
**BPI (BRITISH RECORDED MUSIC INDUSTRY) LIMITED
RESPONSE TO DIGITAL ECONOMY ACT 2010
CONSULTATION ON DRAFT INITIAL OBLIGATION CODE**

30 July 2010

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Introduction

The BPI¹ is the representative voice for the recorded music industry. Our membership comprises 426 record companies and associates including 384 independent labels and the four major record labels. Together, these account for 85% of the sound recordings sold in the UK every year. Within the music community the BPI, together with our sister organisation the IFPI and working with third party providers, has led the way in developing the processes and systems necessary to generate high volumes of Copyright Infringement Reports. On the back of this expertise, the BPI ran a trial of notifications with Virgin Media in May 2008, and was the sole rightsholder involved in the Principle 4 MOU trial with Ofcom and the 6 major ISPs in Autumn 2008. We would envisage being one of the principal rightsholders groups in the rolling out of the CIRs under the Initial Obligations Code ('IOC'), although naturally we hope that having the Digital Economy Act in force will encourage many other rightsholder groups to invest in the systems necessary to generate CIRs.

The BPI commends Ofcom for the speed with which it has responded to the requirements of the Digital Economy Act to prepare an Initial Obligations Code. Aside from this formal response to the consultation we greatly appreciate the many opportunities to liaise with Ofcom to discuss key issues around the formulation of the Code.

The measures in the Digital Economy Act are essential to help create an online environment which encourages high levels of investment in creative content in the UK and in innovative digital content services, including music services. Record labels have made great progress in licensing digital music services over the last few years – there are now at least 59 in the UK alone – and in creating new initiatives (such as the Music Matters campaign and Certification Scheme²) to promote those legal services to consumers. The BPI and its members will continue to seek closer business partnerships with ISPs and others internet platform providers, such as search engines, to ensure that wherever possible consumers are encouraged to use legal music services, and will work constructively with Ofcom, Government and Parliament to ensure that action taken in respect of illegal downloading is effective, proportionate and cost-effective.

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 BPI strongly disagrees that Copyright Owners should be obliged to meet the costs ISPs incur in meeting the obligations placed on ISPs under the Digital Economy Act. We set out the reasons for this, in full, in our response to the DBIS consultation document "online infringement of copyright initial obligations cost-sharing". We attach a copy of that response at Annex 2.

¹ BPI (British Recorded Music Industry) Limited

² www.whymusicmatters.org

The BPI understands that it is the intention of Government and Ofcom that Copyright Owners share the costs incurred by Ofcom in this process. If this is the case, then it is imperative that Copyright Owners are consulted fully about decisions taken by Ofcom which could have an impact on these costs. For example, where Ofcom is procuring third party support for monitoring infringement, Copyright Owners should be fully involved in the tender process.

Equally, if Copyright Owners are to be asked to make a significant financial contribution to the Initial Obligations Code processes then it is imperative that their views as to the effective operation of the Code are taken fully into account. Rightholders' views on questions such as the time gaps between notifications and the criteria for being placed on the Copyright Infringement List (as outlined further below) go right to the heart of the efficacy and deterrent power of the system. We urge Ofcom to give due weight to these views, in the light of the possibility of Copyright Owners contributing to the costs for the system.

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.*

We agree that a Copyright Owner should be required to provide an estimate of the number of CIRs they intend to make in a notification period. (Those Copyright Owners which outsource detection of infringement to third party vendors – likely to be the majority – will have a good feel for this figure as it will be set out in agreement with the vendor.) However, whilst two months may be an appropriate period for the very first notification period (i.e. when ISPs are considering their set-up costs) it is likely that such a long period would not be necessary once the initial obligations system is up and running. So for all subsequent notification periods we believe the lead time should only be one month. This shorter forecast period will also allow Copyright Owners to “fine tune” their requirement according to release schedules, observed levels of infringement and available financial resources.

With regards to the Notification Period itself, the BPI maintains that this must not run for longer than 3 months. This will allow an assessment to be made on a quarterly basis as to who should be in scope. Allowing a longer period would permit “piracy havens” to be created, whereby infringers migrate to alternative services – either fixed or mobile – safe in the knowledge that their infringement cannot even be detected for a further 12 months. The harm that this activity causes would go unaddressed, and the whole policy would be undermined.

Furthermore, small Copyright Owners will find it extremely difficult to provide assessments – and payments – for the anticipated level of CIRs for a 12 month period. Smaller labels' financial and creative cycles will not permit them to make the commitment required under such a long notification period. A quarterly notification period will thus help ensure that the Initial Obligation Code can be utilised by small businesses, as well as larger ones.

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?*

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?

Questions 3.3. and 3.4 are answered together.

All ISPs are covered by the Act, but not all are subject to the Code. Ofcom's approach creates a central "core" of in scope fixed line ISPs with over 400,000 subscribers; a "permeable membrane" through which fixed line ISPs may become in scope if their subscriber numbers should rise; and a "hard shell" which excludes mobile operators at the outset.

The logic of the flexibility of the "permeable membrane" is to be welcomed, as - we presume - it means that the Code does not have to be rewritten or re-notified to the European Commission in order to bring ISPs within its scope if their subscriber base rises. Conversely, the disadvantage of this approach is that it raises the prospect of the need to revise the Code (and notify the Commission) to bring certain other providers into the Code.

Better, we believe, would be to extend the logic and have the Code as potentially applicable to all ISPs - whether fixed line or mobile - at the outset, but set further conditions (alongside the already proposed subscriber threshold) which would operate to bring an ISP through the permeable membrane and into the core of "in scope" ISPs where those conditions are fulfilled.

These further conditions would be based upon:

1. Ratio of infringement to subscribers and absolute infringement levels.
2. Regions with single providers.
3. Mobile operators delay in provision.

1. *Ratio of Infringement to Subscribers and absolute infringement levels.*

ISPs with a subscriber base of below 400,000 should be brought into scope of the Code's provisions if they satisfy two conditions: (a) they have a large ratio of infringers to subscribers, in comparison with an industry average and (b) the total level of infringements on their network is above a *de minimis* level.

The BPI has evidence of the number of infringements identified per week from each of the major fixed line ISPs, and has been able to compare this to the published market share of those ISPs, effectively generating for each ISP a ratio for the number of infringements per week per subscriber. BPI would be willing to share this data with Ofcom on request. However, the BPI's evidence gathering is currently limited in scale and it is not therefore able accurately to determine what proportion of an ISP's subscribers are regularly engaged in infringement. However, Ofcom will have this data to hand as a result of its proposed monitoring activity with regard to the initial in scope large ISPs.

Our proposal is that where a small ISP exceeds the average for the number of infringements per subscriber over one or more Notification Periods/quarters³ by a margin of 20% or more, it should have to comply with the Code provisions from the following [notification period]. For example, if the average across the large ISPs is that there are 200 infringements per 1,000 subscribers per notification period/quarter, then an ISP with 240 infringements per 1000 subscribers would come into scope from the next notification period. (Equally, an industry average of 100 infringements per 1000 subscribers would see 120 as the trigger point.)

³ n.b., as noted above, we propose that Notification Periods should be 3 months in duration.

As a second, cumulative condition, ISPs would only be brought into scope if rightsholders had in total identified a minimum of 1000 infringements (potential CIRs) for that ISP over a notification period/quarter.

The aim of these two conditions is to ensure that the introduction of the Code does not create “piracy havens” which are able to operate outside of the Code simply by dint of their low subscriber base but which nevertheless are host to regular infringement.

2. Regions With Single Providers

Alongside Ofcom’s proposed threshold of 400,000 subscribers we believe that special provision needs to be made for KCom (previously “Kingston Communications”). Although it has only around 180,000 subscribers, these are all located in or around the city of Hull, giving KCom a virtual monopoly of internet access provision in that region. It would be a perverse, and surely unintended consequence of the introduction of the Code, if one geographical region of the UK were to be entirely excluded from the effect of an Act of Parliament, simply by dint of this market anomaly. Were KCom to be excluded from the Code there would be no disincentives to infringers on its subscriber base whatsoever, and therefore nothing to prevent this region becoming a hotbed of online copyright infringement. This provision would also apply to any other monopoly regions which may exist in the future.

3. Mobile Operators Delay in Provision

A final condition would see mobile operators included in the Code from the outset, but given a longer period – we propose 18 months - than fixed line operators to comply with it. (As with fixed line ISPs, only those operators with a threshold of over 400,000 subscribers should be in scope.) This would ensure that the mobile networks could not become the “escape route” for fixed line infringers, which would be detrimental for the mobile operators and their customers. The justification for this approach lies with the facts that:

(i) copyright infringement is currently taking place on mobile networks;

Since 7 June 2010, BPI (via IFPI/DtecNet) has been analysing the platform source of online copyright infringement. Whilst overall the biggest platforms are fixed line, the picture is varied: the largest fixed line infringer has more than 25% of the total weekly infringements, whereas another of the “big 5” fixed operators accounts for c.5%. The highest levels of infringement on a Mobile Internet Access Provider (MIAP) (and where mobile traffic is clearly distinguishable from fixed traffic) are at 2%. This means that the scale of the problem on the highest MIAP is already one third of the scale of the problem on one of the fixed line ISPs. Furthermore, when looked at a peer-to-peer protocol level, for certain protocols such as “Gnutella” and “Ares” there is greater prevalence on one particular MIAP than on some fixed line ISPs (albeit not large ISPs).

(ii) infringement is liable to rise as mobile networks become faster and smart phone penetration increases;

On 15 Feb 2010, the International Telecommunication Union (“ITU”) (an agency of the United Nations which regulates information and communication technology issues) issued a press release stating that it expects to see the number of mobile broadband subscriptions exceed one billion globally during 2010, having topped 600 million by the end of 2009. It assesses that over 71 million Europeans use their mobile phone to access the internet in a typical week. With current growth rates, web access by people on the move — via laptops and smart mobile devices — is likely to exceed web access from desktop computers within the next five years.

Research carried out by a UK entity mobileSQUARED (which conducts primary research on the mobile industry), suggest that mobile broadband connections will exceed fixed-line broadband connections in 2011, and that by 2011 the number of active 3G devices in the UK will be 36.3 million, as well as 6.4 million dongles/embedded devices, taking the total number of mobile broadband connections to 42.7 million versus expected broadband internet users of 42.5 million

(iii) the use of “dongles” and wi-fi to access the internet across mobile networks is also increasing rapidly, further increasing the need to ensure mobile operators are within the scope of the Code; With an increasing number of MIAPs now offering customers the use of dongles, access to the internet for mobile subscribers is not reliant upon their device. One MIAP is now offering an 18gb monthly allowance on its dongles – thus providing the capacity for mass illegal filesharing on these services (around 5000 mp3 tracks could be downloaded per month).

(iv) emerging technologies will link mobile to fixed line broadband thus blurring the line between the two, and solving the problem of mobile spectrum capacity, allowing more data to be downloaded through mobile devices.

There is a clear commercial imperative for mobile operators to reduce the volume of traffic on their networks whilst maintaining a high level of subscriber activity. One user with a heavy bandwidth requirement is less commercially attractive than a large number of users with lower bandwidth demands. For this reason, mobile operators are increasingly exploring ways to divert some of their traffic on to fixed line networks, before transferring back to the mobile network to complete the call. New “mifi” services such as that offered by O2 are making it increasingly easy for subscribers to select at a given location whether they access the internet through their 3G account, or via wi-fi. The more this happens, the more capable MIAPs will be of handling large amounts of data, and the more vulnerable these networks will be to high levels of copyright infringement.

Given these rapid developments in the market it is clear that MIAPs are soon to become hosts to much higher levels of copyright infringement. Merely indicating that mobile operators may come into the scope of the Code at some unspecified later date will not provide sufficient incentive for them to make the necessary investments and practical adjustments required. They may believe, as some fixed line ISPs apparently did, that the legislation is unlikely ever to apply to them. A clear signal is required to the effect that mobile operators are in scope, but have a period of adjustment to enable them to make any changes necessary to for them to comply with obligations under the legislation.

There is a further, practical, reason why particular types of operator should be not be excluded from the scope of the Code. This is pertinent to those companies which operate across fixed, public wi-fi services and mobile networks; referred to here as ‘joint operators’. These joint operators run services which enable customers to use one or more access methods as a result of their subscription, e.g. fixed and mobile, as described in the following table:

Operator	Fixed line	Mobile	Public Wi-Fi
BT	Yes	Yes ("BT Mobile" - Vodafone MVNO)	Yes (BT Openzone & FON)
Carphone Warehouse	Yes	Yes ("TalkMobile" – Vodafone MVNO)	No
Hutchinson 3G	No	Yes	No
O2	Yes	Yes	Yes (via BT Openzone /The Cloud)
Orange	Yes	Yes	No
Sky	Yes	No	No
Tiscali-Pipex	Yes	No	No
T-Mobile	No	Yes	Yes
Virgin	Yes	Yes ("Virgin Mobile" - T-Mobile MVNO)	No
Vodafone	No	Yes	No

From a rightsholder detection perspective, distinguishing infringements on these different parts of an ISP's network may be challenging. In the normal collection of evidence, rightsholders will "capture" an IP address and will be able to see which entity controls it using various online databases. However, how a joint operator manages their networks (and associated 'netnames') affects how easily a mobile, wi-fi or fixed line service can be differentiated from another.

