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*Response to Notice of Ofcom's
proposal to make by order a code
for regulating the initial
obligations*

Non-confidential version

26 July 2012



T-Mobile

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EE Response to Ofcom draft Initial Obligations Code

1 Introduction

Everything Everywhere welcomes the opportunity to respond to Ofcom's consultation on the Initial Obligations Code (The Code).

The revised Code provides clarity on a number of important issues including which ISPs are in scope of the obligations and the need for copyright owners to have their processes for identifying potential infringers approved by Ofcom. However, there are still some points, most of which were raised previously and which relate to practical implementation issues, that we do not believe have been adequately addressed. We remain of the view that these points are essential in order to ensure the Code's clarity, proportionality and effectiveness.

While the focus of EE's comments here is on the specific, proposed obligations under the draft code and the practical implementation of these, we would like to emphasise that the copyright owners (CROs) must at the same time continue to take further action to develop and promote legitimate content services and also to be prepared to use this new process to identify and, ultimately, execute legal action against the most serious infringers.

We would point out that we have had to keep our comments fairly brief in this response, in view of the very short timescales that have been provided to respond to the amended draft code. While we appreciate that Ofcom has its own internal timescales to meet, this should not be at the expense of industry consultation on a matter which will have significant cost, operational and consumer impact.

We have set out our comments in the order in which the relevant sections are presented in the draft code.

2 PART 3 – Copyright Infringement Reports

2.1 Contents of Copyright Infringement Reports (CIRs)

In addition to the information suggested, we maintain that it is essential that the following information is sent to help with the matching and notification process:

- the file format of the alleged copied work; and,
- the file size.

This information is important as it helps the subscriber to investigate the infringement identified in the notification letter. We note that Ofcom has revised the draft requirement to make it explicit that subscribers must be provided with sufficient information to conduct investigations (4.33 of the interim statement), although exactly what "sufficient information" means is not specified. We would also point out that, unless this information is provided in a standard format across all CROs (and a requirement to include the aforementioned information will assist in this regard), from an ISP perspective, it makes it much more difficult to process the reports.

Automation of our processes will only be possible if we have a uniform format for CIRs. We note 4.6.b in the code requires uniformity, but this must extend across all CROs to ensure we do not have deal with multiple formats (which will be more costly and resource intensive for us).

Furthermore, we disagree with Ofcom's initial conclusion that it is not necessary to include the IP addresses and port numbers of the party detecting the infringing behaviour in CIRs. Both the IP addresses and port numbers of the CRO's agent and the apparent infringement (i.e. both the source and destination IP address and port number) are necessary.

3 PART 4 - Identification of Fixed Subscribers

3.1 Procedures and reports

Whilst EE supports the concept of Ofcom approving copyright owners procedures for gathering and verifying evidence it is not entirely clear what exactly Ofcom is proposing, what criteria they will use to approve the CROs' processes or that it will be acceptable to the appeals body.

In the event that the appeals body does not believe that a CRO's process for gathering and verifying evidence of copyright infringement is sufficiently robust, the effect would be that not only would the appeal in hand be thrown out, but all CIRs that that ISP has processed could be held to be unsound. At a minimum, this would entail the destruction of the infringer list for that ISP and a significant amount of money and effort will have been wasted along the way.

Clearly this outcome undermines the certainty and confidence that is needed for the new obligations to work successfully. Given these very real risks, it is absolutely essential that the processes of all qualifying CROs are certified as robust from an evidential perspective by an independently validated accreditation process before 'go-live' and that the appeals body must be comfortable with the process being followed by each participating CRO. This would increase the confidence of all stakeholders in the process and will reduce the likelihood of frivolous appeals.

Setting aside our concerns about the lack of detail around the CRO accreditation process, on the ISP side, we're more fundamentally concerned about the lack of any clarity around the acceptability of the processes which we put in place to accurately identify subscribers. There is no process for assurance that the processes which we invest in will be acceptable to any appeals body. This is of particular concern where the appeals body can require us to compensate customers – we do not know what standards we will be measured against until the appeals body considers a case. At a bare minimum, Ofcom will need to perform this function. This is not only important to give ISPs certainty over costs and investments, but also to give customers comfort that proper and comparable procedures are being applied. It will also help to minimise complaints about perceived process failings if these are deemed to be independently reviewed (even if there is no certification). The current proposal for Ofcom to simply publish our IP matching processes may give some subscribers some comfort, but it will not assure them – or us – of the acceptability of our processes.

