

**LINX Response to Ofcom consultation:
Digital Economy Act Draft Initial Obligations Code**
<http://stakeholders.ofcom.org.uk/consultations/copyright-infringement/>

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30th July 2010*

About LINX

LINX is the largest membership association for Internet Service Providers and other major network operators in the UK. Our 350+ members include a truly diverse selection of the market: major consumer broadband providers in the UK, business-to-business network access providers for enterprise class, SME and niche markets, core infrastructure operators, as well as network operators interconnecting in the UK without a substantial customer base here. The one class of ISP not represented is the “Virtual” ISP that is: all LINX members operate a network and interconnect at our exchange; our membership does however include the underlying networks for most major ISPs.

With such a broadly-based support, LINX is especially well-positioned as a consultation partner for the government and Ofcom, helping to ensure that the interests of the entire industry are considered in its policy development process.

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.”

Yes.

In order to comply with the requirement to receive and process Copyright Infringement Reports (CIRs) and to issue notifications to subscribers ISPs must be given adequate opportunity to build the systems that will be needed to process CIRs in the anticipated volume, and must receive the funding of the investment cost. Both the fair estimation of volume and the up-front delivery of investment costs would be thwarted if Copyright Owners were able to take advantage of the procedures without meeting their obligations, and this would threaten the viability of the entire process to the detriment not only of ISPs but also of Copyright Owners who did meet their obligations.

The approach Ofcom suggest is not only necessary, it is also clearly suggested by the Act – section 124(C)(4).

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.”

No.

An ISP with reason to expect they will be covered by the Code and have some obligations to discharge will still need at least six to nine months notice of the volume of CIRs they will be required to process in order to build a system capable of meeting that volume, as recognised by the Mott-Macdonald report.

Attempts to determine the expected volume informally have failed: suggestions have been made of volumes ranging from “similar to the MoU” (tens of thousands per ISP) through to tens of millions of CIRs pr ISP per year. Nor is even the bottom end of this wide range certain: major copyright owners have been unwilling to definitively commit to use the scheme at all. Accordingly, at least for the initial period, a notification period should be set of at least six months for ISPs Ofcom can confirm will lie within the scope of the Code.

We would distinguish between the initial phase – now – when ISPs do not have any systems in place to process CIRs in anything like the volumes that have been suggested and there is a very high degree of uncertainty about the level of uptake by Copyright Owners, and later years, when some systems will have been built and more will be known about Copyright Owners’ practices.

For now, the only reasonable approach is to give ISPs sufficient time to build the requisite systems *in response* to the estimates of volume received. This implies a lead time of at least six months between receipt of the estimate and the first customer notifications.

It is possible that over time the volume of CIRs will stabilise, such that an ISP could estimate the volume of CIRs based on the volume received in previous periods. If that occurs, it might then be proportionate for Ofcom to review the lead time, for example by allowing Copyright Owners to vary their volume within specified limits on a shorter lead time, or even none at all. We can only know if this would ever become a suitable approach with the benefit of experience, probably of several notification periods.

If Ofcom were to adopt this approach it should consult fully on proposed changes at the time.

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?”

AND

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?”

As a broadly based membership association that includes both ISPs with more and those with fewer than 400,000 subscribers, we do not have a specific comment on the level of threshold chosen. We do, however, recognise and support Ofcom’s intention to avoid placing a burden on small ISPs that is disproportionate to any benefit that could be achieved from the scheme.

We note that Ofcom has chosen an arbitrary threshold: an alternative approach would be possible, where the Code would begin with a transition period during which Copyright Owners would generate CIRs but not issue them to ISPs. This alternative approach would have enabled Ofcom to make an objectively justifiable decision on which ISPs to include within the scope, and would have also provided Copyright Owners with a good basis for estimating the volume of CIRs they intended to issue (addressing the issue referred to in question 3.2). We draw Ofcom’s attention to the fact that although there is a statutory deadline for introduction of the Code, there is no constraint on the Code providing for transition measures such as these, and ample provision is made within the Act for Ofcom to specify conditions on the basic procedure such as transition measures.

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?”