For example, if an infringement was detected with an IP address of 193.35.132.43, this would resolve back to "Orange-PCS-1" using the RIPE database or "Orange PCS PLC" using a commercially available database. This address was actually in use via a mobile device but there is no clear indication that this is the case from the description given. There are, therefore, a number of assumptions that have to be made here:

- i. That the name used to describe the network is sufficiently descriptive and consistent to enable the different services to be identified;
- ii. That the IP address block is solely used for that service, i.e. all IP addresses relate to fixed line subscribers;
- iii. That internet registries are kept up to date with the correct assignments, especially where networks/netblocks are acquired or re-assigned by qualifying ISPs.

Given the difficulty in some instances in differentiating between the networks operated by qualifying ISPs, we propose that where an ISP qualifies by dint of their fixed line subscriber base, then all of the services also offered by that ISP are also deemed to be qualifying.

Throughout the operation of the Initial Obligations Code Ofcom will have responsibility for monitoring the levels of infringement and providing the assessment as to which operators should be brought into scope. In conducting this assessment, we hope that Ofcom will have regard to evidence provided Copyright Owners as to levels of infringement.

Mitigation Measures by the ISPs

Some ISPs have raised the prospect of their businesses being confronted with high costs due to the implementation of the IOC. As we note in our response to the BIS Costs Consultation, it is difficult to assess the accuracy of the ISPs' predictions on this point. However, what is clear, is that the lower level of copyright infringement on an ISP's network, the lower its costs will ultimately be. The BPI would urge ISPs – and urge Ofcom to help convey this message – to adopt the technologies which are available to filter or manage their traffic. We believe that these are currently under-utilised by ISPs, but if they were applied at a network level and/or more widely promoted to home-owners, then their networks would be less prone to misuse.

A number of web filtering solutions are currently on offer that can cater for anything from individual home users to ISPs/Carriers. Some of these filtering solutions are able to cover a broad range of deployments whilst others are more specifically targeted at home installations, business or ISPs. Three examples of options already in use and currently available to ISPs are set out below.

(i) Blue Coat WebFilter

Bluecoat is a web filtering service that can be used on many levels from home users (for free) up to ISPs. The PacketShaper 10000 series supports 200,000 individual host IP addresses. Bluecoat also offers K9 Web Protection, a free product for home users allowing parents to filter/block millions of sites from a list of 71 categories (including P2P URLs). Policies can be applied at user and group levels with options including time based blocking. The products also provide an *Advise, Coach, Enforce* approach by redirecting users to educational splash pages, warning and alerts to communicate company or ISP policies.

(ii) SafeNet/Aladdin eSafe SecureSurfing

The eSafe SecureSurfing service is a B2B product built for ISP networks with a view to ISPs offering it as a value added service. It can cater for tens of thousands to millions of users. The system is predominantly built to protect home and business users from malware, offering anti-spyware, HTTP/FTP Security, Parental Control, IM and P2P control. URL filtering is an option rather than a standard function of the service although it can be tailored to each member of a household. The system is able to block individual elements on a webpage whilst still allowing access to other content. Users of the system do not need to install, configure or update the product as this is all done at ISP level making it fully transparent. The system also allows for users to be redirected to notification pages and produces detailed per user reports.

(iii) Plusnet Broadband Firewall and SafeSurf

The Plusnet Broadband Firewall blocks specific ports to prevent incoming traffic to services running on the customer's machine. Plusnet offer seven levels of broadband including the option to block all incoming or unwelcome internet traffic depending on the user's needs. Plusnet's SafeSurf option is a new facility specifically set up to block access to common peer-to-peer networks and USENET (a long-standing Internet news service which is also used for file sharing).

If ISPs were to deploy measures of this type at a network level, and activate them either for all subscribers or at the request of individual subscribers, they could potentially substantially reduce the volume of CIRs that they would need to process or, alternatively, could avoid coming into scope altogether. If all in-scope fixed line ISPs were to include in notification letters the option for the account holder to activate, at their request, network-based security measures that blocked some or all P2P protocols and which blocked access to known major sources of copyright infringement, then they would be assisting the account holder in avoiding further CIRs or notifications. Moreover, these safety measures would apply even if a third party succeeded in accessing their account through an insecure wireless connection and would therefore protect the account against unauthorised abuse.

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?

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?

Questions 3.5 and 3.6 are answered together.

The Draft Code outlines proposals for dealing with wi-fi, but much greater clarity is required. We understand Ofcom’s proposal to be broadly as follows. Where a wi-fi provider registers individual users, allocating IP addresses to identified users, then the provider can be deemed an ISP and the users can be deemed subscribers under the terms of Code. In effect, this would mean that the wi-fi provider/ISP can potentially have a CIR sent to it, and that it will have to send notifications to subscribers. We agree with this approach, but would add that the provider should be charging specifically for the provision of internet access and receiving customer data in order to be regarded as an ISP (for example, many hotels operate wi-fi services in this way).

Ofcom goes on to propose that where the wi-fi use is not subject to any registration and where users are totally anonymous, then the wi-fi provider is itself the subscriber, and the company which provides it with internet access is the ISP under the Code. In effect, this means that the wi-fi provider would be the recipient of notifications. We agree with this approach.⁴

However, there is a second dimension to the definitions, revolving around the numbers of subscribers to a service.

In paragraph 3.23 Ofcom state that a wi-fi provider may be defined as an ISP (as noted above, if they allocate IP addresses), but that they would not be a “qualifying” ISP under the Code because they would not have the threshold number of subscribers.

This is likely to be the case for small business concerns – coffee shops, etc - but it may not be the case for wi-fi access providers such as The Cloud or BT Openzone. For these services, whilst at any one time the number of users may be below 400,000 (if that indeed becomes the threshold) of far more salience is the *total* number of subscribers which the provider actually services. If we distinguish between “users” – i.e. those actually using the service at a given time; and “subscribers” – i.e. the total of people who have used the service over a year, then the subscriber threshold is easily reached in many cases.

Wi-fi access providers such as The Cloud or BT Openzone should be judged on the ‘reach’ of their service in terms of the numbers of people who use it over a notification period as opposed to the number of venues that they provide a service for. This is especially important given the increasingly blurred line between

⁴ For clarity, however, we do not agree with Ofcom’s suggestion that where internet access is provided for free alongside other goods or services, where the wi-fi provider does not enter into a specific contract for the provision of internet access and the wi-fi provider does not obtain any details of the identity of the user, that that wi-fi provider should be treated as an ISP. Rather, they should be treated as a subscriber. In the event that a commercial establishment (such as a coffee shop) were to receive notifications from its ISP in these circumstances, it would be able to implement simple security measures to ensure that the problem did not recur. BPI finds that it is very rare that UK companies are detected as the source of infringing filesharing activity, since most companies have in place simple firewalls that prevent their networks from being used for illegal activity. It is reasonable the establishments offering wi-fi in the course of business should also implement such controls should this prove necessary.

fixed line providers, mobile networks and wi-fi operators which we discuss in response to question 3.3 above.

For example, BT customers can access BT Openzone wi-fi hotspots as part of their package (however, increasingly it is possible to “buy into” BT Openzone on a temporary basis using vouchers paid for with cash or a credit/debit card). BT reports that presently there are 1.5 million locations present in UK and this number is soon to surpass the 2.5 million mark by the end of 2011. The Cloud states that it connects “over 3 million devices each month to its wi-fi network” and advertises itself as having “thousands of great locations where you can get online”, and since these cover as diverse locations as Everton Football Club, McDonalds and Canary Wharf, it is clear that the subscriber base for these services is way above 400,000 people in the UK.

Question 4.1: Do you agree with the proposed content of CIRs? If not, what do you think should be included or excluded, providing supporting evidence in each case?

The BPI broadly agrees with the proposed content of the CIRs but we propose the following change. 3.3 (e) says “a description of the apparent infringement, including a filename...”. In some cases the infringing content will not be in the form of a file, but a stream. In which case there will be no filename. To accommodate this possibility 3.3 (e) should be amended to include after “filename”...“or any other appropriate identifier, such as a Uniform Resource Locator”.

A further technical point is that due to the nature of peer-to-peer streaming, there may be multiple port numbers used rather than just a single one. As such, we suggest that the description of item (i) in a CIR should instead read as follows:

(i) relevant port numbers used to conduct apparent infringement;

Further, we do not believe that online infringements will always take place via a "website" or "protocol" (if not now, then certainly in the future). As such, we suggest that the description of item (j) in a CIR should instead read as follows:

(j) the website, protocol, application, online location or internet-based service or internet-based system via which the apparent infringement occurred;

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 BPI agrees with this proposal. It will ensure that the system is fair and will give certainty to both ISPs and infringers that the allegation they are dealing with is based on firm foundations. The proposal will prevent opportunistic Copyright Owners or their representatives from playing fast and loose with the IOC measures to the detriment of consumers. Where certain features of the detection process and contractual information are subject to commercial confidentiality agreements between Copyright Owners and third-party providers, we would require Ofcom to observe this and not make these aspects publicly available.

Where a rightsholder sends a CIR to an ISP on the basis of the evidence-gathering standards outlined in the Quality Assurance Report (and as approved by Ofcom) the CIR will have the status of a rebuttable presumption; analogous to, for instance, the assertion of copyright ownership on the face of CD.

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?

BPI agrees that the 10 day period is appropriate. It dovetails with the evidence-gathering and reporting processes employed by our third-party provider.

It reports on a weekly basis, with infringements detected from midnight Friday / Saturday through to the following week. This is received by the BPI on the Tuesday following the end of the detection period and CIRs are then sent to ISPs. Hence, it is possible that an infringement which takes place early on a Saturday morning does not generate a sent CIR until 7 working days later. Given that unanticipated delays could occur within this process we propose that it is prudent to allow for a deadline of 10 days.

Question 5.1: Do you agree with our proposals for the treatment of invalid CIRs? If you favour an alternative approach, please provide supporting arguments.

The language in the first half of the Code Consultation document is of the “invalidity” of CIRs – as reflected in this question. We do not agree that the validity, per se, of the CIR is linked to whether or not an ISP is able to process them. The Draft Code itself merely talks about the reasons for “not processing” a CIR – this language is more accurate.

The Ofcom draft code sets out 7 reasons why a CIR may not be processed. Three of these, we agree with: (1) if the IP address is not allocated to the ISP; (2) if the IP address was not used by one of the Qualifying ISP’s subscribers, and (3) if the IP address cannot reliably be identified. In these cases it would be inappropriate or impossible to send a notification.

However, we disagree with the other four reasons proposed, as discussed below:

“The CIR refers to an account that is no longer active”. The suggestion here is that the subscriber did commit an infringement but that the account has been made inactive following that infringement. Not processing a CIR in this instance would allow a subscriber to commit an infringement and then immediately switch ISP in order to avoid any action being taken against them. It is likely this would become an attractive course of action for those who have already received two notifications – a third offence could be committed with impunity if the account is closed immediately after it is done. (Knowledge of this loop-hole would be quickly disseminated on blogs, so that what sounds as if it may be an isolated case would in all likelihood become common practice.)

An ISP sent a CIR relating to a recently closed account would still be in possession of the relevant subscriber details and would be in a position to act upon it. The Code should not encourage users to switch ISP to avoid the effects of the DEA, including being placed on the Copyright Infringement List.

“A Subscriber cannot be notified because the ...ISP...does not hold an electronic or postal address”.

Given that the ISP in question will – presumably – be billing its customer, it will not be the case that it has no way of contacting the subscriber. Indeed, it should be a stipulation within the Code that a qualifying ISP must maintain up-to-date contact details of all of its subscribers.

In paragraph 3.27 Ofcom states that “if [the ISP] does not hold sufficient information to process the CIRs it will be required to ensure that it is able to do so, possibly by entering into a contract for processing services from their wholesale access provider or other arrangement.” Further, in paragraph 3.28 Ofcom states that “certain providers such as pay-as-you-go mobile broadband operators or libraries which fall to be considered as ISPs and are therefore potentially subject to the Code, may not hold such information [i.e. addresses] about their subscribers. In those circumstances, if such operators fall within a future definition of Qualifying ISP....they would need to ensure that they do collect this data so as to be able to comply with the obligations in the DEA.”

What both of these statements make clear is that ISPs which are “in scope” are or will be responsible for having addresses of their subscribers. It is therefore not possible for not having this information to be the basis for declaring a CIR invalid and/or not processing the CIR.