In terms of IP address matching processes, we are concerned that there is a lack of safeguards for ISPs in cases where there are matching errors (even where we have adhered to any agreed standards). This is an omission that needs to be addressed to ensure that ISPs are not held responsible, or deemed to have otherwise infringed the code, in these circumstances.

4 PART 5 - Notification of Fixed subscribers

4.1 Intermediate notification

Every CIR will be recorded against the subscriber and potentially be produced as evidence in any court proceedings taken by the CRO. Therefore, the subscriber should have the opportunity to appeal each CIR being recorded against them, not just the ones that give rise to a notification letter. To enable this, subscribers should be sent details of all CIRs that have been received by the ISP since the previous Notification Letter and not just the number of infringements against them. It is also not clear whether this number refers to all infringements by all CROs against a subscriber or just those infringements relating to the relevant CRO in the notification letter.

Ensuring clarity of the notifications process is essential in order to ensure subscribers understand and respond to the process and to help promote the effectiveness of the notifications.

4.2 Notification letters after 12 months

EE would welcome further clarity about Ofcom's intentions for subscribers whose infringer behaviour stretches beyond 12 months.

For example, a CRO sends CIRs to an ISP in April and October and these CIRs lead to the first and second notifications being sent. The next CIR is then not sent until the following April. The ISP will still have a record of second Notification letter having been sent in October. Even though the infringements of the previous April would, after 12 months be erased from the subscriber's record, the second letter would still be on file and it would not really then make sense to completely start again with this subscriber. To do so would undermine the overall process. We note that Ofcom seeks to address this issue at 5.84 in the consultation document; however, it's still not clear whether, in the above example, we'd be expected to consider the October notification to be considered the first or second notification and to now, 13 months later, send a second or third notification.

4.3 Update notifications ("Further infringement list notification")

EE rejects the concept of 'update notifications'. The concept of sending three letters to an infringing subscriber has formed the basis of the proposals on file sharing for some time. It was on this premise that Parliament debated the provisions on file sharing to ensure a fair and balanced approach would be adopted. Once the third Notification Letter has been sent, then that should be the end of the ISP's obligations. The subscriber is on the Copyright Infringement List (CIL) and there should be an expectation that the CRO proceeds with legal enforcement.

4.4 Contents of Notification Reports

Everything Everywhere broadly agrees with Ofcom's approach to the content of notifications. However, we believe that the format of notifications should be standardised and agreed across the industry (and not just within each ISP) to aid subscriber awareness and understanding of the content.

Moreover, we believe that, in its current form, the Code imposes all the information provision obligations on ISPs as opposed to CROs who are best placed to, and have a greater interest in, informing and educating subscribers about illegal file-sharing. This is a point we have raised previously but it has still not been addressed by Ofcom. Accordingly, we believe that the Code should set out the following obligations for COs:

- CROs should set up a portal and hotline in order to comply with the information requirements set out in section 16 (f), (g) and (h) which provide the recipients of notifications with further information on the online copyright infringement process, the appeals process and information on where to get independent legal advice. This should also include definitive guidance on what steps a subscriber can take in order to take "reasonable steps" to prevent unauthorised use of their internet service by a third party; and
- CROs should set up and bear the cost of a telephone support line for the recipients of notifications, which should be advertised in all communications to apparent infringers. The service should enable the public to access independent information anonymously to avoid any deterrent effect. CROs are best placed to explain their concerns with breaching copyright law. ISPs' customer services employees are trained on how to respond to customer queries on the use of their services and their accounts and are not able to explain about copyright beyond directing subscribers to further information. Furthermore ISPs' customer service advisors will not have access to the systems which contain details of alleged infringements, so they are limited in how they can help the customer.

CROs have over 12 months to put these arrangements in place and it would demonstrate that they are serious about the need for education rather than just pursuing enforcement and technical measures.

4.5 Records

The threshold provides that a Subscriber is added to the Copyright Infringement List if they have had the third letter in 12 months. The ISP would surely need to retain the CIRs relating to the first and second letters, as they are evidence that it was correct to send a third letter, leading to the Copyright Infringement List.

EE is therefore concerned that the true timescales for retaining CIRs, if they are needed to substantiate the CIL, are in fact longer, if not much longer, than the 12 months stated in the consultation document. EE would welcome clarification on the precise way that this should work, as there is a significant cost associated with retaining CIR data. There are also significant costs involved in dealing with related subject access requests.