We disagree with aspects of the approach and statements and implications made in paragraphs 3.23-3.28 of the consultation document, as follows.

With respect to paragraph 3.23 on wi-fi networks provided in conjunction with other goods or services to a customer, such as a coffee shop or a hotel, we would comment that the Ofcom’s approach is flawed in treating provision of the network via wi-fi differently from provision of the network using other wireless or wired technology (for example, Ethernet ports in hotel rooms).

Furthermore, paragraph 3.23 it misstates the Act in claiming that such a provider is either an ISP (it is has an agreement with subscribers) or a subscriber (if it does not); any person that would qualify

as an ISP under the Act if they have agreements with subscribers would clearly qualify as a communications provider if there was no such agreement (either because there was no agreement, or because there was an agreement but it was with other communications providers, who are not subscribers).

Paragraph 3.27 includes the statement “There may be instances where a retail provider of internet access may not have direct control over, or records of, the allocation of IP addresses to its subscribers since this function is performed by an upstream wholesale provider”. Once again, we draw Ofcom’s attention to the fact that a provider of internet access may not have direct control over, or records of, the allocation of IP addresses to subscribers for other reasons than that this function is performed by an upstream wholesale provider; for some business models, this function is not performed at all. This function is often unnecessary, and indeed unhelpful in various business models including in public spaces, provision on a charitable or community basis, provision in association with other services (such as within the hospitality trade) etc.

Paragraph 3.27 goes on to state: “If it [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”. We do not see any provision in the Act that requires ISPs to begin collecting information on the identity of their subscribers or to abandon business models where the lack of collection of such data is necessarily or naturally consequent from the business model. Accordingly, that quoted statement appears to be unsupported in law, and wrong. We disagree with paragraph 3.28 for the same reason. We believe that in order to achieve clarity and certainty for the ISP industry and to avoid similar error by Copyright Owners and the Appeals body, the Code ought to specify explicitly that the Code obligations only apply to ISPs in cases where they hold the identity of the subscriber, by limiting to definition of a Qualifying ISP to ISPs that hold the identity of the subscriber.

This would have the further advantage of slightly reducing Ofcom’s reliance on the arbitrary threshold in order to avoid grossly disproportionate impositions.

Question 3.6

“Do you agree with Ofcom’s approach to the application of the Act to subscribers and communications providers? If you favour alternative approaches, can you provide detail and supporting evidence for those approaches?”

No. We believe Ofcom has gone well beyond the Act and substituted its own policy for the one set out by Parliament.

This issue is crucial to the balance of policy, and will have a marked effect on the development of the availability of Internet access in the UK.

We recognise the possibility (but do not admit the certainty, or even the likelihood) that unless the wide variety of entities that provide access to the Internet to third parties (some of whom are identified in our previous submission, appended to this response) are treated as subscribers then the Act may turn out to be significantly less effective at reducing the incidence of copyright infringement than if it would be if they are. On the other hand, if they are treated as subscribers then they will be subject to a great burden, and may indeed feel forced to withdraw their service or limit it with technical measures the imposition of which Parliament has not approved. This could amount in aggregate to the difference between the Internet being truly ubiquitous and it only being available in private homes and places of employment. Clearly, this is a sensitive policy question with important interests on both sides.

However, this balance was struck by Parliament. We cannot stress this enough, **Ofcom is not given an unfettered discretion as to whom may be treated as a subscriber**; it is clearly set out in the Act that a person taking Internet access service as a communications provider is not to be treated as a subscriber.

The Act clearly provides that

“subscriber”, in relation to an internet access service, means a person who—

- (a) receives the service under an agreement between the person and the provider of the service; and
- (b) does not receive it as a communications provider;

Accordingly, any person who receives an Internet access service as a communications provider *cannot* be treated as a subscriber for the purposes of the interpreting the provisions of the Act. This cannot be set aside merely because, in Ofcom’s view, it would be helpful to the purposes of the Act to induce them to take unspecified steps to counter copyright infringement.

Contrary to paragraphs 3.30-3.31, the critical test is therefore whether a person taking Internet access service under an agreement with a provider is taking *as a communications provider*.