“The IP address relates to a Subscriber which does not receive a fixed internet access service...”. This reason pre-judges the question as to whether mobile operators should be included in the operations of the Code or not. As we set out above, we are firmly of the view that mobile should be included at the outset, albeit with a delayed start to implementation. In which case, whether or not the internet is through fixed or mobile is of no consequence. In any event, the second reason in 4.3.9 (“the IP address was not used by one of the Qualifying ISP’s subscribers at the relevant time”) would appear to cover the instance being captured here.

“There is some other reason why in the reasonable opinion of the Qualifying ISP, the CIR should not be processed.” This ground gives the ISP extensive latitude in deciding whether or not to process a CIR. It thereby introduces a huge degree of uncertainty to Copyright Owners and ISPs as to whether CIRs will be processed or not. The list of reasons for not processing should be exhaustive and this reason deleted from the list.

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 welcome the use of quality standards to ensure that all Copyright Owners and ISPs operate to the same high standards when it comes to evidence gathering and address matching. The Quality Assurance system needs to perform two functions: first, adherence to it should be a key element of the “gateway” in allowing Copyright Owners and ISPs to become “qualifying” entities. This function is anticipated in the Draft Code.

Secondly, adherence to the processes set out in the Quality Assurance standard should be a sufficient basis for the Appeals Body to be satisfied that the qualifying entities have conducted themselves correctly. It could not be a ground for appeal against the receipt of a CIR that the processes used are not satisfactory provided that they have been complied with by the rightsholder. Given Ofcom will have established clear quality standards, provided these have been met, the Appeals Body should not second guess the standards themselves.

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.

Section 5 of the Draft Code deals with the Notification Process and we provide our views on detailed aspects below:

5.5 “The First Notification can be sent either to the Subscriber’s electronic or postal address”

Due to the extra significance which is attached to physical mail, the deterrent effect of the notification will be much stronger if the notification is delivered through physical postage. Furthermore, if the infringement is being committed by someone other than the registered subscriber (such as by a child in the household) it is very possible that they will intercept an email notification, and prevent it ever being read by the subscriber. This is far less likely a possibility in the case of physical mail. Finally, email addresses held by ISPs are often incorrect or are no longer used by the subscribers. Indeed, some ISPs have freely admitted to the BPI that they do not have valid email addresses for all of their subscribers. For all of these reasons, the Notification system must not rely on email.

5.6.1 “...the subscriber has been sent a First Notification within the previous 6 months”

It is unnecessary and ineffectual to provide that second infringements must take place within 6 months of the first. No justification is provided for it and it cannot be argued that it will help reduce online copyright infringement – to the contrary, allowing notifications to be “wiped clean” every six months will allow serial infringement to go unchecked. At this point, it cannot be said with certainty whether Copyright Owners’ detection processes will be capable of detecting large numbers of infringers, especially at the outset. Most of all, this “clean slate” provision will distort the composition of the Copyright Infringement List. An infringer who infringes massively once and then again seven months later will not be counted as a repeat infringer and will not be on the CIR: however, someone who infringes less extensively but within six months will be.

Ofcom has informed the BPI that this “clean slate” provision has been introduced to the Code on the basis of legal advice. However, at the time of writing Ofcom has been unable or unwilling to provide the BPI with any further detail on this advice. Provision of this advice would be of great interest to all Copyright Owners as it would allow us either to understand Ofcom’s reasoning and, if thought necessary, to challenge it.

5.6.2 “...a further CIR has been made against the same Subscriber...more than one calendar month since the sending of the First Notification.”

This one month “grace period” during which a CIR cannot generate a second notification is unnecessarily long. The main justification for having any period between notifications is to allow infringers to either secure their networks, identify who – other than themselves – is infringing on the network, or to simply stop infringing themselves. These remedial activities should not require a month. The possibility that subscribers will, for instance, be on holiday does need to be taken into account: but with the average length of the British consumer’s holiday being 8.3 nights, one month is unnecessarily long time.

The “grace period” between first and second notifications should be 21 days. This is the same period as is allowed in the discount period for parking tickets, the time after which a spot fine can be increased for shoplifting if unpaid, the time to appeal a penalty fare with most train companies, or the time to appeal against a small claims court judgement.

5.7.2. “...a further CIR has been made against the same Subscriber...more than one calendar month since the posting of the Second Notification.”

For the reasons stated above, remedying infringing activity does not require a whole month. Prior opportunities to improve security or take other remedial steps will have not been taken. Hence, with regards to a second notification less leniency can be shown towards the infringement. Therefore, the “grace period” between second and third notifications should be 14 days.

5.7.3 “A further CIR has been made against the same subscriber...more than one calendar month since the posting of the Second Notification”...the [...third..] CIR...was received by the ISP no more than 12 months after the receipt of the CIR in relation to which the Qualifying ISP sent the Subscriber the First Notification.

Again, a “grace period” of one month is too long: for the reasons stated above, 14 days would seem an appropriate time period here.

This proposal effectively means that an infringer has the slate wiped clean after a year if they have only been notified twice. A third detected infringement after this time would take them back to stage one, and receipt of a First Notification. An infringer who receives a “First Notification” for their third detected offence would be completely entitled to think that they are under no serious danger of having further action taken against them – provided that their serious and repeat infringement is not so frequent, they can infringe with impunity. This is not the signal which a policy intending to significantly reduce online copyright infringement should send.

5.8 “The Third Notification must be sent by recorded delivery to the subscriber’s postal address, unless the Qualifying ISP does not have and cannot reasonably obtain the Subscriber’s postal address...”

As we state in our response to Question 5.1. above, in paragraph 3.27 of the Consultation Document Ofcom states that “if [the ISP] does not hold sufficient information to process the CIRs it will be required to ensure that it is able to do so, possibly by entering into a contract for processing services from their wholesale access provider or other arrangement.” Further, in paragraph 3.28 Ofcom states that “certain providers such as pay-as-you-go mobile broadband operators or libraries which fall to be considered as ISPs and are therefore potentially subject to the Code, may not hold such information [i.e. addresses] about their subscribers. In those circumstances, if such operators fall within a future definition of Qualifying ISP....they would need to ensure that they do collect this data so as to be able to comply with the obligations in the DEA.”

What both of these statements make clear is that ISPs are or will be responsible for having addresses of their subscribers. It is therefore not possible for not having this information to be the basis for declaring a CIR invalid and/or not processing the CIR.

5.9 *“The ISP must send an “Update Notification...if” “the Subscriber has not been sent a notification with the previous 3 calendar months.”*

The gap between receiving the Third Notification and Update Notification is too long if it is set at 3 months. In order for the Updates to have any deterrent value they should be sent with greater regularity, to convey that to the repeat infringer that their continuing to act with impunity is being noted. The gap between the Third Notification and the Update Notification, and for subsequent Update Notifications should therefore be 1 month.

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?

Ultimately, the aim of the notifications is to guide consumers to legal services, to educate them about the harm caused by copyright infringement and to deter any further infringement. The language used in the notifications should be sensitive to the fact that different subscribers will have received the notifications for different reasons: some will themselves have knowingly infringed, others may be unaware that someone else has used their internet connection but nevertheless still be contractually responsible. Some may be unaware of the law on copyright but be willing to change their behaviour if told about it and guided in the right way. Naturally, the system could never hope to send a bespoke communication to each recipient, so it is vital that the notification covers a range of bases.

The Code should stipulate that ISPs must not include in any notifications language which would have the effect of undermining the spirit of the Code; for instance, an ISP should not be permitted to criticise or dismiss the Initial Obligations or undermine the overall efforts of Copyright Owners to prevent the infringement of their copyright online.

Copyright Owners, as the potential funders of the Initial Obligations Code, must be allowed to contribute to the drafting of the notifications and approve their final form.

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.

No. The Copyright Infringement List (CIL) should be comprised of those subscribers whose accounts have been detected as infringing repeatedly, i.e. twice. There are three reasons for this.

First, the CIL should build up a picture of those for whom the First Notification fails to deter infringement, for whatever reason. Copyright Owners – who at the time of writing seem likely to have to bear some of the costs for the notifications – have a right to know how effectively the system they are paying for is working. Only seeing third-time notified infringers will give Copyright Owners a very partial view of the operation of the system.

Secondly, the CIL exists in the Act to allow Copyright Owners to target potential litigation. At this stage, before the efficacy of the system is known, it is impossible to say with confidence that there will be any Third Notifications sent, in particular because of the various “grace periods” in the process. Whether or not

they are depends to a very large extent on the capability of Copyright Owners to generate a high volume of detections (and as has been stated before, this depends entirely upon costs).

Consequently, it is entirely possible that, initially at least, the number of detections and subsequent CIRs only yield up second time infringers. In this case, under the proposed threshold, the CIL will be empty and therefore useless.

Third, there is a basic lack of fairness in Ofcom's proposal. It is perfectly conceivable that someone who infringes three times, and is detected on each of those occasions, and with a frequency which avoids the grace periods will be included on the list; meanwhile, a subscriber who infringes only twice but at a massive level will not be. The latter infringer, if detected, will have had a high number of CIRs raised against them and will have infringed more often. But they will escape further action. This is a plausible outcome of the proposed system and introduces unnecessary distortions into the system and limits the ability of copyright owners to protect their rights. The distinction in levels of infringement is a vital piece of information for Copyright Owners in determining which infringers are appropriate targets for further action. Designing the system in the way suggested by Ofcom will reduce its efficacy and is unfair to consumers.

Only by including subscribers in receipt of second notifications on the CIL can it be guaranteed that the CIL will serve the purpose which Parliament and the Act intend for it – i.e. to provide guidance to Copyright Owners on appropriate targets for litigation.

It is incorrect to see Parliament as having stated a preference for the CIL to include only three notifications. When the Bill was progressing through Parliament, BIS prepared an Outline Code, to help guide Parliament's discussion ("Online Infringement Of Copyright – What The Initial Obligations Code Might Look Like", January 2010). This envisaged an entirely different method of populating the CIL, through multiple CIRs: it states *"In effect we would expect the code to require ISPs to send letters on (eg) the first infringement; the 10th infringement (or x days after the first letter; whichever is the greater) and the 30th."*

However, in its final form the Act allows that the threshold may be set by reference to "the time within which the reports are made; and the time of the apparent infringements to which they relate" (Section 7 (5)). Ofcom have rightly preferred this approach, as the alternative would have meant it practically impossible for any infringer ever to come to the attention of Copyright Owners' detection processes a sufficient number of times to be on the CIL. It seems wrong, therefore, to base any further detail of the CIL policy on presumptions which have not been taken forward.

In any event, the BIS document was a discussion of a possible framework and was in no way intended to be a definitive guide to policy. Whilst seeking to provide "greater clarity" on "key areas" the document is self-avowedly a **"rough template"** to how the Code may be drafted. There is, therefore, nothing in this guidance which can be construed as hard and fast policy.

With regards to Copyright Owners' requests to view the CIL (as set out in paragraph 6.6 of the Code), it must be possible to see the CIL more frequently than the proposed 3 month period. Being able to view the CIL only four times a year is insufficient given that Copyright Owners are to be expected to make judgements about bringing legal action against certain subscribers. The mechanics of bringing litigation is complicated and time-consuming. In order to be done efficiently, Copyright Owners would need to bring a steady stream of cases, rather than in clumps based upon infrequent views of the CIL.

Therefore, we propose that Copyright Owners should be able to make requests to see the CIL every month. This will allow more methodical and effective planning of any proposed litigation; in turn ensuring

that Ofcom and the Secretary of State will be able to make an assessment of the effectiveness of legal action.

The CIL should not be restricted to showing only the CIRs relating to the Copyright Owner who made the request to see it. It should also indicate that the subscriber against whom the Copyright Owner has raised CIRs has had CIRs raised against him by other Copyright Owners (even if the identity of these other Copyright Owners is not made clear). This provision would enhance the ability of Copyright Owners to ensure that litigation is targeted against those individual subscribers who are the most prolific. It will also make it easier and cheaper for the ISP to produce the CIL as it will require less filtering out of information. (This is fully in-keeping with the provision of the Act which states that the CIL sets out “in relation to each relevant subscriber, which of the CIRs made by the owner to the provider relate to the subscriber”. This description in no way precludes the Copyright Owner also being told that the subscriber happens to have other CIRs raised in relation to them.)

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.

BPI of course agrees that the Code made by Ofcom must comply with the requirements concerning subscriber appeals set out in the Communications Act 2003 s.124K(2)-(8) (in accordance with s.124D(6), s.124E(1)(h) and s.124K(1)(a)).

In due course, it may be necessary for Ofcom to establish a code regulating appeals against the imposition of technical measures. Accordingly, it is essential that this prospect be borne in mind in Ofcom’s formulation of the present draft Code (so that the initial obligations appeal process is capable of dovetailing with the further appeal process, as and when that is implemented).