It is also not clear which records ISPs are required to log and store. Are ISPs required to retain all invalid CIRs and CIRs that do not result in a notification letter because multiple CIRs may have been sent about an individual within the same month? We would welcome clarity on this point.

4.6 Circumstances where notification requirements do not apply

Everything Everywhere agrees with Ofcom's proposed approach subject to the following comments:

- The ISP needs to be able to refuse a CIR if there is some ambiguity with the subscriber's traceability. For example, if the time on the CIR is within an agreed period of the IP address being reallocated to a new subscriber then the ISP cannot be certain that the particular subscriber is the one identified by the CIR. These parameters must be agreed as part of the quality standard process.
- 18.e should be amended to "the subscriber cannot be identified because the Qualifying ISP does not hold an electronic or postal address for the subscriber." On this point, the deletion of "and it is not reasonably practicable..." is important as an ISP will either have the contact details or they will not. An ISP should not be required to undertake any research or investigation to see if the contact details can be established from any other source.
- The Code should clarify that ISPs should be paid for processing invalid CIRs. Every CIR will automatically generate a search on an ISP's systems and the administrative costs associated with processing a CIR which is found to be invalid are similar to those that are valid. Therefore, both invalid and valid CIRs will count against the forecast and the flat fee will be payable by the CRO
- The Code should clarify the action required of ISPs where there is a subscriber appeal pending before the Appeals Tribunal. ISPs should not be required to action further CIRs for that individual. In its decision, the Appeals Tribunal should also issue directions to the ISP as to how the ISP should manage the relevant records it holds for that subscriber (for instance that the relevant CIRs should be deleted);
- The Code should clarify the circumstances in which the ISP is entitled to stop processing CIRs from that CRO. For example, an ISP may have a substantive dispute with a CRO over the content of a CIR or CIRs or the manner in which they are being submitted. It would seem sensible that the Code provides for a suspension in the processing of CIRs while a dispute is resolved.
- The Code should clarify whether duplicate CIRs should count, e.g. where two CIRs apply to one copyright work and resolve to one subscriber who is allocated different IP addresses within a short space of time. While this may seem academic to the CRO, the subscriber may feel more inclined to appeal if he believes he is being accused of the same infringement twice.

5 PART 6 - Identification of Repeat Infringers and Provision of Copyright Infringement Lists

5.1 Provision of Copyright Infringement Lists (CILs)

One aspect of the CILs which is not covered by Ofcom's question, and which we believe is important, concerns the privacy and data protection implications of the compilation, maintenance and sharing of CILs between ISPs, CROs and persons authorised by CROs. For instance CILs may only contain information directly related to CIRs made by the requesting CRO. However, because the definition of CROs includes persons authorised to act on behalf of the CRO, such authorised persons may receive information concerning multiple CROs. Furthermore, it should be clarified that once an ISP has disclosed, on the basis of a court order, the name of a subscriber to a CRO, the ISP should then allocate a new anonymised identifier to that subscriber.

Everything Everywhere believes that due to the complexity and intrusiveness of the personal data processing operations envisaged by the Code Ofcom should consult with the Information Commissioner's Office to ensure that the processes set out in the Code are compliant with the Data Protection Act and the Privacy and Electronic Communications Regulations. If additional safeguards are required to ensure compliance with data protection legislation, the ICO should be asked to publish guidance.

6 PART 7-9: Appeals

EE agrees that only in exceptional circumstances should it be necessary to hold an oral hearing and that in the vast majority of cases an appeal should be decided on the documents presented by the appellant to the appeals body and any other relevant evidence.

- We note that Ofcom has the right to approve the appeals body's procedures. We would therefore suggest that Ofcom is in a position to set some fairly important parameters for how that body will operate and that the draft code should go into more detail on some issues:
- The draft code should also be amended to provide that awards of compensation should be extremely limited in occurrence and, in any event, capped at a figure (we are still of the view that £5,000 would be an appropriate limit as this is comparable to other awarding bodies, such as CISAS). Ofcom suggests that it cannot set a cap under the Communications Act (at section 124K 2 (c)), but we believe that guidance can be given to ensure that caps are not limitless. Notably, the appeals body should only award amounts that are directly related to the impact of the code's application and should not be awarded for consequential loss or emotional distress. Ofcom can also provide this guidance as part of the procedural rules approval process.
- EE notes that a new paragraph has been added (23(4)) to require the appeals body to publish 6 monthly summaries of its findings. While we believe this is a useful step forwards in terms of transparency (and this must include KPIs reflecting the number of successful vs. unsuccessful cases), EE considers that it would still be preferable for Ofcom to mandate that appeals decisions are published publicly;
- EE considers that the draft code should also include a statement about whether the receipt of an appeal effectively stays the further sending of Notification Letters to the same subscriber, again by adding to paragraph to the draft code; and
- Para 27 (3): While we note that Ofcom has now inserted wording to give the appeals body the option to ask for written submissions, EE still considers that an ISP should have the opportunity to lodge written submissions with the appeals body if it wishes to, and not just if invited to so do, and the draft code should be amended to reflect this.
- Para 27 (6): The ISP's written submission will contain details about the individuals working for the ISP who are handling the case. The subscriber will therefore have visibility of named

