



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to Ofcom notice on draft Initial Obligations Code, Digital Economy Act 2010

July 2012

Contents

Introduction and summary	3
Summary of Consumer Focus's concerns:	8
Evidential standards and transparency of the appeals process	9
Requirement to establish a standard of evidence for an apparent infringement on the 'balance of probability'	11
Burden of proof when appealing contraventions of the Initial Obligations Code	15
Subscribers' right to appeal – transparency, time to lodge an appeal and representative bodies	17
Lack of legal certainty in relation to reasonable steps	21
Lack of legal certainty and proportionality in relation to WiFi providers, businesses and public bodies which provide internet access to consumers	25
The lack of legal certainty for WiFi providers	30
The lack of legal certainty for public bodies providing internet access	34
Appendix	41

Introduction and summary

Consumer Focus is the statutory watchdog for England, Wales and Scotland, and for postal consumers in Northern Ireland. We work across copyright exceptions, licensing and enforcement to achieve competitive markets and proportionate enforcement.

Consumer Focus has been working on copyright enforcement since early 2009 to ensure that copyright enforcement against consumers is proportionate, and respects consumers' right to due process and privacy. We have been critical of the approach enshrined in the Digital Economy Act 2010, not because we believe that an educational notification system of subscribers is objectionable, but because sections 3 to 16 of the Digital Economy Act 2010 implement what is known as 'graduated response', as we set out below.

Ofcom has given notice under section 403 of the Communications Act 2003 that it is seeking to make an order, namely an 'Initial Obligations Code' which would implement part of the Digital Economy Act 2010. In essence the Act implements a two stage approach: Under the Initial Obligations Code, obligations are placed on internet service providers (ISP) to notify their subscribers that a copyright owner has issued 'copyright infringement reports' in relation to their IP addresses (which effectively identifies an internet connection). ISPs will be furthermore required to establish 'copyright infringement lists' for their subscribers, if the number of notifications received by a subscriber reach the threshold set in the Initial Obligations Code. Under the Initial Obligations, copyright owners are expected to take Norwich Pharmacal orders out in relation to subscribers who are on the 'copyright infringement list' to obtain their personal data, such as name and address, from ISPs. Such subscribers are regarded as 'repeat infringers', and the Government expects copyright owners to take legal action against such subscribers for civil copyright infringement.

However, if the Initial Obligations Code has been in force for 12 months, the Digital Economy Act 2010 allows the Secretary of State to impose technical obligations on ISPs, by directing Ofcom to make a 'Technical Obligations Code'. Any subscriber on the 'copyright infringement list' will be a relevant subscriber in relation to 'technical measures' which may be imposed. These measures can include the slowing of an internet connection, or 'suspension'. Consumer Focus believes that it is entirely disproportionate to effectively disconnect entire households from the internet as punishment for possibly one member of the household having committed civil copyright infringement. We are also concerned that notifications represent mere allegations of copyright infringement, and that subscribers could face technical measures on the basis of allegations which have not been tested in court. The link between the Initial Obligations and the Technical Obligations from the perspective of subscribers who are placed on a 'copyright infringement list' during the first stage, means that notifications are not merely educational. Because of the potential consequences further down the line, subscribers will have to appeal wrong notifications. The explanatory notes for the Digital Economy Act 2010 even emphasises that 'technical measures could only be used against subscribers who met the threshold for inclusion in a copyright infringement list under the initial obligations.'¹

Consumer Focus is concerned that the Digital Economy Act 2010 puts subscribers at a significant disadvantage once they are accused of copyright infringement by copyright

¹ [Digital Economy Act 2010 explanatory notes](#), para.33

owners. Under the appeals process set up in the Act for notifications, subscribers are expected to show that they personally did not commit the alleged infringement and that they have taken reasonable steps to prevent others from infringing. However, under copyright law, internet subscribers who are taken to court for alleged civil copyright infringement on their internet connection are not presumed liable for any infringement on their connection. Neither are they expected to prevent others from infringing. Under copyright law individuals are only guilty of an infringement, if they themselves have committed the copyright infringement, or have authorised others to infringe copyright.

