

Communications Consumer Panel response to Ofcom's interim statement and notice of a proposal to make an order in relation to the Online Infringement of Copyright and the Digital Economy Act 2010

Introduction

The Communications Consumer Panel welcomes this opportunity to respond to Ofcom's interim statement and notice of a proposal to make an order in relation to the Online Infringement of Copyright and the Digital Economy Act (DEA) 2010. The Panel considers it essential to ensure that measures to curb online infringement of copyright occur in a way that protects citizen interests and that the measures are proportionate and balanced and meet accepted standards of due process.

The Panel submitted a detailed response to the consultation held in 2010 and so this response confines itself to a restating of the principles that were developed by the Panel in conjunction with other user groups in 2010, and comments on the draft document, published in June 2012.

Customer Protection Principles

In 2010, together with Consumer Focus, Which?, Citizen's Advice and the Open Rights Group, the Panel developed a set of Customer Protection Principles in relation to Online Copyright Infringement. The principles were intended as a guide to protecting the citizen interest in a proportionate way when developing an initial obligations code and appeals mechanism as part of the implementation of the new framework for online copyright infringement and were intended to help Ofcom and other policymakers as they develop and implement the new framework for sections 3-16 of the Digital Economy Act 2010. The consumer bodies recognised that Ofcom does not have the powers to mandate all the measures they believe are necessary to protect consumers. So the principles are also intended as a useful guide for ISPs and rights holders.

There are five overarching principles, based on:

- The need for cogent evidence
- The need for clear, unthreatening and non-partisan notifications to be sent to alleged infringers

- The need for consumers to have the opportunity to appeal against a notification of copyright infringement
- The need for general education outside the notifications and appeals process on legal alternatives
- The need for an independent, impartial, transparent, expert, representative and accountable appeals body/process.

A full copy of the principles is attached but below is a summary of the main points.

The **first principle** requires that rights holders must have solid evidence before requesting an ISP to log a copyright infringement report. It is important that the rights holders provide this evidence to the ISP and that it can be independently verified by an independent body. This evidence should also be available to alleged infringers.

The **second principle** focuses on the information alleged infringers receive as a result of the generation of copyright infringement reports by rights holders. It is important that notifications sent by ISPs to alleged infringers are positive, clear and easy to understand but also give customers all the information they need.

We recommend that notifications from ISPs take the form of a short letter accompanied by a standard information pack, which would explain the details of the notification process and about how to appeal.

The **third principle** aims to ensure that customers can appeal against any copyright infringement reports raised against them. The appeals process should be free to customers, it should be simple to access and there should be an independent third party available to advise on the process and on how to gather evidence to support the appeal. Customers whose appeal is successful should receive compensation.

The **fourth principle** is aimed particularly at rights holders. We call for rights holders to provide information about legal online content services outside of the notification process. This means doing more to develop attractive, easy to use and affordable alternatives to illegal downloading, and to better market and promote these services.

The **final principle** sets out standards for the appeals process and appeals body. They should be:

- independent and impartial, particularly independent from ISPs and rights holders
- transparent: meaning that information on its constitution, budget and work should be easily available to the public

- expert: in terms of technology, copyright and media law, and media use and media literacy
- representative: so it should also include lay consumer members; and
- accountable: to the general public, the Government and Ofcom

Specific issues:

Notifications

The Panel recognises that Ofcom has removed the provision in the May 2010 consultation enabling it to give directions to the ISPs as to the form of the notification sent to subscribers. The Panel strongly urges qualifying ISPs to work together to produce a standard notification, of the nature outlined in Principle 2 above, and to develop such a pro-forma in conjunction with representatives from user and consumer groups. This should be accompanied by a standard information pack.

The Panel would suggest that, to future-proof the Code against potential technical developments, copyright owners are required to inform ISPs within a month of an alleged copyright infringement taking place, rather than their discovery of such. Whilst these are currently generally synchronous, this may not always be the case and it would be counter intuitive for a consumer potentially to receive a number of separate notifications based on historical alleged activity which would eliminate the desired potential for behaviour modification.

The Panel welcomes Ofcom's revised requirement for notifications to be sent by post, but would urge the retention of recorded delivery for the third notification, given the potential consequences of this stage of the process.

Evidence gathering and identification systems

The Panel welcomes Ofcom's intended requirement for copyright owners to have their evidence gathering procedures approved by Ofcom before they can send any reports of apparent copyright infringement to ISPs. Similarly, it is pleased to note that Ofcom intends to sponsor a publicly available specification for evidence-gathering procedures in addition to a specification for matching IP addresses to individual subscribers. The Panel would encourage the copyright owners and ISPs to adopt the use of the relevant specification.

Providers of wi-fi and public intermediaries

The Panel once again calls on Ofcom to ensure that public intermediaries do not and will not have any responsibilities of a Qualifying ISP under the code that would either: force them to limit the type of access provided to users to a degree that would disadvantage users of these services in relation to people with access to home broadband services; or shut down services entirely due to cost and

administrative burden. This also applies to small businesses that provide wi-fi to their customers.

Awareness raising

Raising consumer awareness is a crucial part of the jigsaw of addressing online copyright infringement. ISPs should be able to provide individual and small business subscribers with clear, unambiguous information about their responsibilities so that the provision of internet access is not stifled by misplaced anxiety. The Panel calls on Ofcom to monitor closely the work undertaken by industry to inform consumers of the nature of online copyright infringement and how to avoid it, in addition to the investment undertaken to enable lawful access to content.

As suggested in 2010, the Panel recommends that Ofcom extends the requirement for ISPs to inform subscribers that CIRs are available on request. This requirement should instruct ISPs to update subscribers automatically of any CIRs received against their account, if the subscriber makes an initial request for this to happen. Subscribers could be updated by email or perhaps by logging on to a website run by the ISP that subscribers could use to check any CIRs against their account.