In our opinion paragraph 3.30 fails to give meaningful guidance on this, and paragraph 3.31 appears to give incorrect guidance contrary to the Act.

We do agree that a person who is a subscriber is likely to remain so despite wholly incidental use of the Internet connection by a third party. For example, a domestic user who has a guest visit their home will not become a communications provider merely because the guest uses the Internet connection. However, where a business is plainly making the Internet connection available to the public in the course of business, for example as part of its competitive offering (in the case, for example, of a conference venue) or as part of its mission (in the case, for example, of a library), it would be absurd to say that they forfeited the shield given to communications providers merely because it was also used by its own staff. At the extreme, any ISP makes use of its internet access for its own staff's Internet access. In our opinion the issue upon which paragraph 3.30 should give guidance is, "in what circumstances the making available of an Internet connection to a third party is so incidental that the person doing so cannot reasonably be deemed to have turned themselves into a communications provider, and when that activity is significant and they are entitled to be viewed as receiving the Internet access service as a communications provider?"

Paragraph 3.31 contains a serious error. It states "Those who wish to continue to enable others to access their service will need to consider whether take steps to protect their networks against use for infringement, to avoid the consequences that may follow". The clear implication is that any person "who wish[es] to continue to enable others to access their service" is to be treated as a subscriber, without regard to whether they are taking the Internet access service as a communications provider.

We previously set out for Ofcom's consideration a range of scenarios which our members presented as representing realistic circumstances in which organisations provide Internet access to third parties (a copy is appended to this submission). In many of the scenarios we mentioned (which range from cybercafes to hotels to student landlords to schools to care homes and others) we believe the organisation are or may be entitled to be treated as a communications provider as a matter of law.

We believe that Ofcom has erred seriously in supposing that these bodies are not entitled even to argue that they satisfy that status of communications provider, if their particular circumstances do not satisfy the definition of an ISP under the Act. For this reason we believe that Ofcom is acting well outside its authority when it threatens such entities with "the consequences that may follow" to subscribers who fail to take reasonable steps to prevent copyright infringement.

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?"

This appears broadly correct, with one important omission.

We believe that the Copyright Owner should be obliged to identify the means by which the evidence was obtained.

Ofcom states its intention “We believe that this matches the standard of evidence required by the courts in relation to civil proceedings by Copyright Owners for copyright infringement”. In order to meet that standard, we believe that the Copyright Owner should be obliged to identify the means by which the evidence obtained. Of course, it is not necessary to provide a voluminous statement with each CIR; a reference to a version-controlled published description is sufficient.

We recognise that Copyright Owners might assert an interest in keeping their evidence gathering techniques secret. We agree with Ofcom that it should attempt to follow the ordinary expectation of civil litigants in the means of acquisition of evidence which is relied upon. Therefore the Copyright Owner should be obliged to identify the means by which the evidence was obtained, but should not be obliged to identify the investigatory steps preparatory to evidence gathering (for example, there is no need to disclose the reason that a particular filesharing site was targeted for investigation, or the basis for deciding to investigate the sharing of certain copyright works and not others).

We note that Ofcom proposes that Copyright Owners should be obliged to produce a Quality Assurance report. We suggest that this report specify in detail the means by the evidence was obtained, that the Copyright Owner should be obliged to file a revised Quality Assurance report when this changes, and that copies of the Quality Assurance report be made available to the ISP and to the subscriber who is the subject of CIR (or perhaps, for maximal transparency and public confidence, simply made available to the public at large). Under those circumstances the CIR could then simply refer to the (correct version of) the Copyright Owner’s Quality Assurance report.

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.”

In general we support this approach, but believe that further safeguards are necessary in order to give effect to Ofcom’s intention.

We note that while for ISPs the process required to match IP addresses to subscribers is a reasonably well-trodden path that has been used satisfactorily in other areas for many years (see, for example, Regulation of Investigatory Powers Act 2000 Part I Chapter II), the same can not be said for the process the Copyright Owner follows to obtain the IP address in the first place.

We therefore believe that Ofcom should impose significant requirements on Copyright Owners in order to ensure the accuracy and robustness of evidence gathering that would not be necessary to ensure the accuracy and robustness of the processing of subscriber records by ISPs.