Consumers commonly share internet connections, with their family members, other members of the household or complete strangers. Consumer Focus does not believe that the Digital Economy Act 2010 represents a scheme that is workable, or proportionate. Imposing de facto liability on subscribers for other peoples infringement on their internet connection is in our view not suitable to give effect to the stated aim of the Digital Economy Act 2010, which is to reduce significantly the level of online infringement of copyright. Moreover the Initial Obligations would apply in relation to all of the ISPs' subscribers, that is anybody who receives internet access under an agreement, whether a domestic household, private business or public body. We are therefore concerned that businesses and public bodies which provide internet access are within the scope of the Digital Economy Act 2010, and if they are considered 'subscribers' they may incur significant costs, which could lead to the reduction of internet access provision to consumers.

Ultimately Ofcom cannot remedy the fact that the Digital Economy Act 2010 enables technical obligations to be imposed on ISPs. However, Ofcom has a duty to ensure that it sets robust evidence standards for accusations by copyright owners of copyright infringement under the Digital Economy Act 2010. Furthermore Ofcom has, in our view, a duty to mitigate any 'chilling effect'² on internet access provision resulting from the implementation of the Initial Obligations Code by clarifying what reasonable steps subscribers may take to prevent others from infringing on their internet connection. Ofcom should provide legal certainty to WiFi providers, business and public bodies providing consumer with internet access.

The draft Initial Obligations Code proposes that the initial obligation will apply to the UK's six big consumers ISPs who provide fixed internet access (thus excluding mobile internet). These are: BT, TalkTalk, Virgin Media, BSkyB, Everything Everywhere and O2. Ofcom is anticipating that copyright owners will send between 75,000 and 175,000 Copyright Infringement Reports (CIRs) per month, thus the scheme will operate on a significant scale. Therefore the Digital Economy Act 2010 will operate on significant scale, with the six qualifying ISPs covering 93.5 per cent of the retail broadband market. Consumer Focus's submission focuses on the areas where we fear the draft Initial Obligations Code could cause most consumer detriment. These are:

- Standard of evidence: unless the Initial Obligations Code makes effective provisions on the 'means of obtaining evidence' and 'standard of evidence', as required by the Digital Economy Act, a large number of subscribers risk being wrongly notified of alleged copyright infringement and placed on a copyright infringement list
- Lack of legal certainty over reasonable steps: unless the Initial Obligations Code provides legal certainty on what reasonable steps consumers, as well as businesses and public bodies which provide internet access, should take to prevent others from infringing, consumers, businesses and public bodies will not

² Chilling effect is the legal term for the inhibition or discouragement of the legitimate exercise of rights by the threat of legal sanction

be in a position to regulate their conduct, so as to avoid being labelled an 'infringer'

- WiFi providers, business and public bodies providing internet access: unless the Initial Obligations Code provides legal certainty for the wide range of internet intermediaries which provide large numbers of consumers with internet access, a disproportionate cost could be imposed on such intermediaries, which would result in a chilling effect on internet access provision to consumers

Our recommendations to Ofcom in relation to the draft Initial Obligations Code are that:

Standard of evidence:

- Ofcom amends paragraph 4(4) and 6(5) to impose an overall evidence standard for copyright infringement reports on the balance of probability
- Ofcom amends paragraph 6(5) so that Ofcom may only approve evidence-gathering processes which on the balance of probability give reason to believe that an infringement has been committed on an internet connection
- Ofcom amends paragraph 29(2) of the draft Initial Obligations Code should be amended so it does not apply to appeals which are brought on the basis that the copyright owner or the ISP has contravened the Initial Obligations Code
- Ofcom amends paragraph 29(1) so that it implements the requirements of the Digital Economy Act 2010 correctly, and specifically requires copyright owners and ISPs to show that a copyright infringement report relates to the subscriber's IP address at the time of that infringement
- Ofcom amends paragraph 6(4) should be amended to so that the qualifying copyright owner may only exclude information as directed by Ofcom from a report outlining evidence-gathering processes approved by Ofcom
- Ofcom amends paragraph 26(3) should be amended to provide subscribers with 20 working days to declare their intent to appeal a notification, and a further 20 working days to lodge all the supporting documents with the appeals body
- Ofcom amends paragraph 27(4) should be amended to remove the right of the qualifying copyright owner to appoint a representative body for appeals. Instead Ofcom should consider extending such a right to subscribers, to ensure equality of arms