BPI agrees in part with Ofcom’s proposed implementation of s.124K at section 7 of the draft Code. However, in certain respects (some of them very significant) BPI disagrees with Ofcom’s proposals. Annexed to this consultation response is BPI’s proposed amended version of section 7, setting out BPI’s suggested changes. The reasoning and evidence in support of those changes is set out in relation to each paragraph of section 7 below.

7.2 (Matters that may be the subject of an appeal)

s.124K requires that subscribers must have the right to bring a subscriber appeal but does not specify precisely what is to be appealable. The Code gives Ofcom an opportunity to provide clarity in this regard, to help citizens and consumers understand their rights and to assist the smooth operation of the code for all concerned.

Paragraph 7.2 of the draft Code is much too broad and unclear in its terms. Ofcom’s draft creates a free-ranging appeal right against *any* act or omission by a rightsholder or ISP, subject only to the imprecise criterion of it ‘directly affecting’ a subscriber. This is likely to generate confusion and dispute, with uncertainty as to the extent to which subscribers may appeal the internal workings of the CIR process rather than the service of a notification itself.

The subscriber must only have the right and ability to appeal those CIRs of which they are aware – i.e. those which are the basis of the notification they receive. The right to challenge is thus triggered by the notification. The Code should not therefore make provision for a subscriber to appeal a CIR which has been raised against them but of which they are yet to be notified.

Nor is there any reason why a subscriber should be able to appeal their inclusion in a copyright infringement list. Inclusion in such a list is simply the result of a certain number of notifications being made in respect of a subscriber. If a subscriber chooses not to appeal the notifications, they should not be entitled to appeal their inclusion in the list. If a subscriber wishes to challenge the accuracy of the information held about them in an ISP's database (e.g. if they wish to allege that the record of the number of notifications is erroneous) rather than challenging the substance of the notifications themselves, the subscriber has an existing right to seek rectification of the database under s. 14 of the Data Protection Act 1998. There is no need to complicate the initial obligations appeals process by the inclusion of remedies which are already available to subscribers elsewhere.

7.2A (Appeal fee)

The Code should provide, as it does at BPI's new paragraph 7.2A, for the payment of a modest appeal fee: BPI suggests £25, but the precise sum should naturally be kept under review by Ofcom. Such a fee would be proportionate to the monthly cost of broadband access, and would be unlikely to discourage an appellant with a legitimate complaint, but would act as a deterrent to spurious challenges. There are of course direct analogues for this in the ordinary courts; there are also analogues in other tribunal systems. Thus in the Leasehold Valuation Tribunal fees from £50 to £350 must be paid in certain circumstances (see Leasehold Valuation Tribunal (Fees) (England) Regulations 2003, Regulation 3), and in the Upper Tribunal (Lands Chamber) the filing fee for an appeal is £50 (see Lands Tribunal Rules 1996, Rule 5C(4)(c) and the Upper Tribunal (Lands Chamber) Fees Order 2009).

7.4 (Appeal procedures)

The Code should spell out the fact that the Appeal Procedures must be compliant with the Code.

7.7 (Anonymity)

BPI agrees that the Code should make it clear that a subscriber's pursuit of the appeal process should not result in their identity being disclosed to a rightsholder. However, BPI proposes an additional sentence to make it clear that this is not intended to create any new 'anonymity right' which might prohibit disclosure in a Copyright Infringement List or where otherwise required by law, e.g. by a Court order.

7.10 (Time limit for appeal notice)

Although the Code should leave some flexibility as to time limits, it should lay down a longstop date for the submission of appeals, as set out in BPI's proposed paragraph 10A. The time limit should be relatively tight (21 days at most, in keeping with our proposed "grace period"). There are two reasons for this. First, it is desirable that any appeal against a notification should be determined before the subscriber receives a further notification. Secondly, to avoid confusion for subscribers, the time limit for an appeal under the initial obligations code should be the same as that for an appeal under the (future) technical obligations code. For the technical obligations code to be effective, it will be necessary for any appeals to be determined swiftly; else there will be a real risk of some subscribers abusing the appeals system in order to delay the imposition of a technical obligation.

If this time limit threatened to work injustice in a particular case, the Appeal Body could of course use its powers pursuant to paragraph 7.10 to extend the time limit.

7.11 (Matters to which appeal must relate)

We recommend that Ofcom's draft paragraph 7.11 be removed for the reasons given in relation to paragraph 7.2, above.

7.12 (Grounds of appeal)

The Code must, under s.124K, provide for three grounds of appeal (see subsections (3) and (4)): (i) that copyright was not infringed, (ii) that the report does not concern the subscriber's IP address and (iii) that the code or an obligation regulated by the code has been infringed by the service provider or the copyright owner. BPI agrees, of course, that these grounds of appeal must be included in the Code, and considers that it is sensible to follow the statutory language closely, as Ofcom has done at its paragraph 7.12.1, 7.12.2 and 7.12.4.

The grounds of appeal should, however, be limited to these three. It would be inappropriate for appeals to be 'at large' (as Ofcom has suggested at paragraph 7.12.5), because it would create uncertainty and impose an excessive burden on the Appeal Body. In effect, a general and open-ended challenge could require the Appeal Body to conduct resource-intensive copyright infringement trials – which might as well be conducted in the ordinary courts, and which would destroy the simplicity, speed and effectiveness of the initial obligations system. Parliament has only thought it necessary for three specific grounds of appeal to be available, and Ofcom should not presume to go further. Indeed, BPI would question Ofcom's vires to include an open-ended ground of appeal in the Code where that cuts against the grain of the specialist, tailored scheme that Parliament has created.

Ofcom's proposed paragraph 7.12.3 appears to represent a misunderstanding of subsection 124K(6). That subsection, like subsection (5), is a deeming provision regulating how an appeal should be determined: it is quite clear that it is not intended to represent a ground of appeal in itself (the subsection itself refers to circumstances "*where a ground mentioned in subsection (3) is relied on...*"). Subsection (6) should be given effect in the provisions regulating the Appeal Body's determination of appeals, as it is in BPI's proposals below.

7.13 (Time limit for sending appeal to ISPs and Copyright Owners)

BPI considers there to be no need for a five days period for the Appeal Body to send copies of the appeal on to ISPs and Copyright Owners. For what is a simple administrative act, two days are sufficient. This shorter time limit is aligned with the need to secure a tight timetable for the initial obligations appeals process (and the future technical obligations appeals process).

7.15 to 7.17 (Submissions, fresh evidence, and further information)

Copyright Owners and ISPs should certainly have the opportunity to make submissions in appropriate cases. BPI considers that the circumstances in which a rightsholder or ISP will wish to seek to rely on fresh evidence, or the Appeals Body will require further information, will be very limited. The initial obligations appeal process is *not* a copyright trial; it is a swift and tailored mechanism for resolving disputes about the issuing of notifications to subscribers. The CIR should usually contain all the relevant evidence.

However, there is good sense in making provision for exceptional or unforeseen circumstances and, subject to the observation above, BPI agrees with Ofcom's proposals for paragraphs 7.15 to 7.17.

7.18 (Reply by subscriber)

BPI agrees that it may be necessary to give a subscriber an opportunity to reply in circumstances where an ISP or rightsholder has made submissions.

7.19 (Oral hearings)

BPI strongly agrees that there should be no oral hearings save in exceptional cases. The cost and time involved in an oral hearing (which is not necessary to the fair determination of an appeal) is very unlikely to be proportionate to the benefits, particular since all that is at stake is the validity of a notification.

7.20 to 7.26 (Determination of appeals)

BPI agrees with proposed paragraphs 7.20, 7.25 and 7.26. BPI agrees with proposed paragraph 7.22 subject to a minor amendment consequential upon BPI's proposals regarding paragraph 7.2 (see above).

BPI recognises that s.124K(5) and (6) broadly require provisions in the form of paragraphs 7.23 and 7.24. However, paragraph 7.24 should refer only to paragraphs 7.12.1 and 7.12.2, since the requirement in s.124K(6) applies only *"where a ground mentioned in subsection (3) is relied on"*. It is incoherent to apply the deeming provision to other grounds of appeal, e.g. where the subscriber relies on a breach of the provisions of the Code.

BPI considers it entirely inappropriate for the Code to include provision of the kind at Ofcom's paragraph 7.21. The central purpose of the initial obligations system is to provide for a system for notifying subscribers that their internet connections have been used for unlawful copyright infringement. Notifications do not involve the attribution of any civil or criminal liability, nor in themselves do they imply fault. There is no reason why any level of technical ignorance on the part of a subscriber should be relevant to the question whether a notification has been properly made and is supported by adequate evidence. Paragraph 7.21 runs the real risk of (a) confusing citizens and consumers as to the nature of an initial obligations appeal and (b) distracting the Appeal Body from the core issue before it, encouraging it to embark upon arbitrary assessments of perceived fairness and undermining legal certainty.

7.27 to 7.29 (Remedies)

BPI agrees that the terms of paragraph 7.27 are required by s.124K(7).

Likewise, paragraph 7.28 is a necessary provision in light of s.124K(8). The provision should only apply, however, where a subscriber appeal is successful, as required by s.124K(8). It is plainly inappropriate that there should be a general rule that appellants recover their costs even when unsuccessful (which would be the effect of Ofcom's current drafting).

The Code should, however, make further provision for the award of costs against a subscriber who has acted unreasonably, as BPI proposes at paragraph 7.28A. Although this is not specifically required by s.124K, it is the general position in tribunals in England and Wales that there should be a power to award costs against a person who has acted unreasonably in conducting the challenge or appeal (see for example the Estate Agent Appeals Tribunal (First Tier); Consumer Credit Appeals Tribunal (First Tier); Financial Services and Markets Tribunal (First Tier); Tax Tribunal (First Tier); Transport Tribunal (First Tier); and Employment Tribunal). Such possibility for a costs sanction is necessary in order to discourage frivolous appeals: it would be extraordinary if a subscriber could intentionally abuse the appeals system with absolute immunity from any costs consequences. Unmeritorious challenges by subscribers for no substantive good reason would plainly unnecessarily increase the strain on the Appeal Body and reduce the speed at which it can operate. This would operate to the disadvantage both of subscribers with genuine challenges and of Copyright Owners. By limiting the costs sanction to cases of unreasonable behaviour, the Code would be proportionate, and would not adversely affect subscribers who bring appeals reasonably and in good faith, albeit unsuccessfully.

BPI agrees with paragraph 7.29, but proposes certain adjustments in light of proposed new paragraph 7.28A.

7.30 and 7.31 (Timeframe)

The swift determination of appeals is necessary for the reasons set out in relation to paragraph 7.10 (see above). Accordingly, BPI proposes that the Code should include provision to this effect, in the form of new paragraphs 7.30 and 7.31.

Paragraph 7.30, is particularly important. By specifying a time period in which appeals must be determined, the Code ensures that the Appeal Body's operation will be driven by the timetable, not by resources. Without such a provision, the Appeal Body's timetable is likely to be driven by the resources available to it, leading to potentially indefinite delays in the event of large numbers of appeals. With this provision, the Appeal Body will be in a position to call for more resources to meet its obligations under the Code, helping to secure adherence to a strict timetable.

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.

BPI agrees with Ofcom's approach to administration and information gathering, although BPI would suggest alternative wording for paragraph 9.1: *"Ofcom may make such directions as it considers are necessary for the administration of the Code"*.

BPI is in broad agreement with Ofcom's approach to dispute resolution, as set out in paragraphs 9.13 to 9.20 of the draft Code.

BPI disagrees with Ofcom's approach to enforcement more generally. The legislation provides for two distinct categories of enforcement or dispute resolution in connection with the initial obligations Code:

- (i) Ofcom's *"function of resolving owner-provider disputes"*, i.e. disputes that (a) are between persons who are copyright owners or internet service providers and (b) relate to an act or omission in relation to an initial obligation or an initial obligations code' (s.124E(9)). This dispute-resolution function is described as a subset of *"administering and enforcing"* the Code (s.124E(7)(a)).
- (ii) Enforcement action by Ofcom in response to contravention of an initial obligation, i.e. an obligation on an ISP under s.124A or s.124B (s.124L).

Section 124L provides that sections 94 to 96 are to apply to a breach of an initial obligation as they are to apply to a breach of a condition set under section 45. Accordingly, BPI considers that the Code should simply state that: *"Ofcom shall enforce the initial obligations under this Code pursuant to sections 94-96 of the Communications Act 2003, as if the initial obligations were conditions set under section 45 of that Act"*. BPI does not consider it appropriate that Ofcom should be placed under the further burden of investigating (of its own motion) breaches of the Code which do not amount to contraventions of initial obligations and which are not brought before Ofcom pursuant to the dispute-resolution procedure. Parliament has not mandated Ofcom to take on this task and they should not do so. Accordingly, paragraphs 9.3 of 9.12 of the draft Code are unnecessary.

