

BPI response to “Online Infringement of Copyright and the Digital Economy Act 2010”

1. The BPI (British Recorded Music Industry) is the representative voice for the recorded music industry. Our membership comprises over 350 independent labels and the four major record labels – Universal Music, Sony Music, EMI Music and Warner Music. Together, these account for more than 85 per cent of the sound recordings sold in the UK every year.
2. BPI welcomes the publication of the Interim Statement by Ofcom; overall the statement represents a fair balance between the views within the consultation. The Interim statement provides a sensible way forward in ensuring that the Act is finally implemented with reasonable protections in place for consumers.
3. BPI regrets the delays due to legal action that have held up this process but remains firmly committed to ensuring the Act is implemented to reduce levels of online infringement and encourage use of the many legal digital music services now available in the UK. The lengthy court process has been at the expense of UK creators and UK jobs and growth.
4. The High Court has upheld the Digital Economy Act as a proportionate response to the serious problem of online infringement and it is incumbent on all legitimate businesses in the UK to play their part in ensuring that infringement is minimised. To this end, BPI hopes that there will be a co-operative approach to the implementation of the code to ensure the effectiveness of the Act and that it gives all parties a clear signal to prepare for implementation.
5. As part of the long consultation and period of reflection on the code, BPI accepts that judgements have been made by Ofcom. BPI will try to avoid responding on issues where there has been such a judgement taken by Ofcom only save where there may be new information, where clarity may be added to the document or where BPI believes that there are important omissions.

Application of the code to Internet Service Providers

6. BPI accepts that Ofcom has come to a decision on the definition of the internet services and internet access providers that are within scope and agrees with its definition. In the early application of the Act, BPI agrees that it should concentrate on the major ISPs and the application of a subscriber benchmark will, BPI hopes, be of benefit in ensuring the Act is applied proportionately. BPI also accepts that Ofcom has come to a reasoned decision on the exclusion of Wi-Fi and mobile access providers.
7. That said, BPI would like to ensure that the code remains flexible enough in its application that Ofcom may designate further service providers to be within scope if it becomes clear that infringement on those services is at a significant level. Whilst Ofcom has the ability to “remake” the code, the process of making a statutory code is cumbersome and not speedy enough to respond to rapidly shifting online behaviour. A new code expanding the designation would take, as we have seen, possibly two years to undertake.
8. Mobile applications were a nascent market at the time of the consideration of the draft code, but the rapid increase in their availability coupled with the potential for increases in speed on mobile networks flags this already as a significant problem. Additionally, the much

wider availability of roaming and free wi-fi services bundled in with contracts means that the constraint of 3G speeds is not in itself enough to protect against the ability to infringe content on mobile phones.

9. In 3.86 it states of mobile *“Ofcom research published in May 2011 found that, as at Q4 2010, the average download speed achieved by those surveyed was 1.5Mbit/s”* as an argument against the potential for mobile downloads of content. The data speeds are perfectly sufficient for the infringement of copyright in music. At this speed a song can be downloaded in less than 30 seconds, and an entire album in 6 minutes.
10. BPI would urge Ofcom to retain the ability within the code to designate new services on the basis of research it undertakes under its statutory reporting duty. As such the code should have a more flexible application to ensure that the process of adding internet service providers does not lead to lengthy, costly, delays by leading to a need to redraft the Code.
11. If this is not possible, BPI would urge that Ofcom begins, now, an urgent review of the potential for rapid expansion of infringement on mobile networks and propose potential measures to combat this, including possible amendments to the Code. This should be done in parallel with implementation of the current Code.

Accuracy of Evidence Gathering

12. BPI welcomes the development of a technical standard to cover evidence gathering. BPI would welcome involvement in this process at the earliest possible opportunity, and propose that Ofcom begins that process alongside the Code’s process through Parliament.

Process of sending Consumer Infringement Reports

13. BPI notes the changes in the process of sending Consumer Infringement Reports. At the time of the first draft code BPI was concerned that email would not find the intended recipient in the first instance. BPI now believes that the circumstances have changed due to moves by the ISPs to increase take up of paperless billing by nominating an email address to receive bills. Where a subscriber has paperless billing BPI would now argue that concerns over dead email addresses is minimised and should receive their first notification by email and only receive a letter with their second and third notification.
14. Given that caveat, BPI welcomes the move to first class letter rather than recorded delivery as a reasonable measure to ensure that the subscriber is made aware of infringement.
15. BPI agrees that there is a need for a sensible period of time to allow subscribers to change behaviour, and are comfortable with the 20 day period before a CIR may trigger a notification that Ofcom has set out within the code. However, it might be made clearer that the copyright owner sending the CIR will have no knowledge which subscriber that CIR relates to, nor whether they would have a notification within the previous 20 days. It should also be made clear that should a further notification be triggered by ongoing infringement on that account, any CIR that was matched to that account within the 20 day period should stand as evidence. i.e. the 20 day period grace does not apply if the infringement continues on that subscriber account after that 20 day period.
16. BPI acknowledges Ofcom’s view that it does not have the statutory power to rule ex-ante on the content and tone of the letters. BPI is concerned that the letters are drafted in line with

Ofcom's original intent – that is they are measured, advise the subscriber that there has been a breach without accusing the account holder of the breach, advise on securing their network access, point the subscriber to legal content and provide information about the importance of copyright.

17. As the letter will be a significant tool in the education around the Act and its implications, it is important that the letters are appropriate to this aim. BPI would hope to be involved in the drafting and would favour standard letters to subscribers that have been discussed with consumer groups. BPI, however, welcomes the intent of para 5.89 to make clear that Ofcom would use enforcement action if necessary if the tone and content of the letters was inappropriate.

Appeals Process

18. The decision of the Court requires that BPI and other rights holders bear the costs of appeals even if those appeals are on grounds where the ISP is at fault. One issue arising from this is that there is no mechanism for compensating rights holders in such instances, only subscribers wrongly identified. BPI would ask that Ofcom consider potential solutions to this problem. If there is a consistent problem of incorrect matching, Ofcom may use its statutory powers to provide an ex-post remedy to any such problem. Again, however, the cost burden will have fallen on rights holders with no means of compensation should an ISP be found in breach and fined. BPI would hope that Ofcom would make this point to Government on an appropriate use of any such fines going to the Consolidated Fund that have also caused a loss to rights holders. At the least BPI would hope that any fines on ISPs for breaches relating to the Digital Economy Act are recycled into education campaigns that support copyright.
19. It is also important that the appeals system is proportionate. Whilst Ofcom has indicated that the procedures of the appeals body are its to decide in the matter of oral hearings, the cost attached is important to manage. BPI believes also that the potential for vexatious complaints is an important risk to be managed, and welcomes the Government's announcement of a fee for appeals, returnable on successful appeal. Without an appeals system that is focused on minimising the unsuccessful appeal rate, rights holders will bear heavy costs on top of the costs of infringement that lead to notifications. As such, BPI also welcomes the removal of wide grounds of appeal and believes it important to keep to the statutory list of appeal grounds.