Reasonable steps:

- Ofcom provides legal certainty in the Initial Obligations Code, particularly in relation to open WiFi providers, by defining reasonable steps or providing guidance on reasonable steps

WiFi providers, businesses and public bodies providing internet access to consumers:

- The Initial Obligations Code should make explicit provisions for WiFi providers, business and public bodies which provide internet access
- The Initial Obligations Code should effectively exempt businesses and public bodies which provide WiFi to consumers, as well as businesses and public bodies which provide fixed internet access to consumers
- The Initial Obligations Code should provide legal certainty by making clear provisions which would allow qualifying ISPs to not pass on 'copyright infringement reports' as notifications if they relate to businesses or public bodies providing internet access to consumers

Consumer Focus welcomes Ofcom's efforts to make provisions on the 'means of obtaining evidence' and the 'standard of evidence' in the new draft Initial Obligations

Code. Our most significant concern in relation to these provisions in the new draft Initial Obligations Code is that Ofcom only requires copyright owners to meet evidential standards on the basis of reasonable grounds. The Initial Obligations Code should set the standard of evidence for a CIR by a copyright owner, which in principle alleges that an infringement has occurred on a subscriber's internet connection, on the basis of 'balance of probability', not the weaker 'reasonable grounds'. Furthermore, we are concerned that when Ofcom is approving copyright owners' evidence-gathering procedures, the draft Initial Obligations Code merely requires it to 'consider' whether the procedures described give reasonable grounds to believe that a copyright infringement has occurred on a subscriber's internet connection. Because of the scale on which the Digital economy Act 2010 scheme will operate, any margin of error will be significant. Thus Ofcom should only approve evidence-gathering procedures, if it is satisfied that they establish that on the balance of probability, an infringement has occurred on an internet connection.

Consumer Focus is furthermore concerned that since Ofcom last consulted on the draft Initial Obligations Code in May–July 2010, no significant progress has been made in relation to the definition of reasonable steps or specific provisions to clarify the situation for WiFi providers, businesses and public bodies providing internet access to consumers. In our opinion the solution Ofcom is proposing in its notice in relation to both these issues is totally unsatisfactory, and the lack of legal certainty the draft Initial Obligations Code provides is likely to have a chilling effect on internet access provision to consumers. Internet access is now essential. UK citizens who do not have internet access either at home or through private or public intermediaries will find it more difficult to find a job, find accommodation and more generally participate in social and economic life. In relation to Ofcom's proposals for how public intermediaries such as libraries and universities are considered in the draft Initial Obligations Code, Ofcom acknowledged that the following general duties are potentially relevant (but are not limited to):

- Furthering the interests of citizens in relation to communications markets
- Having regard to the desirability of encouraging the availability of and use of high speed data transfer services throughout the UK
- Having regard to the vulnerability of children and of others whose circumstances appear to put them in need of special protection
- Having regard to the needs of persons with disabilities, of the elderly and of those on low incomes³

Consumer Focus does not believe that Ofcom's proposals satisfy these general requirements. Moreover Ofcom has acknowledged the likely cost associated with its proposals, and the risk of a chilling effect on internet access provision to consumers if what will be qualifying ISPs treat public intermediaries as subscribers. We are concerned that Ofcom has not quantified the cost arising to public intermediaries from its proposals, which essentially envisage that business and public bodies which provide internet access to consumers contact their ISP to secure the status of 'non-qualifying ISP', rather than subscriber under the Act. Consumer Focus urges Ofcom to quantify the cost to businesses and public bodies arising from its proposals and to come to a conclusion on whether the draft Initial Obligations Code is proportionate. We are concerned that the draft Initial Obligations Code, in relation to WiFi providers, business and public bodies which provide internet access to consumers, the code is not proportionate in relation to what it is intended to achieve. It potentially discriminates unduly against particular people, namely low-income consumers and consumers living in the 20 per cent of households which do not have internet access at home.