**ANNEX 1 TO BPI (BRITISH RECORDED MUSIC INDUSTRY) LIMITED
RESPONSE TO DIGITAL ECONOMY ACT 2010
CONSULTATION ON DRAFT INITIAL OBLIGATION CODE**

30 July 2010

Proposed Alternative Code
7. SUBSCRIBER APPEALS

Appeals Body

7.1 In accordance with section 124K(2) of the Communications Act 2003 Ofcom shall appoint an independent person with the function of determining Subscriber appeals (“the Appeals Body”).

[old paragraph 7.2 deleted]

7.2 Any Subscriber who has been the addressee of a notification under the Code may submit an appeal against that notification to the Appeals Body (“a Subscriber Appeal”).

7.2A Any Subscriber making a Subscriber Appeal must, together with their appeal, make payment of an appeal fee of £25, such fee being refundable to the Subscriber in the event of the appeal succeeding.

7.3 The Appeals Body shall determine all Subscriber Appeals in accordance with the provisions of the Code.

7.4 The Appeals Body shall establish procedures for the determination of Subscriber Appeals in accordance with the Code (“Appeal Procedures”). Any Appeal Procedures shall comply with the requirements of the Code and shall be subject to approval by Ofcom. ~~and~~ Ofcom may require the Appeals Body to amend the Appeal Procedures before granting approval.

7.5 Ofcom may require the Appeals Body to provide it with all such information as it considers necessary for the purposes of carrying out its functions under the Communications Act 2003.

7.6 In carrying out its functions under this section, the Appeals Body may request such information and assistance from Ofcom as it considers appropriate.

Anonymity

7.7 The Appeals Body and any Qualifying ISP to whom a Subscriber Appeal relates must ensure, to the greatest extent possible, that the identity of a Subscriber which has submitted a Subscriber Appeal is not disclosed directly or indirectly to a Qualifying Copyright Owner without the express written consent of the Subscriber. This paragraph is not intended to restrict the disclosure of the identity of a Subscriber in a Copyright Infringement List or pursuant to the order of a Court or as otherwise required by law.

Notices and Periods of Time

- 7.8 The Appeal Procedures shall set out the form and service requirements of any notices or other communications that may or are required to be given under this section.
- 7.9 The form of appeal notice set out in the Appeal Procedures shall be a standard form which shall provide the opportunity for the Subscriber to set out, in particular:
- 7.9.1 details of the matter ~~act or omission~~ set out in paragraph 7.2 against which the Subscriber is appealing;
 - 7.9.2 the grounds of appeal which he/she is putting forward;
 - 7.9.3 any steps taken by the Subscriber to prevent other persons from infringing copyright by means of the relevant internet access service;
 - 7.9.4 any additional information which the Appeals Body considers appropriate;
 - 7.9.5 a statement of truth confirming that the information in the appeal notice and any evidence submitted with it is true to the best of the Subscriber's knowledge and belief.
- 7.10 The Appeal Procedures shall set out time limits for the submission of any notices or other communications that may or are required to be given under this section. Any time limit set out in the Appeal Procedures may be extended by the Appeals Body where it considers it appropriate to do so, taking into account all relevant circumstances.
- 7.11 The time limit for the submission of an appeal notice under the Appeal Procedures shall be no more than 21 days from the date of service on the subscriber of the notification that is the subject of the subscriber's appeal. The date of service for this purpose shall be deemed in accordance with rule 6.7 of the Civil Procedure Rules.

Grounds of appeal

[old 7.11 deleted]

- 7.12 The grounds of appeal may include the following:
- 7.12.1 that the apparent infringement to which the CIR relates was not an infringement of copyright;
 - 7.12.2 that the CIR does not relate to the Subscriber's IP address at the time of the apparent infringement;
- [old 7.12.3 deleted]
- 7.12.3 that an act or omission by a Qualifying ISP or Qualifying Copyright Owner amounts to a contravention of the Code or of an obligation regulated by the Code.

[old 7.12.5 deleted]

Response by a Qualifying ISP and/or Qualifying Copyright Owner

- 7.13 Where the Appeals Body has received a Subscriber Appeal, it must send a copy of the Subscriber Appeal to a Qualifying ISP and/or any relevant Qualifying Copyright Owner, as appropriate, within 5 days of receipt of the Subscriber Appeal. Where a Subscriber Appeal is sent to a Qualifying Copyright Owner, the Appeals Body must ensure that the anonymity of the Subscriber is maintained in accordance with paragraph 7.7.
- 7.14 Where the Appeals Body considers it appropriate to do so, a Qualifying ISP or Qualifying Copyright Owner may be given the opportunity to make written submissions on the grounds of appeal contained in the Subscriber Appeal in accordance with the Appeal Procedures.
- 7.15 Where a Qualifying Copyright Owner has been invited to make additional submissions in response to a Subscriber Appeal, any such information or evidence shall be provided with the written submissions in accordance with the Appeal Procedures. Such information or evidence must include a statement sworn by an individual authorised by the Qualifying Copyright Owner, confirming that the information is true to the best of his or her knowledge and belief, and may include:
- 7.15.1 evidence that copyright subsists in the Relevant Work in the UK;
 - 7.15.2 evidence that the Qualifying Copyright Owner owns copyright in the Relevant Work in the UK, or is authorised to act on behalf of a person which owns copyright in that work in the UK;
 - 7.15.3 evidence that the Subscriber has infringed the copyright of the Qualifying Copyright Owner in the Relevant Work in the UK;
 - 7.15.4 evidence that the Qualifying Copyright Owner did not authorise the Subscriber to carry out the relevant act in relation to the work which gave rise to the infringement of copyright in the work;
 - 7.15.5 reasons why this information or evidence was not included with the CIR; and
 - 7.15.6 any additional information which may be specified in the Appeal Procedures as appropriate, within 5 days of receipt of the Subscriber Appeal.
- 7.16 Where a Qualifying ISP has been invited to make additional submissions in response to a Subscriber Appeal, any such information or evidence shall be provided with the written submissions in accordance with the Appeal Procedures. Such information or evidence must include a statement sworn by an individual authorised by the Qualifying ISP, confirming that the information is true to the best of his or her knowledge and belief, and may include:
- 7.16.1 information or evidence as to the measures taken by the Qualifying ISP to determine that the relevant CIR related to an IP address used by the Subscriber at the time of the alleged infringement; and
 - 7.16.2 any additional information which may be specified in the Appeal Procedures.

Power to require information

7.17 The Appeals Body may require a Qualifying ISP or Qualifying Rights Owner to provide it with such information as it may require for the purposes of determining the Subscriber Appeal.

Additional Representations

7.18 If the Appeals Body has invited submissions from the Qualifying Copyright Owner or Qualifying ISP pursuant to paragraphs 7.15 or 7.16 above, it shall consider whether it is just in the circumstances to take such submissions into account in determining the Subscriber Appeal. If it decides that such submissions should be taken into account, it shall provide those submissions to the Subscriber and afford the Subscriber an opportunity to make additional written submissions in response.

Hearings

7.19 Save in exceptional circumstances where the Appeals Body considers it appropriate, no oral submissions will be accepted and no oral hearings will be held in determining a Subscriber Appeal.

Determination of Appeal

7.20 Subject to paragraph 7.18, the Appeals Body shall determine all Subscriber Appeals on the basis of the submissions and evidence received by it from Subscribers, Qualifying Copyright Owners and Qualifying ISPs.

~~7.21 In reaching its determination, the Appeals Body shall take due account of the technical knowledge of the Subscriber and the extent to which a particular Subscriber may have been aware of his/her ability to control access to his/her internet access service.~~

7.22 On determination of a Subscriber Appeal under paragraph 7.20, the Appeals Body may (subject to the requirements in paragraph 7.20 and 7.21), ~~in relation to a CIR, Notification, inclusion of a Subscriber on a Copyright Infringement List, proposal to include a Subscriber on a Copyright Infringement List or any other act or omission which is the subject of the Subscriber Appeal:~~

7.22.1 uphold the Subscriber Appeal; or

7.22.2 reject the Subscriber Appeal.

7.23 A Subscriber Appeal on any grounds may only be determined in accordance with paragraph 7.22.2 if the Appeals Body is satisfied that there is sufficient evidence to show that, as respects any CIR to which the Subscriber Appeal relates or by reference to which anything to which the Subscriber Appeal relates was done (or, if there is more than one such CIR, as respects each of them):

7.23.1 the apparent infringement was an infringement of copyright, and

7.23.2 the CIR relates to the Subscriber's IP address at the time of that infringement.

7.24 Where a Subscriber Appeal contains a ground set out in paragraph 7.12.1, or 7.12.2, ~~7.12.3, 7.12.4 or 7.12.5~~ a Subscriber Appeal must be determined in accordance with 7.22.1 if the Appeals Body is satisfied that the Subscriber has shown that, in relation to a relevant CIR:

7.24.1 the act constituting the apparent infringement to which the CIR relates was not done by the

Subscriber, and

- 7.24.2 the Subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service.
- 7.25 A determination of a Subscriber Appeal must be in writing and include all reasons on which the Appeal Body relies for the purposes of the determination.
- 7.26 A determination of a Subscriber Appeal must be sent to the Subscriber, the Qualifying Copyright Owner and the Qualifying ISP in accordance with the Appeal Procedures, subject to the requirement of anonymity set out in paragraph 7.7.

Remedies

- 7.27 In addition to the powers set out at paragraph 7.20, where a Subscriber Appeal is determined in accordance with paragraph 7.22.1, the powers of the Appeals Body shall also include power:
- 7.27.1 to secure so far as practicable that a Subscriber is not prejudiced by an act or omission in respect of which a Subscriber Appeal is determined;
- 7.27.2 to make an award of compensation to be paid by a Qualifying ISP or Qualifying Copyright Owner to a Subscriber affected by such an act or omission; and
- 7.27.3 to direct a Qualifying ISP or Qualifying Copyright Owner to reimburse the reasonable costs of the Subscriber.
- 7.28 Where a subscriber's appeal is successful, the Appeals Body shall make a determination in accordance with paragraph 7.27.3 unless it is satisfied that it would be unjust to give such a direction having regard to all the circumstances including the conduct of the parties before and during the proceedings.
- 7.28A Where a subscriber's appeal is unsuccessful, and the Appeals Body is satisfied having regard to all the circumstances including the conduct of the parties before and during the proceedings that the subscriber's conduct has been frivolous, vexatious or otherwise unreasonable, the Appeals Body may direct that the subscriber shall reimburse the reasonable costs of a Qualifying ISP or Qualifying Copyright Owner.
- 7.29 Where the Appeals Body has made a determination in accordance with 7.27 or 7.28A, the Qualifying Copyright Owner or Qualifying ISP shall pay to the Subscriber, or the Subscriber shall pay to the Qualifying Copyright Owner or Qualifying ISP (as the case may be) such amount as may be determined by the Appeals Body within such time as indicated in the determination.

Timeframe

- 7.30 All appeals must be determined by the Appeal Body within 42 days of the submission by a subscriber of an appeal notice.
- 7.31 Without prejudice to paragraph 7.30, the Appeal Procedures shall provide that subscriber appeals must be determined expeditiously.

**ANNEX 2 TO BPI (BRITISH RECORDED MUSIC INDUSTRY) LIMITED
RESPONSE TO DIGITAL ECONOMY ACT 2010
CONSULTATION ON DRAFT INITIAL OBLIGATION CODE**

30 July 2010

**BPI RESPONSE TO THE DEPARTMENT FOR BUSINESS, INNOVATION & SKILLS
ONLINE INFRINGEMENT OF COPYRIGHT (INITIAL OBLIGATIONS) COST-SHARING CONSULTATION
DOCUMENT**

MAY 2010

EXECUTIVE SUMMARY

- The Digital Economy Act is aimed at bringing about a reduction in unlawful filesharing on peer-to-peer networks of between 70 - 80% over 2 to 3 years. The detailed implementation of the Act – such as the costs and the design of the Initial Obligations Code – must be geared towards this aim. A costs regime which does not make it feasible or economic for rightsholders to utilise the initial obligations will render the entire legislation unworkable, and therefore the aim will not be achieved.
- The working assumption of the draft Order is flawed, because attempting to predict both cost and volume levels at the outset is a “Catch 22”. Therefore, the notifications system should be initially created with costs lying where they fall.
- This is also the fairest way to operate the system, since it ensures a just balance between the costs ISPs should reasonably bear in dealing with copyright infringement on their networks, with the costs rightsholders have to bear in raising Copyright Infringement Reports, bringing litigation and driving consumer awareness.
- The actual effective cost-share, taking these activities into account, is close to 50:50 (ISP / rightsholders).
- It also ensures that the system reflects that ISPs will experience some benefit from a reduction in infringement on their networks, and is based on the economic theory around the generation of negative externalities.
- If in spite of the strong argument to the contrary the Government proposes a costs split at the outset, the ratio must be such that rightsholders’ costs are taken fully into account, there are clear incentives for ISPs to operate efficiently and controls to prevent overcharging.
- Critically, the system should not be designed so as to make the Initial Obligations prohibitively expensive for small rightsholders, as this will place them at a competitive disadvantage.
- Ofcom’s costs of regulating the parties by preparing and monitoring the Code and establishing the appeals system, must be split equally between ISPs and rightsholders, so that there is no possible perception of bias or prejudice.
- The Notification Period should be 3 months, rather than the proposed 12, so that ISPs initially outside the Code can swiftly be brought within its remit, should they become “infringement havens”.
- The costs assumptions in the Impact Assessment with regards to ISPs appear to be extremely high and do not realistically reflect what ISPs will have to pay to comply with the Code.

