

**ONLINE INFRINGEMENT OF COPYRIGHT AND THE DIGITAL ECONOMY ACT 2010
- NOTICE OF OFCOM'S PROPOSAL TO MAKE BY ORDER A CODE FOR REGULATING
THE INITIAL OBLIGATIONS**

To:
Justin Le Patourel
Head of Online Copyright
Floor 2
Internet Policy Team
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
via e-mail to: onlinecopyrightinfringement@ofcom.org.uk

From:
Dr Audrey McCulloch, ACMI
Chief Executive
Association of Learned and Professional Society Publishers
15 Windmill Way
Tring
Herts HP23 4HQ

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Introduction

1. The Association of Learned and Professional Society Publishers (ALPSP) is the international organization for non-profit publishers and those who work with them. It has a broad and diverse membership of over 300 organizations in 37 countries who collectively publish over half of the world's total active journals as well as books, databases and other products. ALPSP's mission is to connect, train and inform the scholarly and professional publishing community and to play an active part in shaping the future of academic and scholarly communication.
2. ALPSP is pleased to respond to Ofcom's proposal for the initial obligations code.
3. Whilst we understand it is a challenge to ensure that new legislation can be accessed by as many stakeholders as possible, we are seriously concerned that the vast majority of small and medium-sized (SME) publishers will be unable to access this legislation.
4. According to the Annual Business Survey¹ and the Business Register Employment Survey² there are nearly 5,000 book and journal publishers, employing around 140,000 people in the UK. The majority of businesses (76%) in the publishing sector have fewer than 10 employees³.
5. The scale of the problem that this legislation is seeking to address is not a small one; the Publishers Association Copyright Infringement Portal⁴ has issued over 100,000 take down notices to date in 2012.

Access to the DEA

6. Many SME publishers are not able to constantly monitor infringement of both their and their authors' copyright material. This is primarily due to staff resources and it is unrealistic to suggest that they can achieve the same output as dedicated, specialist teams in larger organisations. Such businesses tend to have very low margins and they do not have the same investment capacity as larger organisations. They tend to discover infringements by chance or via discussion on listservs where infringement has been found by others. As a result, it could be argued that this group is already at a disadvantage compared to the larger market players.
7. Many SMEs will therefore not be able to submit to Ofcom their process for detection of infringing activity. Quite simply, they do not have the resources to have one. This will result in the immediate removal of their access to the DEA legislation to combat infringing activity. Does the UK Government and Ofcom intend for majority of the scholarly and professional publishing industry to be removed from the process?
8. The technology required to detect infringing activity and the resources required to monitor it are out with the reach of most SME scholarly publishers. The technology may be there to do it, but SMEs are unable to make the investment. ALPSP publisher members are able to register at reduced rates to the Publishers Association copyright Infringement Portal; however, even with that discount, many are unable to make use of this important industry initiative.
9. The Ofcom consultation suggests Trade Associations (TAs) could act as conduits for providing estimates and payments, SMEs paying back as they go, in order to provide a facilitation mechanism for such SME publishers. This rashly assumes that: a) TAs have the resources to do this; b) TA members believe this to be the best use of their

¹ <http://www.ons.gov.uk/ons/rel/abs/annual-business-survey/2010-revised-results/index.html>

² <http://www.ons.gov.uk/ons/rel/bus-register/business-register-employment-survey/2010/index.html>

³ <http://www.bis.gov.uk/analysis/statistics/business-population-estimates>

⁴ <http://www.copyrightinfringementportal.com/>

members' dues when they are paid to support a much wider range of issues; and c) a single process by which all TA members discover infringing activity can be agreed upon and approved by Ofcom. I should note that at least one TA much larger than ALPSP has confirmed that they would be unable to do this by themselves for their members.

10. It seems that the large players with departments dedicated to detecting infringing activity and the resources to take legal action against persistent infringement activity are to be the ones who will be able to access this legislation provided by the DEA. It can be argued therefore, that the implementation of the legislation has failed the majority of businesses who suffer from infringing activity. The Government has failed to help the small and medium sized businesses who they have repeatedly stated are the key to economic recovery.

Cost of involvement

11. Notwithstanding the barriers to accessing the legislation outlined above, the fact that the majority of costs will be borne solely by the copyright owner will prevent most SMEs from being involved, and would certainly price many authors out of this legislation also.
12. As already stated, many SME publishers have very small margins and they simply do not have the financial resources to allow them to access this legislation. Many SME publishers are also part of Learned Societies and provide their surplus to those Societies; on-going utilization of a sizable portion (if not all) of any surplus will prevent the Society from providing support to their members in academic institutions. In the biosciences alone, such contributions have been estimated to provide around £3.9 million in additional support for Higher Educational Institutions (HEIs)⁵. Given current the funding restraints for HEIs, this support from Learned Societies is significantly increasing in importance.
13. We are extremely frustrated to see that this legislation provides for those who already have the resources to detect, follow up and prosecute persistent copyright infringers.
14. It is questionable whether the remaining very large organisations that are both willing and able to take part in this system will be enough to achieve the aim of a 75% reduction in online copyright infringement. As already mentioned, 76% of businesses in the publishing industry have fewer than 10 employees (micro business) and this rises to 94% for companies with fewer than 50 employees (small businesses). If such a high proportion is unable to access this legislation, how can the legislation reach its goal?
15. The House of Lords Merit Committee on Statutory Instruments also questions whether the legislation has the potential to achieve its policy objectives⁶.

Extent of the legislation

16. We also question whether the exclusion of wifi and mobile is short-sighted. Mobile internet access technology is continuing to evolve and become more powerful at a considerable pace. The statement from Ofcom that "mobile networks are currently less conducive than fixed networks to online copyright infringement" may be redundant even before the regulations come into force in 2014. Bringing mobile operators into scope once such networks are more "conductive" will simply provide a space for those determined to infringe to operate in, in the meantime. We would strongly recommend their inclusion at this stage in some form.

⁵ <http://uksg.metapress.com/content/rt327514t0126320/?p=25d59027b8364ed5809c25e103c8470d&pi=0>

⁶ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/>

Purpose of the legislation

17. The policy this legislation is trying to address is to reduce online infringement of copyright by 75%. It aims to do so by educating consumers, through the infringement notifications. Unless a copyright owner has the resources to obtain the details of individual infringing subscribers (via court order) and then launch legal proceedings, no further legal action will or can be taken.
18. At the present time and until the potential of technical measures can be brought in by secondary legislation, it could be argued that this is nothing more than an alarmingly expensive and overly-complicated consumer education system, rather than legislation which adequately addresses the economic impact of copyright infringement.

Conclusion

19. We are deeply concerned that ALPSP SME member publishers will be unable to access this legislation. The proposals as they stand will be a significant barrier to commercial growth or competitive success and pose a real risk to jobs and organisational security due to their impact on costs and resources.
20. ALPSP is prepared to work with other organisations to try to establish mechanisms which may enable SMEs may be brought into scope. It seems an industry solution is required given that existing legislation does not address their needs.
21. Ofcom needs to recognise the industrial structure in the sector and work with ALPSP and its members to find a constructive solution. ALPSP would be delighted to host further consultation with our members to discuss the challenges and options for SME publishers.
22. We strongly recommend the inclusion of mobile networks in this stage of the consultation.