



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 consultation

Response by British Sky Broadcasting

July 2012

SUMMARY

1. Sky welcomes this opportunity to respond to the Ofcom Consultation on initial obligations to online copyright infringement. Sky has a unique perspective on the problem of illegal file sharing. We are one of the UK's most significant investors in content as well as one of the country's largest ISPs. Illegal file sharing continues to threaten the entire value chain and with it the incentives to invest in content.
2. We remain fully supportive of the DEA and we would like to take the opportunity to encourage Ofcom to ensure that the administrative architecture behind the Code and costs are in place as soon as possible. It is vital that implementation does not suffer any further delays. Ofcom should also understand that compliance will necessitate significant technical changes to our business and it is vital that the appeals process, volume forecasting and costs mechanisms are defined in sufficient time for us to adapt our infrastructure to the challenge.
3. Sky would also like to see a co-ordinated approach to notifications, which would save copyright holders considerable funds if implemented. We also have concerns over the security implications and necessity of IP matching process publication and seek clarity on copyright infringement reports. We hope that these questions can be resolved at the earliest opportunity and rights holders, ISPs and Ofcom can work together to implement a system that should help protect and incentivise investment in high-quality content in the UK.

UNIVERSAL DATA STANDARDS

4. In order to reduce implementation costs and ensure compatibility, all participants would benefit from a universal set of standards across rights holders and qualifying ISPs. This should cover all relevant data transfer protocol including agreed formats for CIRs, CILs, monthly reports, receipt and rejection messages.
5. Without a common design, participant copyright owners may be forced to adapt to numerous different specifications during the notification process. Ofcom should ensure that provisions are made for co-ordination of the industry-wide standards and their maintenance.

6. Sky would like to see the introduction of a technical annex to the Code, or the insertion of a reference in the Code to a mandatory agreement, which bring together a universal schedule for all transactions between ISPs and copyright owners.

DEFINITIONS

7. The definitions contained in the revised Code are still unclear. The status of public intermediaries, such as libraries and universities whose activities include the provision of internet access services has not been adequately addressed. Ofcom must not leave libraries, and other bodies, to argue with qualifying ISPs over their status. This is a role for the independent regulator.

CIR VOLUME & FORECASTING

8. In Part 3, Para 4 of the Code Ofcom specifies that copyright owners will not be required to submit launch forecasts until a "date to be specified by Ofcom." Sky would like this date to be set as early as practically possible.
9. The potential volume of the CIRs will be the most significant factor in determining the appropriateness of the potential technical solutions available to ISPs. Investment in our internal infrastructure will be designed to respond to the capacity required by copyright owners.
10. The volumes required by rights holders will also govern our ability to deliver a solution that will be fully operable in early 2014. Depending on scale, nine months may be insufficient time to put in place our technical response to the Code Consultation. The time available to implement under the Code by ISPs may, in fact, be less than 9 months given the requirement that ISPs submit to a quality assurance process with Ofcom during this period.
11. The fast-tracking of the initial forecasting process is imperative to manage the risk inherent in major infrastructure decisions of this kind. An early forecast would give Sky the security and confidence we require to move forward in a timely and efficient manner.
12. We also ask that Ofcom introduces caps to volume forecasts for subsequent notification periods. As noted above, the technical infrastructure implemented will be sensitive to volume. We are concerned that the relatively short two-month window for "subsequent" notification periods will leave our technical solution vulnerable to large fluctuations in demand from copyright owners.
13. Sky cannot commit to supporting potentially unlimited changes in volume within 2 months of receiving subsequent forecasts, as these may require significant scaling of hardware depending on their size. Substantial changes may even mean changing the technical solution entirely depending on total volumes across copyright owners. A cap would provide relative certainty to qualifying ISPs and may also incentivise copyright owners to deliver rigorous estimates of volume in the initial forecasting phase of implementation.

APPEALS

14. The operational detail of appeals will have a significant impact on the scheme. Despite some progress in the June Consultation, there remain significant features of the process yet to be clarified. Key elements include the full procedure for the determination of subscriber appeals, definitional clarity on key terms and, in particular, the cost of the appeals system. While we understand that the detailed procedures will be determined by the independent appeals body. We would urge Ofcom to begin the appointment process as early as possible.
15. The DEA impact assessment published by DCMS notes that the level of copyright holder participation is directly dependent on the number of appeals. Given the way Ofcom have chosen to proceed on appeals, the level of participation remains uncertain. In previous submissions copyright holders have stated that if the proportion of appealed notifications increases fewer CIRs will be sent. This uncertainty should be resolved as soon possible.

CIR CONTENT

16. Sky appreciates Ofcom's precision in outlining all the required components of CIR at this stage. However, included within the obligations laid out in the Code are two standard statements designed to explain to the subscriber the fact and nature of the offence committed:
 - (d) a statement that there appears to have been an infringement of the copyright in the copyright work;
 - (f) a statement that no consent has been given by the owner of the copyright in the copyright work for the act giving rise to the apparent infringement;
17. We would appreciate confirmation that these two standard declarations can be incorporated into the letter template used by ISPs, rather than included within the CIR itself. If they are required to be stored within the full notification system the cost of these extra pieces of data, though small individually, may amount to a significant resource cost at scale.

IP ADDRESS/SUBSCRIBER MATCHING

18. Prior to the start of the notification period Part 4, Para 9, of the draft Code requires qualifying ISPs to establish and follow procedures for the accurate identification of fixed subscribers. This report will cover the procedures, audit and monitoring systems introduced by the ISP for the identification of fixed subscribers.
19. Part 4, Para 9, Provision C of the Code notes that the ISP will publish this report of its IP matching procedures "as soon as is reasonably practicable following delivery of the report to OFCOM" and "in such manner as is appropriate to bring it to the attention of subscribers and copyright owners." The June 26th 2012 Consultation also notes that failure to comply with the requirement for accurate address matching is likely to be considered a material breach of the Code, with the prospect of enforcement action and a fine as penalty for non-compliance.
20. Sky has significant concerns over communicating our IP matching processes to third parties. Our IP matching protocols are already used for law enforcement and have long been accepted as sufficiently rigorous and accurate for that purpose. At this point Ofcom has failed to

explain why further external examination of our practices is necessary, notwithstanding the additional costs and resource that such a step would entail.

21. The dissemination of our proprietary information has potentially serious implications for the security of our systems and the effectiveness of the process. For that reason, we would strongly oppose the publication of our existing IP matching methodology. Moreover, we retain reservations about submitting this information to Ofcom and would request guarantees that recognise the commercial and security sensitivities of the information.