ABOUT THE BPI

The BPI⁵ is the representative voice for the recorded music industry. Our membership comprises 426 record companies and associates including 384 independent labels and the four major record labels. Together, these account for 85% of the sound recordings sold in the UK every year. Within the music community the BPI, together with our sister organisation the IFPI and working with third party providers, has led the way in developing the processes and systems necessary to generate high volumes of Copyright Infringement Reports. On the back of this expertise, the BPI ran a trial of notifications with Virgin Media in May 2008, and was the sole rightsholder involved in the Principle 4 MOU trial with Ofcom and the 6 major ISPs in Autumn 2008. We would envisage being one of the principal rightsholders groups in the rolling out of the CIRs under the Initial Obligations Code ('IOC'), although naturally we hope that having the Digital Economy Act in force will encourage many other rightsholder groups to invest in the systems necessary to generate CIRs.

INTRODUCTION

For the DEA measures to have any chance of success in reducing online copyright infringement by a significant level, it is imperative that rightsholders find it economically feasible to use the system. Therefore, it is vital that any allocation of costs is fairly balanced rather than disproportionately burdensome to rightsholders. If generating CIRs is neither cost-effective (i.e. if the prospective gains to the individual label or company are not greater than its envisaged costs) nor efficacious (i.e. if all the system involves is sending notifications with no deterrent measures) then it will not be used. The upshot will be an ineffective piece of legislation, an unsolved problem of P2P copyright infringement, continuing serious damage to the UK's creative industries and the need for yet further statutory action if government is to achieve its stated aims.

COSTS SHOULD LIE WHERE THEY FALL

We believe that the system should operate according to the principle of costs lying where they fall, for two reasons:

- *Simplicity* – it is virtually impossible for any partner to predict the right level of costs in advance given the complicated interplay of factors that will determine these costs. This difficulty could render the whole legislation ineffective.
- *Fairness* – there is a compelling case for ISPs to meet their costs under the initial obligations based upon the principle of joint responsibility which underpins the whole Digital Economy Act, and upon economic theory on the generation of negative externalities.

Allocating costs on this basis would lead to an effective ISPs / rightsholders cost allocation of close to 50:50.

1. Simplicity

There is a very complicated calculation to be made by Government in determining the specifics of the costs provision. There are two simultaneously moving parts to the formula: the costs of setting up and operating the system and the number of CIRs / notifications to be generated. Moreover, these two factors are fully inter-dependent: rightsholders' appetite for generating CIRs will be determined to a significant degree by their cost; meanwhile the costs of CIRs will be affected by how many there are to be processed. Both sides of the equation will be informed by the shape of the Initial Obligations Code, the draft of which - at the time of writing - is yet to be published by Ofcom. For even ISPs and rightsholders to make an educated assessment of costs and levels is extremely difficult. For Government to second guess this assessment – as this consultation exercise requires it to do – is next to impossible. The consultation is effectively presenting the sector with a "Catch 22": neither the question of "how many" nor "how much" can properly be answered without first knowing the answer to the other.

The Mott MacDonald "P2P Report" as commissioned by government gives conflicting advice on this point. On the one hand it acknowledges the difficulty of making a decision and on the other hand says the

⁵ BPI (British Recorded Music Industry) Limited

decision should be made quickly. Initially it states: “the costs will depend very much on the contents of the Code, especially the CIR / notification volumes, storage times and the algorithm between receiving CIRs and sending notifications” (page 10). It concludes that “More work is needed on the Code before a situation is reached where there is a clear initial specification of what needs to be done and [how] this will affect costs” (page 53)

However, the report then goes on to say it is important that the “government decides as finally as is possible within the parliamentary process the percentage of the ISP costs to be paid by the DROs *in theory*”. So Mott MacDonald say both to defer a decision and make it immediately. Given the absence of a draft Code this present costs consultation this is even more problematic. However, we understand from conversations with Ofcom that it is planning to publish a draft Code which will act as a framework, with few specifications. In this case, Mott MacDonald’s presumption that the Code would provide “clear initial specification” will be wrong.

The logical conclusion which flows from Mott MacDonald’s analysis, but not one they arrive at themselves, is that the better course of action would be to resist stipulating a cost split, and require each side of the equation to meet their own costs. This is a position which accords better with economic theory regarding the efficient allocation of regulatory costs (as outlined further below).

This approach is likely to lead to a balanced and efficient system, as we go on to show. At the very least it will provide a better indication of the level of costs being generated by all parties, and so better inform how they should subsequently be dealt with.

2. The Case from Fairness

There is a fundamental principle of equity at play, which urges an allocation based on each party meeting its own costs. Fairness dictates that ISPs should meet their own costs, for four reasons:

(i) they have a responsibility to do so as a matter of policy. ISPs – like all businesses – have a general requirement to comply with regulations, whether or not those regulations are novel. It should not be potentially left to third parties (in this case rightsholders) to pick up the tab for the ISP doing what it should be doing in the general course of business. Like any other legitimate business, ISP should take the responsibility in any event to take reasonable steps to avoid and prevent the obvious widespread abuse of their services for illegal purposes. There is no clear justification provided – or available in theory – as to why other businesses should be made liable for ISPs’ statutory costs.

(ii) ISPs uniquely have the ability to pass their costs on to infringers. Economic consultancy LECG prepared a report for the BPI on this issue in December 2009 in which it analysed the proposals on costs from the standpoint of economic theory. It found that an application of the fundamental principles of equity led to the conclusion that ISPs should meet their costs. The LECG report stated the following:

“In this instance, the direct beneficiaries of the lack of regulation are the IP2P file-sharers. They are also the ones responsible for committing the illegal act. As a result, they have gained the use of creative content and the creative industries have lost sales. It would therefore be most equitable for IP2P file-sharers to bear the costs of regulation (in line with the first two principles laid out above).

“It may be impractical for legislation to directly allocate the costs of notification to the IP2P file-sharers themselves. However, if the regulatory costs are allocated to the ISPs, then they have the ability to pass these on to infringing customers, i.e. those directly responsible for, and benefiting from, the illegal act. They may choose to do so, or they may choose to pass costs evenly on to all customers, both illicit and legal ones, or to absorb the additional costs themselves; this is for the ISPs to decide.”⁶

⁶ We understand that there are instances in the normal course of business where ISPs pass costs on to individual customers, e.g. when moving house.

“The ISPs are unique in having this choice: if rights holders bore these costs, they would not have the option of passing them on to the infringers. In contrast, the only customers to whom rights holders could pass on the costs would be legal consumers of creative content. Allocating the costs to ISPs would therefore be the practical mechanism that would most closely match the principle that the perpetrators of illegal acts should bear the costs their activities give rise to. That is a strong argument for asserting that it is equitable for the ISPs to bear these costs.”

(iii) Furthermore, the ISPs have generated a negative externality, and it is a widely recognised principle in economic theory, and practice, that in such circumstances the “polluter pays”. Clearly, there has to be a limit to such liability. Government Ministers have attempted to suggest (as in a letter from Stephen Timms MP to Christine Payne, 2 February 2010), that the application of this principle could lead to road construction companies being asked to pay for the costs of speeding or pollution. Such a *reductio ad absurdum* argument is incongruous and adds little to the debate. In any event, the analogy fails, because the equivalent of the ISP is not the road construction company, but the road operator (i.e. the State). The State does pay for the costs of mitigating speeding, such as through the provision of traffic-calming measures and policing of speeding. In this sense, the root cause generator of the negative externality – the road provider – does indeed meet the costs of mitigating it.

Negative externalities are a brute fact of life and economic policy routinely accommodates them. The high levels of online copyright infringement taking place on ISPs’ networks are a classic example of a negative externality and are the clearest justification for ISPs having a responsibility to meet costs. Again, the economic consultancy LECG analysed this issue in its report of December 2009. It stated:

“Another approach is to consider the analogy with the polluter pays principle. This is most apparent if we consider why the need to regulate has arisen. In this case, we must consider the incremental impact of the emergence of (broadband) ISPs. If mass illegal P2P file-sharing of copyrighted material had been anticipated as a negative consequence of high-speed internet access at the time, the terms of any broadband licences granted may have required safeguards (such as those now proposed) to mitigate this risk. In such a situation, the cost of such safeguards would have been considered to be part of the ISPs’ cost of doing business, and this allocation would have been considered equitable. It is highly unlikely that rights holders would have been asked to bear these costs. There does not seem to be any rationale for a different allocation of costs to be considered equitable now, merely because regulatory action is being taken at a later stage. In the same way, if the impact of emissions from coal-fired power stations (in terms of acid rain, respiratory disease, etc) had been understood earlier, it is plausible that developers would have been required to fit them to new build power stations (and under the Large Combustion Plant Directive they are now required to retro-fit them).”

(iv) ISPs are beneficiaries of a reduction in illegal filesharing and should therefore not expect others to pay for the costs of achieving it. Again, the LECG report provides a robust analysis of this position from a theoretical standpoint:

“In addition, while the illegal P2P down-loaders benefit most directly, some of their illicit gain is transferred to ISPs, in the sense that illegal file-sharing is a significant driver of demand for broadband, and therefore contributes to ISPs’ profits. On this basis also, it is not inequitable for the ISPs to bear the cost of regulation, since the ISPs are benefiting as a result of illegal acts, albeit unintentionally. This certainly appears more equitable than for rights holders to bear these costs. Rights holders in this case are not so much a party that will benefit from regulation, as a party whose losses will be diminished by it.”

There is clear evidence that ISPs benefit from measures to reduce unlawful filesharing. Indeed, both Talk Talk⁷ and Orange have publicly stated this. A study commissioned by the BPI by Ovum Research in March 2010 identifies the benefits to ISPs which stand to be derived by them if there is reduced online infringement. The Research notes that without the ongoing threat of illegal services which undermine legitimate models, ISPs will be better placed to develop new music services. Ovum calculates that if all the Tier 1 UK ISPs were to launch digital music services in 2010, the total potential direct market value at retail for ISPs is £103m by 2013 in a medium case adoption scenario, equivalent to 41% of the total retail value of the UK digital music market in 2009. Music services can also help ISPs reduce the cost of subscriber churn. An ISP with 3.5m subscribers, and annual churn of 13%, and an average revenue per user of £40 per month, will generate indirect value of £21.8m per year, if its music service cuts churn by 10%.

A justification frequently put forward by Government and others for the proposed cost allocation is that rightsholders alone benefit from the measures. This is clearly contradicted by this research. Furthermore, reducing online copyright infringement is more likely only to mitigate rightsholders' losses, rather than deliver outright gains.

3. Actual Costs Under this Approach

We maintain that it is extremely difficult to predict either sides' costs with any accuracy, given the interplay between costs and levels of activity. However, in the interest of making a prediction, the BPI commissioned a report into ISPs costs from Sweet Consulting in December 2009. This shows that the likely capital expenditure cost (i.e. the one-off set up costs) for a single large ISP (one with 5 million subscribers) would be £2,175,000. If this is scaled up to cover the subscriber base of the larger ISPs of 17.5 million (i.e. by a factor of 3.5) then the total capital expenditure figure is £7,612,500 (n.b. this figure is notably lower than the estimates given by some ISPs as to their capital costs).

Detection & Verification Costs

As well as the assessment of ISP costs, there is also the consideration of rightsholders costs including detection, verification and reporting that must also be brought into the equation. The BPI has worked with its third-party provider to provide a top-line estimation of the detection costs for a high level of initial notifications. (It must be noted that these costs apply only to rightsholder activities and are thus easier to define – the picture becomes cloudier once an attempt is made to overlay ISP costs.) Detection of infringement would cover the main P2P filesharing networks on a full-time basis; and we also go on to assume that at least one other major rightsholder would undertake the same level of detection as the BPI.