We make the following recommendations:

- The Copyright Owner should be required to file a new Quality Assurance report with Ofcom when their procedure for obtaining evidence changes materially. A material change is one

which a subscriber would need to know about in order to present an argument that the evidence was not accurate;

- The proposed Quality Assurance report from the Copyright Owner should be made available to the ISP and to the subscriber, or alternatively, made available to the public at large;
- Ofcom should reserve to itself the power to determine, on reasonable grounds and on the basis of expert advice, that a Copyright Owner's Quality Assurance report did not give sufficient grounds for Ofcom to be satisfied that the evidence provided by that Copyright Owner would meet an adequate standard of accuracy. In circumstances where Ofcom made such a determination the Copyright Owner's participation in the procedure should be suspended (that is, they should only be a Qualifying Copyright Owner on condition that Ofcom had not made such a determination) until such time as they submit a satisfactory Quality Assurance report.

Question 4.3

“Do you agree that it is appropriate for Copyright Owners to be required to send CIRs within 10 working days of evidence being gathered? If not, what time period do you believe to be appropriate and why?”

Yes.

We agree that it is important that Copyright Owners be required to send CIRs promptly.

10 working days appears to be a reasonable period while giving Copyright Owners ample leeway for temporary operational difficulties and avoiding imposing on them the burden of operating a High-Availability system. Greater clarity would be achieved by expressing this as 14 calendar days, as public holidays would otherwise make this a variable length of week.

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.”

In general we support this approach.

We recommend that the Code specify that an invalid CIR still counts as a CIR for the purpose of calculating the volume of CIRs issued and received, and related cost-recovery, but that it does not count as a CIR for the purposes of assessing the level of infringement identified.

We agree with Ofcom that the list of reasons to reject a CIR enumerated in the consultation is not exhaustive, and note one particularly important reason to reject a CIR that has been omitted from Ofcom's list: namely, that the CIR relates to a person who was receiving Internet access from the ISP as a communications provider.

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.”

In general we support this approach.

We note that the exact capabilities, methodologies and accuracy of subscriber matching are sensitive, not only for reasons of commercial confidentiality but also to the law enforcement and security and intelligence communities.

When determining the statements ISPs are to be required to make on the Quality Assurance Report, and in particular the level of detail on steps taken and processes and procedures that ISPs are to be required to disclose, Ofcom should have regard to the need to avoid any public disclosure the effect of which would be to compromise national security, public safety, or the prevention, detection, investigation and prosecution of serious crime.

Accordingly, we recommend that the Code should permit ISPs to omit information from the Quality Assurance report where they reasonably believe disclosure would compromise any of those interests.

In our view the requirement that ISPs should be required to include in a Quality Assurance Report “any other information as directed by Ofcom” is not supported by the Act, is overly broad, and should be removed from the Code.

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”.

Yes.

We are concerned that Copyright Owners might wish to target ISPs unfairly for strategic reasons, either by issuing CIRs selectively or by storing CIRs to be unleashed in an excessively large batch (as has happened in the USA), or both. The requirements that CIRs be issued within 10 days and the requirement that Copyright Owners pay at the start of the notification period for all the CIRs they intend to issue in the notification period appear to address these issues, but since this is possibly seen by Ofcom as a secondary function of those requirements we draw Ofcom’s attention to the reliance we place on them in agreeing with its proposals.

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?"

No, the specified content is sufficient.

It is important to remember that the Act does not provide for the Copyright Owner a marketing channel to the subscriber, and that the ISP continues to own the customer relationship. Accordingly, while it is correct for Ofcom to specify the information that must be contained in notifications in order to operate the procedure, and to give subscribers fair notice of their rights under the scheme, the ISP must be permitted to communicate freely with their own customer.

The ISP must not be compelled to make statements with which it may not agree (for example, blanket criticisms of certain types of technology, or support for particular persons, organisations, policies or business models), or to promote particular commercial enterprises, or to present the notice as its own complaint rather than that of the Copyright Owner.

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".

The purpose of producing copyright infringement lists is to enable Copyright Owners to enforce their rights in civil litigation.