Appeals

The Panel would welcome involvement in the discussion and development of the constitution and procedures of the Appeals Body. It would welcome clarification as soon as possible of the 'reasonable steps' that can be taken to secure a subscriber's wi-fi and would again stress the involvement of consumer representation in the appeals body. In relation to published metrics, the Panel would also suggest the publication of the number of successful appeals.

The Panel suggests that the period for lodging an appeal is amended to one month, in line with the time period suggested for action by content owners and ISPs.

Advice for consumers

In its 2010 response, the Panel noted the importance of the availability of independent advice for consumers in relation to appeals and noted that the code should require a well advertised and funded independent advice body. The Panel notes that Ofcom does not consider that the DEA provisions confer power on it to establish such a body, although it recognises the importance of consumer information on these issues and considers that there is adequate provision for this under the Code. However the examples given by Ofcom:

- that it must approve the procedures of the appeals body and would expect that approval would be conditional on them being user-friendly and easy to understand; and

- that the Code requires the appeals body to produce guidance on its approach to the determination of appeals as well as subscriber notifications containing information on the appeals process

fall significantly short of the advice system recommended by the Panel.

The Panel notes recent reports of CAB offering to provide advice to 02 customers who feel they have been wrongly accused of illegally downloading video content. Many consumers who receive notifications are likely to be daunted by being faced with industry generated data and legal argument. They will need access to advice and guidance from experts in the field - at low cost.

Annex - Customer Protection Principles

1. Rights holders should have to provide cogent evidence of wrongdoing to the ISP before beginning the notification process, and this should be provided to the alleged infringer on notification.

- This evidence must connect the customer to the alleged copyright infringement.
- The systems used to collect this evidence must be independently verified by Ofcom or bodies authorised by Ofcom and meet a prescribed high standard of accuracy and reliability.
- Evidence should not be withheld from customers and subscribers should be notified of every copyright infringement report received by the ISP in relation to their internet account.

2. We strongly believe that customers will best be served by receiving uniform information on the nature and consequences of being included in a “copyright infringement list” of suspected repeat infringers. If different customers receive different letters from their respective ISPs, there will be legal uncertainty. It is important that letters from ISPs are clear, short and to the point. Letters from ISPs should therefore be accompanied by a standard information pack that explains the details of the notification and appeals process. This could be supported by advice and information about legal downloading services.

Notification should be educational and positive and should meet standards for plain English. The pack should not include partisan information on the impact of online copyright infringement.

We believe that it would be a disproportionate reaction to suppress open WiFi networks operated by individuals or organisations at this stage. Since the Act does not mandate that networks be closed, the initial obligations code and notification information should be designed to avoid such an unintended consequence.

- The notification pack should explain clearly the implications and potential implications of being included in a “copyright infringement list”, including all other possible consequences, such as prosecution. If this information is to be used in any future process this should be made clear to the customer now.
- Notifications should explain clearly what data has been collected on a customer, how it has been collected, and how that data will be stored and used in future.
- Notifications should explain clearly the opportunity to appeal, including the grounds on which an appeal can be made and the consequences of not appealing at this stage.
- Notifications should explain the process involved in bringing an appeal.
- Notifications should not advise customers to secure their Wifi. But they should provide information to customers about how they can, should they choose to do so.

- Notifications should acknowledge that the recipient may not be personally responsible for, or even aware of, the alleged copyright infringement.
- Notifications should explain clearly that that legal liability rests with the infringer or with the person legally responsible for the infringer.
- Notifications should let recipients know who they can contact for advice about protecting their internet connection and for guidance on the appeals process.
- Notifications should not contain any ambiguous or threatening language likely to cause customers undue worry.
- The notification pack should advise the customer of an Ofcom nominated information provider that can provide further independent information and advice on the appeals process.

3. Customers should have fair and reasonable opportunity to defend themselves against a copyright infringement report.

- Customers should be able to defend themselves or appeal accusations on any reasonable grounds.
- There should be at least one independent third party that can provide guidance on the appeals process and on how to gather evidence to refute an allegation.
- The appeals body should make it as easy as possible for customers to make an appeal, if they meet any of the predefined grounds.
- Appeals should be, quick, simple and free. Costs should not be imposed on the customer as they may cause a barrier to accessing an appeal.
- Any customer with a case that meets any of the predefined grounds of appeal should be able to appeal a copyright infringement report without bearing any costs.
- Customers should receive compensation if their appeal is upheld.

4. Customers should be provided with information outside the notification and appeals process about the existence of legal providers of online content services.

- Rights holders should do more to develop attractive, easy-to-use and affordable alternatives to online copyright infringement.
- Rights holders should use marketing campaigns to inform customers about the existence of legal services.

5. The appeals process, and the appeals body, should be:

- Independent and impartial, particularly independent from ISPs and Rights holders. This is essential if the process is to enjoy legitimacy and should be reflected in a majority lay membership, including members that are completely independent of industry, security of tenure for chair and board members and budgetary independence;

- Transparent; maintaining a website containing detailed public information including membership of appeals body, budgeting, numbers of appeals, numbers of adjudications, and nature of adjudication;
- Expert; the appeals body should include independent membership with expertise in: (i) the value of evidence likely to be served relating to ISP logs, IP addresses and other technical matters (ii) copyright and media law relating to fair use and peer to peer networks, and freedom of expression (iii) media use, and media literacy of internet users;
- Representative; the appeals body should, in addition, include lay consumer members similar to the model used by the Food Standards Agency and the National Health Service; and,
- Accountable; to the general public, Parliament and Ofcom.