Education Costs

There will also be costs associated with rightsholders' requirements under the Act to develop education campaigns. Section 8 of the Act (Progress Reports) states that Ofcom will have the duty to report on (inter alia) the "steps taken by copyright owners to inform, and change the attitude of, members of the public in relation to the infringement of copyright" ((5)(c)) and "an assessment of the extent to which they have brought legal proceedings against subscribers in relation to whom a substantial number of reports have been made" ((5)(g)). These can be seen as indirect statutory obligations on rightsholders; activities which the Act anticipates rightsholders having to carry out as part of the operation of the Initial Obligations.

To that extent, these activities are as necessary and unavoidable as the detection of copyright infringement and the issuing of Copyright Infringement Reports. They should therefore also be included in any assessment of rightsholders' costs when determining the balance of costs between rightsholders and ISPs.

In terms of education costs, given the indeterminate nature of these activities it is virtually impossible to predict the level of the costs at this stage. Public information and education campaigns can take many different forms in terms of size and scale. The on-going Music Matters Campaign, launched in March

⁷ Charles Dunstone, Chief Executive of Carphone Warehouse told the Daily Mail in 2009 that "we make no money from copyright infringement....the extra traffic costs us money as we have to add additional capacity to the network to carry the data."

2010, is a good example of the type of activity rightsholders will engage in to improve consumer awareness and understanding of the importance of copyright.

FALL BACK APPROACH: APPLYING A RATIO TO SPLITTING COSTS

If, however, the Government insists upon proceeding with the near-impossible task of determining costs in advance and on the basis outlined in the Consultation, we believe that the inherent unfairness in such an approach can in part be mitigated if the following three principles are adhered to:

- The sharing of costs provisions should take full account of the high costs borne by rightsholders in detecting infringement and generating CIRs and running consumer education campaigns which are necessary pre-conditions to the IOC measures taking effect.
- ISPs should be incentivised to process CIRs and Notifications efficiently and rightsholders should be dis-incentivised from overloading the system and so generating unnecessary costs. Therefore, the system should be designed around a dynamic rather than a static fee structure, with a sliding scale tipping the burden of costs towards ISPs if they do not act efficiently.
- The costs provisions must not work against the interests of smaller rightsholders by making it prohibitively expensive for them to utilise the initial obligations system. This would place smaller record labels at a competitive disadvantage with larger ones, making their works more vulnerable to copyright infringement and therefore weakening their competitive position in terms of signing and retaining artists.

As with the proposal for costs lying where they fall as outlined above, following these principles points in the direction (one can say no more than this without a more accurate assessment of the costs and numbers which, for reasons outlined in full above, we do not have) of a proposed cost split of close to 50:50 ISPs / rightsholders.

1. Taking Rightsholder Costs into Account

To date, and in the current consultation, the costs to rightsholders of detection have been completely ignored. These are considerable and are necessarily incurred by rightsholders if they are to avail themselves of the Initial Obligations. Depending upon how many CIRs are generated, detection costs alone could be nearly 50% of the projected ISPs' costs, as we illustrate in the table above. The costs of operating the entire graduated response system as a whole must be considered in order to achieve the law's goal in furthering societal values on the internet. It is therefore manifestly unfair that these costs are ignored.

Attempts have been made to justify this exclusion by saying that, for rightsholders, the costs are discretionary and that the use of the system is somehow voluntary. This assessment is false. Rightsholders are suffering serious and continuing damage due to illegal filesharing and urgently require action to be taken to reduce levels of infringement and create a sustainable basis for their businesses in the digital environment. The only action that they are able realistically to take to deal effectively with the scale of illegal P2P filesharing, is to avail themselves of the Initial Obligations to reduce their continuing losses. In order to do so they must incur the substantial detection costs outlined above – and under the allocation of costs proposed in the consultation, also bear the lion's share of the ISPs costs. Detection costs are not optional costs: they are a *necessary* precondition of any protection for rightsholders against continuing damage.

Rightsholders have also been advised that Government is minded to stick with the 75:25 split on the basis that it has been approved by the House of Lords during Committee Stage debate. But this is not the case. On 8th March 2010, immediately following that debate, the Minister Lord Young of Norwood Green wrote to Baroness Howe on this issue of costs and stated "*I must stress that the indicative 75:25 split really is illustrative.*" So it is clear that Government were not introducing this split as a fait accompli, or settled policy, and therefore it is not correct to say that it has the approval of Parliament, since the debate was based around a hypothetical figure.

2. Reducing the Adverse Impact on Small Rightsholders

The development of policy on reducing online copyright infringement has been based, in part, on the MOU Notifications trial, undertaken in the Autumn of 2008. This trial involved the BPI as the rightsholder interest, and the 6 major ISPs. The trial was very useful to all involved as it demonstrated the practical challenges involved in operating a notifications system, and highlighted how to make it work to the benefit of all parties. However, the one down-side to the MOU trial was that it did not analyse how smaller rightsholders would utilise the notifications process. It can be anticipated that the economies of scale for smaller companies will work in a very different way: the number of tracks which can be searched for on illegal peer-to-peer networks will be lower; the number of detections which can be undertaken will be lower; and therefore the regularity with which infringers and repeat infringers are identified will be less. Each of these differences has a clear impact on costs. A system designed around the large rightsholders' interests based on the lessons-learned from the MOU trial will fit poorly with the small rightsholders' needs.

It is not clear from the draft order or the consultation that this distinction is even recognised, let alone taken into account. The clear danger is that small rightsholders will not be able to avail themselves of the initial obligations. This will place them at a competitive disadvantage with regard to larger companies. If small labels are unable to offer the same protection for repertoire they will be less attractive to artists, and so their roster development will suffer. Furthermore, their revenues will suffer from higher levels of infringement of their repertoire, compared with larger companies which can afford to tackle online copyright infringement.

One of the ways in which it can be ensured that smaller rightsholders are not adversely affected is to design any cost split to more appropriately require a greater contribution from ISPs.

In response to consultation Question 12 below we include the findings of a survey among independent record company members of the BPI and AIM which highlights the difficulties likely to be faced by smaller labels if the costs of using the system are set too high.

3. Actual Costs Under this Approach

Each of these factors points in the direction of rebalancing the allocation of costs. Once rightsholder detection costs are brought into the equation, it is clear that an allocation along the lines of 50:50 ISP / rightsholder is fair and equitable. This allocation would also serve the purpose of making the system more attractive to smaller rightsholders, and is to be advocated for that reason too.

RESPONSE TO CONSULTATION QUESTIONS

Question 1: Is the list of included cost items correct? What items should be added or removed? Please give reasons.

Rightsholder Costs

For reasons stated above, the list of eligible costs is blatantly one-sided in that it only lists costs to ISPs. The consultation describes rightsholders costs as “*additional costs as a result of these obligations*” (para 5.6), but this is an incorrect description. Rather, they are costs which are intrinsic to the operation of the obligations. Ignoring them is to massively skew the system against rightsholders in a way which is unfair and does not reflect the true costs of using the Initial Obligations. It will also hinder the operational effectiveness of the obligations, perhaps rendering them useless. The activities which rightsholders have to engage in are:

- *Locating infringing users on P2P networks.* Due to the volumes and nature of the evidence-gathering, this process needs to be automated. A third party company will generally be needed to implement automated scanning of specific P2P networks, using a repertoire list supplied by rightsholders.
- *External cost of content verification.* There are two options for automated content verification – hash matching or audio fingerprinting. Audio fingerprinting is the most robust method but is slower and more resource intensive as it requires a full file download for every notice. In practical terms a high volume program would need to be based on hash verification - which involves an initial fingerprint look-up, with subsequent matches by hash, dramatically reducing the number of lookups to the fingerprint database.
- *Internal Costs.* The BPI invests considerable time in defining criteria, selecting repertoire and negotiating with the external provider. We also employ a dedicated team of digital anti-piracy experts, and legal professionals.
- *Rightsholders Raising Copyright Infringement Reports.* There are different ways this can be done, with the costs of each depending upon the degree of automation. In the 2008 MOU Trial, the BPI received evidence from DtecNet (via IFPI) and forwarded it to each of the ISPs, in the format required by each. This involved significant internal resources from BPI and IFPI at the outset in finalising the different formats.

ISPs Costs

Paragraph 4 (2) provides a long list of ISPs costs items which may be considered for inclusion. Our view of these is given below:

- (a) *receiving a copyright infringement report,*
- (b) *matching the IP address to a subscriber...,*
- (c) *generating and sending notification of the CIR...,*
- (d) *retaining records of CIRs and notifications...,*
- (e) *managing subscriber identification information...*

Each of the above elements appears to be a valid and necessary activity under the Initial Obligations Code and we agree that the costs of these activities should be under consideration.

- (f) *Compiling and providing copyright infringement lists to copyright owners...*

It is difficult to see why this activity is any different to item (d) above.

- (g) *Handling enquiries from and providing information requested by a subscriber about notifications received...*

In practice it is likely to be very difficult for an ISP to determine the precise split between subscriber enquiries relating to notifications, and enquiries relating to other aspects of the ISP service. The potential for ISPs to “bundle” all subscriber enquiries into the IOC costs is very high and could leave rightsholders partially liable to pay for costs which are unconnected with the IOC. We therefore believe that this element should be treated carefully by Ofcom – a continual assessment should be made based upon the practical experience gained in the initial phase of the notifications process.

(h) *Maintaining appropriate security and access controls for data processed for the purposes set out in the Code...*

(i) *Monitoring regulatory compliance with the copyright infringement provisions and the Code.*

As with (g) above, ISPs already have an on-going legal obligation to meet the requirements of the Data Protection Act, and it will be very difficult to give a precise assessment of measures taken specifically for the purposes of the IOC. Therefore, we believe that this element (h) should be omitted from the Order.

Similarly, ISPs – like all businesses – have a general requirement to comply with regulations, whether or not those regulations are novel. It should not be potentially left to third parties (in this case rightsholders) to pick up the tab for the ISP doing what it should be doing in the general course of business. Like any other legitimate business, ISP should take the responsibility in any event to take reasonable steps to avoid and prevent the obvious widespread abuse of their services for illegal purposes. Each side will have the responsibility for complying with the Code; rightsholders have just as much responsibility for complying as do the ISPs. This is a clear area where each side should bear its own costs in this regard.

We agree with the list of costs items which must be excluded by Ofcom, as outlined in paragraph (3) of the draft order, i.e. costs payable under a Court Order, costs caused by failure to maintain accurate records, or costs of economic opportunities lost as a result of compliance with the Code. Where an ISP faces these costs, it would be as a result of their failing (in some way or other) to comply with the Code. In a system in which ISPs costs are to be shared, it cannot be right that any other parties could be even partially liable to meet the costs of ISP failure.

We propose adding to this list of excluded items the items (g), (h) and (i) from paragraph (2) for the reasons noted above.

Furthermore, we propose that Ofcom must also exclude any costs generated by ISPs in the communicating or marketing to their subscribers about the provisions of the Digital Economy Act. ISPs may try to argue that the IOC creates a requirement for them to communicate with subscribers about new provisions, but this is not the case. ISPs have to communicate with their subscribers in the form of notifications; but there is no obligation to inform subscribers about the whole process. And insofar as ISPs may wish to forewarn subscribers, this will be at the ISP's discretion and additional to the IOC requirements.

Question 2: Do you think this is the right approach to the sharing of notification costs? If not what should it be? Please give reasons and any supporting evidence.

The consultation gives three reasons for ISPs to bear some costs: to minimise cost, to incentivise voluntary measures and to participate in commercial offers. This list of justifications omits the most important one: that ISPs have derived substantial commercial benefits from illegal filesharing, in that it has been a driver for the uptake of broadband and upgrades to faster speeds and more expensive packages including larger download allowances. This benefit should be taken into account in any allocation of costs.

Many ISPs' marketing material has focused on attracting consumers by highlighting the easy availability of music and films, without making any reference to the need for these to be accessed through legitimate sites.⁸ And it has been undertaken during a time at which ISPs' revenues have grown remarkably. Ofcom's Communications Market Report (August 2009) estimates that the main UK ISPs' residential broadband retail revenue for 2003 was £0.6 billion and in 2008 was £2.7 billion – an astonishing 450% increase and just when the market for recorded music was shrinking drastically. ISPs have clearly contributed – indirectly – to the growth of the illegitimate market and should not be immunised from the costs of remedying the harm they have helped to create.

⁸ For example, a press release from the ISP Orange of 5 August 2009 states "Starting at just under £13 per month, Orange is also launching three unique 'Early Bird' tariffs, providing customers with unlimited mobile broadband between midnight and 9am* in addition to their standard data allowance of either 1GB, 3GB or 10GB. These 12 months tariffs are well suited for those who want the freedom to download that little bit more without the worry of the cost – particularly those that download music or video clips, or commuters wanting to download large attachments on a regular basis whilst travelling to work."