authorised persons from within the ISP. The draft code must therefore be clarified to state that all submissions/enquiries from a subscriber about the ISP's submission must only be directed through the appeals route in the first instance and not via the ISP. If correspondence/contact is received by the ISP, there must be the obligation to refer the subscriber to the appeals body.

The potential liability for ISPs on appeal to have to pay a subscriber costs and/or compensation is not sufficiently clear in the draft code provisions. EE considers that the following points must be added to paragraph 30 of the code:

- That the ISP is not liable to the subscriber or CRO provided that the ISP follows its procedures for the accurate identification of a fixed subscriber as reported to Ofcom;
- That the ISP is not liable to the subscriber where its processes did not work because of an error (whether isolated or widespread) of which it was not aware at the time of sending a Notification Letter;
- That the ISP is not liable for issuing a Notification Letter and adding the subscriber to a CIL because of any mistake made by a CRO in issuing any CIR; and
- That the ISP is not liable to the subscriber where a subscriber is able to prove that someone else was using their internet connection despite "reasonable steps" having been taken.

EE does of course accept that an ISP should be accountable where it is found to be negligent, whether that is discovered before or during an appeal.

7 PART 11 - Administration and Enforcement of Code

Everything Everywhere broadly agrees with Ofcom's approach. We believe that there should be an initial moratorium for 12-24 months in the imposition of fines to enable ISPs and CROs to familiarise themselves with the new regulatory environment. Everything Everywhere would also welcome detailed guidance from Ofcom on enforcement and dispute resolution.

In terms of the specifics of Ofcom's proposals in the draft Code, Everything Everywhere comments as follows:

- Paragraph 39 – In order to prevent undue demands on qualifying entities, there should be a reasonableness qualification to Ofcom's information-gathering and assistance requests, i.e. the words "in their reasonable opinion" should be inserted after the word "necessary".
- Paragraph 40(3): There may be occasions when it is not practical to make representations within ten working days and Ofcom should build in some flexibility.
- The time period should begin once the qualifying entity has received (or is deemed to be served with) the notice, rather than on the date that the notice is sent. Either the Code or subsequent guidelines should make clear the process that Ofcom intends to adopt in order to serve contravention notices.
- Paragraph 40(4): Everything Everywhere disagrees that there would be instances which would warrant a shorter period for representations, and considers that this could unfairly disadvantage the qualifying entity which is alleged to be contravening the code.
- Paragraph 41: In order to offer qualifying entities a measure of certainty, there should be a time limit after which Ofcom is barred from serving a final enforcement notice. This time limit should give Ofcom adequate time to consider any representations received, and time to allow an entity to modify its behaviour should it promise to do so in its representations.
- Paragraph 43: The powers to award compensation are too broad. It is not clear on what grounds Ofcom would consider compensation to be an appropriate remedy. Examples should be provided. Compensation and costs amounts should be capped to £250,000, in the same way as financial penalties under paragraph 42.

Everything Everywhere would also like to make the following general points on enforcement.

In some cases a perceived code breach may be of a nature whereby the best course of action would be for the ISP to suspend the processing of the CIRs that it receives from the CRO in question. In such instances Ofcom must be in a position to respond to an ISP's request, at short notice. Otherwise a situation could arise where an ISP complains about a systematic problem with the CIRs of a given CRO. The ISP is then faced with the choice of either continuing to process CIRs which are strongly suspected of being faulty (thus upsetting customers) or halting the issuance of Notification letters and then being in breach of the Code. The code needs to cover how Ofcom would handle such a situation.

In light of the financial penalties that may be imposed, it is critical that there be a process whereby Ofcom's final determinations can be appealed by the relevant qualifying entity.