Data Protection

Copyright Owners should not be able to make unqualified use of copyright infringement lists. We believe that a Qualifying Copyright Owner should be required to assert that they are asking for the copyright infringement list for the purpose of enabling them to protect their rights through civil litigation, and that they agree to abide by the requirements of the Data Protection Act.

This may seem unnecessary since the Copyright Owner cannot identify an individual from a copyright infringement list without further information, which they may only obtain by Court Order. However, having obtained such a Court Order the situation will change, and the Copyright Owner needs to be restrained at that point. In any case, the legal status of an IP address under the Data Protection Act is unclear: the Information Commissioner advises that it should be treated as personal data when processed for the purpose of tying a record to an individual, and while the general applicability of this view is contentious it may be safest to follow it in this case.

Threshold

S124B(3) provides that Ofcom may set a threshold for appearing on copyright infringement lists.

A subscriber is a "relevant subscriber" in relation to a copyright owner and an internet service provider if copyright infringement reports made by the owner to the provider in relation to the subscriber have reached the threshold set in the initial obligations code.

Although a naïve reading of the consultation document would suggest that Ofcom has chosen a threshold of three CIRs within the year, in terms of applying the above provision of the Act Ofcom has actually chosen a threshold of one relevant CIR.

We fear that this is too low, and could overwhelm the Copyright Owners. We also note that this is dramatically below the level of 50 CIRs that Ofcom understands the government to have had in contemplation when its proposed the Bill (paragraph 5.10). We believe Ofcom should think about the threshold again, remembering this time that the purpose of copyright infringement lists is to support civil litigation.

We also recommend that Ofcom consider introducing different thresholds for different types of subscriber: a much greater number of CIRs would be needed to indicate a serious level of infringement by a large business with many employees than by a single domestic household.

Frequency of request

If a subscriber does not drop out of a Copyright Infringement List for a year, it seems unnecessary to require the ISP to provide the list within five days of the request. This creates an undue burden not only of unnecessary urgency but also unnecessary repetition, since it implies Copyright Owners will ask for the updated list *every* five days. Response within one month would seem an adequate safeguard against undue delay; although we expect a response will typically be made more promptly there is no need to specify a greater frequency than can be justified.

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”.

We are concerned that the Code is insufficiently clear about the circumstances in which “appeals” ought to be upheld, particularly with regard to the following:

- When it is shown that copyright infringement was performed using a domestic Internet connection by a child of the subscriber, or by a guest of the subscriber who was a child, contrary to that subscriber’s express instructions;
- When it is shown that copyright infringement was performed using an Internet made available to members of the public in the course of business (for example, within a hotel, a library etc), and the person making the connection so available asserts that they are entitled to be treated as a communications provider and not a subscriber under the Act;
- When it is shown that copyright infringement was performed using an Internet made available to members of the public in the course of business (for example, within a hotel, a library etc), and it is also shown that the person making the connection so available had taken various measures to dissuade the public from using the Internet connection for the purposes of copyright infringement, but these did not include technical measures such as content filtering, IP address blocking etc.

We are concerned that this lack of clarity will prompt a large number of unnecessary appeals (those doomed to fail), and make the appeals process slower and more expensive than it ought to be (because those doomed to succeed should be expedited rather than contested).

We are also concerned that the failure to require the “appeals body” to publish its reasoned decisions will exacerbate this problem.

We also note that filing an “appeal” with the “appeals body” appears to be the first opportunity the subscriber has to be heard, and so the “appeal” really constitutes a first hearing rather than an actual appeal. This suggests that there ought to be a higher tier appeal body to which true appeals could be made when appropriate, for example when the question at issue is novel or concerns alleged misapplication of the law, or even misfeasance.

We further recommend that the Code should specify that the effect of a CIR is suspended while an appeal is in progress; that is, if a subscriber is appealing their Second Notification then the next CIR received in respect of that subscriber should be treated as generating a Second Notification, not a Third Notification.

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”.

Broadly, we agree.

We suggest that no fines should be levied for non-compliance during an introductory period while all stakeholders are learning the new regime, except in cases of gross negligence or abuse of process.

We would welcome guidelines on dispute resolution.