ofcom has proposed that mobile ISPs be excluded from the Code because, among other reasons, mobile networks are less conducive to online copyright infringement due to speed and capacity restraints, and mobile network operators assign public IP addresses differently from most fixed ISPs, limiting allocations of IP addresses and using them in a more dynamic way, sharing them across subscribers. We agree with the proposal to exclude mobile ISPs from the Code, but we believe similarly compelling arguments exist to support the exclusion of Business Communications Providers and ISPs as well.

¹ For the purposes of these comments, we use the terms Business Communications Provider and Business ISP to mean an entity that provides, amongst other services, wholesale IP, backbone, VPN and similar services to enterprise and large business customers who typically use services purchased to provide internet access to diverse business locations and/or to offer downstream ISP and other services to their own customers. This is differentiated from a residential consumer ISP that will have direct contracts to provide retail services often via a consumer portal.

At a very simple quantitative level a Business Communications Provider is likely to have far fewer customers, from a few thousand to possibly tens of thousands, when compared to the many millions of customers that a mass market residential consumer provider generally has. As such, the likely incidence of infringement, on a per customer basis, is likely to be significantly lower as well for such a Business ISPs², suggesting that exclusion of this group of providers will do little or nothing to support Ofcom's overall objective of combating online piracy.

The anticipated small volume of allegedly infringing conduct among large business customers is understandable when one considers the nature of the workplace and the incentives large businesses – and their employees, have to discourage or abstain from copyright infringement.

- First, contracts of employment typically dictate what is and is not permissible for work based online activity – with the consequences made clear to the employees of large businesses. Therefore, there is a clear incentive on employees not to engage in certain (unlawful) activities when at work for fear of breaching their employment agreement.
- Second, large businesses commonly have work-based IT and internet policies that govern and limit employees' actions in work situations. Employers utilise a range of anti-virus software, content filters, firewalls and other technical controls to police the use of their networks and internet access connections. These efforts not only deter unlawful file sharing activity, they help prevent it from occurring in first instance.
- Third, large businesses have a keen interest in policing their networks to safeguard their data, employees and customers from the viruses, malware and other internet-borne threats that can be embedded in downloaded P2P files. Preventing online piracy through network security practices, and enforcing employee rules against piracy, are ways large businesses can keep threats from infecting corporate networks, and help limit congestion on their networks caused by unlawful file sharing.
- Fourth, large businesses often prevent employee access to sites that offer applications that may promote unlawful file sharing, such as Bittorrent sites.

For all these reasons, we believe that Business Communications Providers, and the large business customers that they serve, are in a very different position from mass market residential consumer ISPs; and therefore, that an exclusion from the Code for such Business ISPs is appropriate.

2. Notification system

An additional and important basis for distinguishing Large Business ISPs from mass market residential consumer ISPs is that the system for identifying alleged infringers is not tailored to the enterprise or large business customer, and the notification system, as proposed, does not work effectively in the case of Business Internet access services.

The process used by copyright owners (“COs”) to notify an ISP about allegedly infringing activity by their subscribers relies on identification of alleged infringers

² We use the terms “Large Business Communications Provider” and “Large Business ISP” synonymously as defined in Footnote 1, supra.

based on the end user's IP address. The COs typically utilise copyright agents whose applications (bots) search the internet looking for shared folders from which to access copyrighted works. In general terms, once a bot identifies the target user, the application initiates an upload session from the shared folder and then captures the user's IP address as well as the title of the allegedly infringing works. The CO's agent determines the user's ISP from the IP address captured during the process and sends the ISP (usually in bulk form) a listing of IP addresses, the name of the work(s) alleged to have been infringed, and the date/time/time zone at the time the content was uploaded by the application.

Whilst this process may work well at identifying individual subscribers in the case where an IP address is assigned to a specific end user, the process does not work well if the shared drive accessed by the bot resides on the network of a large business, where the end user may not be readily susceptible for identification. For example, the IP address may identify a large business – e.g., a bank – but not the actual end user whose computer is connected to the bank's network.

Moreover, the ability of the Business ISP to identify and notify the specific alleged infringer also breaks down. In such a case, the Business ISP will only know the business concern to which the IP address was assigned. It will not have visibility into the business customer's network to know which end user's computer was accessed by the CO's bot. At best, a Business ISP would be able to notify the large business customer to which a notice of alleged infringement applied, but only the large business customer itself would, theoretically, be able to identify the **specific** end user in question (its not clear that most or even many large business customers would be able to tie a specific allegation of infringement to a particular employee).

Thus, the notification process set forth in the Act, which is tailored to mass market residential consumer ISPs who assign individual IP addresses to individual subscribers, does not function well in an environment in which the "customer" of the ISP is another large business that may operate its own network. In such a case, the Business ISP will not be able to issue a CIR to the alleged infringer directly, nor will it be able to send the copyright owner a CIL listing (anonymously) the individual for whom the number of CIRs has exceeded the prescribed threshold.

For these reasons as well, we believe that exclusion of Business Communications Providers from the Ofcom Code is appropriate.

Conclusions

For all the reasons stated above, we agree with Ofcom's scope of limiting the Code to ISPs with 400,000 or more subscribers; however, we also request that Ofcom specifically exclude Business ISPs from the Code in the same manner as it has excluded mobile providers.

If you have any questions please do contact me.

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