And for the reasons stated above, the complexity of arriving at an equitable cost split in the absence of knowledge about the number of notifications means it would be clearer and simpler if costs fell where they laid. The Consultation fully recognises this impasse in paragraph 5.12, but rather than attempt to propose a solution, simply goes on to state (in paragraph 5.13) “nevertheless this is a critical point.”

The consultation states that “*in order to start the whole process off, it is vital therefore that copyright owners give much firmer indications of the level of CIRs they are prepared to generate*” (para 5.13). It is not possible for rightsholders to give this indication without full knowledge of what the costs will be. If it were simply a case of assessing what our own detection costs would be, then it would be a straightforward matter. Adding the complication of an unknown element of ISPs costs makes it impossible. This is why we advocate that the concept of creating a flat fee based on anticipated volumes of notifications, and the concomitant ratio of costs split be dropped.

Question 3: Do you think the 75:25 ratio is the correct one? If not, what should it be? Please give reasons and any supporting evidence.

No clear justification has ever been proposed for this split and it would appear to be entirely arbitrary. Nothing in the consultation, or any previous consultations, provides the rationale for a split on this basis as opposed to 60:40, or 50:50, or even 25:75 or 10:90. The ratio may have been arrived at following a consideration by government as to what the market would bear – perhaps also in the light of the proposed broadband levy, which has now been dropped. But it would appear that only one half of the market (the ISPs) have been taken into consideration.

The consultation asks for evidence for an alternative, but provides no evidence for its own proposals. In the absence of such a rationale, again we maintain that the most equitable proposal would be to allocate costs to the party which incurred them in the first instance. An approach based upon fairness would not seek to find an inherently arbitrary ratio at which to split the costs. Rather, fairness dictates that each side meet the costs that it incurs in fulfilling its duties as part of the Initial Obligations Code.

Question 4: The draft order allows Ofcom to recover costs it incurs in the process of drafting, consulting and approving a code. It is likely that given the intensive nature of this process that these costs, and hence the costs for the first year will be significantly higher than in succeeding years. Do you think this is reasonable? Do you have an alternative formulation that addresses the issue in a more effective way? Please give reasons.

Question 5: Do you think the broad 75:25 cost split should be used to apportion the cost of the regulator functions and appeals? If not, why not and how should they be funded?

(Questions 4 and 5 taken together.)

No. Again, there is no rationale offered for this. Both ISPs and rightsholders will be working with Ofcom and should share in its costs equally. Ofcom’s functions apply to both ISPs and rightsholders in equal measures. Evidence of the Code process to date (albeit after only three meetings) makes clear that equal effort is required on all sides of the debate to make the provisions effective. Furthermore, as an impartial regulator it is important that Ofcom cannot be seen to favour one side (ISP or rightsholder) over the other. The perception of “referee” or objective observer is better maintained if neither side has purchased a higher stake in the outcome of decisions than the other. There must be no opportunity for consumers, or indeed any external audience, to be under any mis-apprehension about unfairness or bias in the system.

A further argument against a bias in the costs paid to Ofcom is that it cannot easily be argued that one side benefits more than another from a well-regulated, efficiently run system. Whilst Government maintains the view that rightsholders benefit more from the provisions in the Act as a whole (a view we take issue with further above) this logic does not extend into saying that rightsholders therefore also benefit more from the supervision of the Obligations. In fact, it is possible to make the reverse case: that because ISPs are the companies under obligation within the Act, it is far more important for them that the system be operated well and efficiently. ISPs may fear an impact upon their commercial operations from the provision of the

Act, and the less well the provisions operate, the more negative they might expect this impact to be. The ISPs therefore have at least an equal interest to that of the rightsholders in ensuring the system operates well.

On the basis of these arguments there does not appear to be any justification for introducing a bias into the costs calculation. Government certainly has not set out any such justification and it would be wholly unfair to proceed on this basis.

The Appeal System

With regards to the Appeal systems specifically, the draft Order does not separate the two types of costs and both capital expenditure and operating expenditure are captured in paragraph 5 (b): *“Ofcom’s costs in establishing a body corporate to determine subscriber appeals and the operating costs of such body corporate.”*

It is vital that the Order takes account of the two different stages and provides clarity to all parties as to what they will be required to pay for. It is in the interests of all parties that an Appeals system exists and, in the manner of an insurance premium, every party should meet the costs of establishing the system even if they do not ever come to use it. But it cannot be fair that certain rightsholders and / or ISPs whose CIRs and notifications are never called into question should also meet the *operating* costs. It may be the case that a lack of diligence on the part of some parties will lead to their notifications being more regularly appealed. Meanwhile, those ISPs and rightsholders who take care not to make errors in their communications may well find that they are rarely if ever taken to appeal.

Either way, the Order needs to set out how this is to be accommodated in the proposed system. We propose that Ofcom makes clear how it intends to operate the appeals system and outline what the operating costs are likely to be within different bands of appeals: for example, the cost of 0 – 500 per month, 500 – 1000, 1000 – 1500, etc. Depending on the decision as to funding, the anticipated costs of appeals will be another critical factor for rightsholders when it comes to determining how many CIRs to raise. Calculations will be made as to the likely ratio of sent CIRs to appeals. If Ofcom assess that the operating costs of the appeal system are going to be high, then rightsholders may consider sending fewer CIRs so as to incur lower costs from the appeals. The converse case will also hold.

So yet again, the Costs consultation is an administrative attempt to put the cart before the horse. It is only possible to make judgements as to how the system will work in terms of volumes and costs once it is in operation, and all parties can make decisions based on fact not guesswork. Ofcom should create the appeals system and operate it for a number of months, and then come to a decision about the appropriate allocation of the operating costs among the parties.

In terms of any split of costs between parties, it is all the more important that this be even. Consumer / subscribers must not have any impression that the appeals process is funded by (or seen to be “owned” by) either side. The perception of total impartiality in this regard is critical to the success and the perception of the whole system.

Question 6: Should subscribers have to pay a fee to access the appeals system? If so, at what level, and how should economically vulnerable people be protected? Please give reasons and any supporting evidence.

The possibility of large numbers of vexatious appeals cannot be ruled out and indeed could be seen to be highly likely. The DEA did generate some opposition in the public (although the few thousand web generated emails received by MPs pales alongside the numbers of creative industries workers who are in favour of the legislation). It can be anticipated that some alleged infringers may bombard the system with appeals, irrespective of the validity of their claims. Indeed, there is an international network of organisations opposing any constraints on file-sharing, which has coordinated in other countries to agitate against graduated response proposals, and are likely to do so in the UK as well. So to prevent any such actions overwhelming the appeals process, a fee is needed as a threshold to act as a necessary and appropriate deterrent.

Of course, the fee should be set at a reasonable amount, so as not to unfairly impact on the economically vulnerable. And if the appeal is successful, there should be the possibility of having the fee being repaid. In the system being proposed in New Zealand, rightsholders' costs are partially reimbursed by the losing party – this may be a further way to reduce vexatious appeals.

Question 7: The Draft Order Seeks to establish a mechanism whereby:

- Ofcom can recover its costs
- Ofcom can calculate and set a flat fee payable to ISPs by copyright owners for processing each CIR submitted
- ISPs operating efficiently have the bulk of their costs covered via the payment of a flat fee by copyright owners
- Ofcom has the ability to review and recalculate the flat fee
- Ofcom can set different fees to reflect situations whereby a discrete group of ISPs have significantly different costs.
- The potential for different parties to “game” the system is reduced
- All parties have certainty over their cost exposure in the short to medium term

Does the draft order achieve all of these objectives? If not, please specify which aim(s) you feel the order fails to achieve and why.

Question 8: If you answered “no” to Question 7, please set out how you think the order should be changed.

(Questions 7 & 8 taken together)

The mechanism for Ofcom to recover its costs is sound.

The mechanism for the setting of a flat fee is very unclear. For reasons stated above, it seems to be impossible for Ofcom to attempt to set a flat fee until it is clear what the level of notifications is likely to be.

Also for reasons stated above, we strongly oppose the provision that ISPs should have the bulk of their costs covered by a flat fee paid by copyright owners. The Draft Order should not make this presumption.

The draft order fails to make clear how it will be decided which are the qualifying entities. Rightsholder bodies will not be able to determine how they intend to operate under the Initial Obligations until it is clearer what the costs will be and how the system will actually operate. For the reasons outlined further above, it is conceivable that some rightsholders, particularly smaller ones, will not use the Initial Obligations at all. These bodies may nevertheless be interested parties in the development of the Initial Obligations Code.

The ability to review and recalculate the flat fee is an important element.

Question 9: Do you agree with the process that the order establishes in terms of when copyright owners may participate?

The section 2 (b) of the Draft Order dealing with qualifying copyright owners needs to be read in conjunction with Section 16 (1) of the Digital Economy Act (Interpretation and Consequential Provision). This section of the DEA states that a “copyright owner” may be someone authorised by a copyright owner (as defined in the Copyright, Designs and Patents Act 1988) to act on their behalf. Therefore, for the purposes of our response on this point, the “copyright owner” in question is taken to be the BPI, acting on behalf of all of its member companies.

The order proposes that a qualifying copyright owner means a copyright owner who has given an estimate of the number of CIRs it intended to make in a notification period to a qualifying ISP. This appears to be a sensible measure as it means for each period it is clear to all parties how many rightsholders are going to be involved. However, we strongly disagree with the suggestion that a notification period could be as long as 12 months. Given that small ISPs may be given an exemption from complying with the Act, it is possible

that some may become “infringement havens” attracting large numbers of new infringing subscribers, safe in the knowledge that the Initial Obligations do not reach them. If this happens, and if it became apparent to rightsholders, it would be vital to have the ISPs in question brought within the scope of the Code as soon as possible. Notification periods of 3 months (i.e. quarterly) would allow this type of transgression to be speedily remedied. A shorter notification period will also allow rightsholders to more accurately plan their CIR sending activity.

There are two further problems with the proposed approach. The Order states that the qualifying copyright owner must estimate how many CIRs it will issue “to each qualifying ISP”. In reality, it is completely impossible to predict the number of CIRs on a per-ISP basis. The detection capabilities of rightsholders mean that infringement is detected on a per-track basis; the ISP on which the infringement occurs is a secondary issue and is only discovered once the infringement is detected. Thus, a rightsholder’s estimation of CIRs per ISP at the outset may well be totally arbitrary.

Furthermore, it is very possible that a rightsholder makes a prediction of the number of CIRs it will send, but then does not detect any infringement of its works. Larger rightsholders may well anticipate raising so many notifications that they can safely predict that there is likely to be a certain level per ISP. But smaller rightsholders will be in no such position. Indeed the very process of analysing and attempting to estimate their costs will be burdensome for many small labels.

Question 10: Does this process ensure that small copyright owners are able to access the system? If not, what alternative provisions could be made?

As we outline in the introduction to this submission above, we have very serious concerns that the process does not make adequate provision for small rightsholders.

The BPI and AIM conducted a survey of independent members to investigate the levels at which they would be prepared to pay to utilise the initial obligations. The findings reveal that most small labels will be easily priced out of the market if the costs are too high.

A detailed calculation on the marginal cost benefit of notifications is not one which would be made by the major labels, who have the resources to take a longer-term strategic view. Their perspective is that the general reduction of online copyright infringement will have a beneficial systemic impact on overall market conditions. Investment in tackling infringement can be justified in the light of the anticipated long-term return. A small label, by contrast, has a much more restricted planning horizon, where any investment has to demonstrate a return within a quarter, or a financial year at most.

Question 11: The impact assessment sets out the costs as we understand them at this stage. Does this represent a reasonable assessment of the position? Please provide any supporting evidence for your comments.

We believe that the Government’s estimation of ISPs’ costs is far higher than they will actually incur. The one-off capital cost is estimated at £35m, which is based upon all 450 ISPs investing £80,000 each in the development of software and systems.

The assumption that all 450 ISPs will be required to make this investment at the outset is highly surprising. The Act makes provision for a threshold number of CIRs for an ISP to be regarded as a “qualifying ISP” for the purposes of the initial obligations. The purpose of this provision is deliberately to exclude smaller ISPs from the Act provisions. The working assumption of the Ofcom consultation on the Code is that only the bigger domestic ISPs will operate under the provisions at the outset. It is more realistic, therefore, to consider the capital expenditure required by those ISPs which cover 96% of the market (BT Retail, Virgin Media, Carphone /AOL/Tiscali, Sky, and Orange). If these “big 5” were the only ISPs engaged with the initial obligations at the outset, then the capital cost calculation based upon the Government’s assessment of set-up costs is £400,000 (£80,000 x 5).

However, the assessment of set-up costs for each company being £80,000 appears to be low – indeed it is difficult to determine from the Impact Assessment document what it is based upon.

Concluding Remarks

We hope the foregoing is helpful to Ministers and Officials in setting out the BPI's position on this consultation and we look forward to discussing it in further detail at your convenience. In the meantime if you require any further information from us, contact details are provided below.

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