³ [Ofcom notice – Online Infringement of Copyright and the Digital Economy Act 2010](#), Ofcom, June 2012, pg.101

It appears that Ofcom, to some extent, feels limited by the guidance it has received from Government in this respect. However, we believe that on both issues – reasonable steps and consideration for internet intermediaries – the Government has made its intention clear during the judicial review of the Digital Economy Act 2010. It was submitted on behalf of the Government that Ofcom would clarify reasonable steps and explicitly deal with subscribers such as libraries and internet cafes in the Initial Obligations Code. Neither is the case. In our response to the Ofcom notice under section 403 of the Communications Act 2003 we outline in detail why Ofcom should not make the Initial Obligations Code as currently drafted. We believe Ofcom should use its powers under section 403. In response to the representations Ofcom has received by those who are likely to be affected by the implementation of its proposals, Ofcom should make different provision for different cases, which may include different provision in respect of different areas.⁴

Under the Digital Economy Act 2010 and section 403 of the Communications Act 2003 Ofcom is empowered to make an Initial Obligations Code by regulation. The Digital Economy Act 2010 also provides that this Initial Obligations Code is subject to the approval of the relevant Secretary of State. We accept that Ofcom is in the very difficult position of having to draft and make an Initial Obligations Code on the basis of primary legislation which has not received the usual parliamentary scrutiny. There is by now no doubt that the Digital Economy Act 2010 suffers from a number of deficiencies, and that its implementation through secondary legislation is a significant challenge. However, Consumer Focus believes that the Initial Obligations Code, as drafted and notified by Ofcom, has significant shortcomings. Thus we will formally submit our response to Ofcom's notice to the Secretary of State for Culture, Olympics, Media and Sport, advising that the Initial Obligations Code as drafted should not be approved. This is because it does not provide legal certainty on reasonable steps or for WiFi providers, business and public bodies which provide internet access to consumers.

We will also write to the Secretary of State asking him to reconsider whether the Digital Economy Act 2010 as is can be implemented in a way that is fair to subscribers. We have significant concerns in relation to the appeals process, where subscribers are asked to prove a negative, namely that they have not personally committed the alleged infringement. It is highly unusual, and from a legal perspective problematic, that an accused needs to prove their innocence by proving a negative. Usually the accuser has to prove their case, in relation to civil copyright infringement on the balance of probability. We have voiced concerns about the burden of proof in the appeals process previously for these reasons. However, adding to our concerns is the fact that Dr Richard Clayton, in his technical expert report on traceability, which we have submitted to both Ofcom and the Department for Culture, Media and Sport (DCMS), has come to the conclusion that subscribers to an internet connection are not technically in a position to identify which machine was used to commit a particular copyright infringement which occurred on their connection, and much less which individual was on the keyboard. Moreover, UK courts have to date not fully tested the evidence advanced by copyright owners to identify an internet connection which has been used for copyright infringement. We fear that under the Digital Economy Act 2010 subscribers are placed in an inherently unfair situation, where they are asked to disprove an allegation even though they do not have the technical means to do so. We accept that Ofcom cannot mitigate this in the Initial Obligations Code, which has to implement the grounds of appeal as set out in the Digital Economy Act 2010. Therefore we will write to the Secretary of State to ask him to reconsider the implementation of the Digital Economy Act 2010.

⁴ [Communications Act 2003](#), section 403(7)(a)

Summary of Consumer Focus's concerns:

Standard of evidence:

- Ofcom does not set the overall standard of evidence for copyright infringement report on the 'balance of probability', instead it has opted for the weaker 'reasonable grounds'
- Ofcom has not implemented the burden of proof requirements of the Digital Economy Act 2010 correctly, especially in relation to the ground for appeal that the copyright owner or ISP has contravened the Initial Obligations Code
- Ofcom does not give subscribers enough time to lodge a full appeal with all supporting documents
- Ofcom has extended a right to appoint a representative body for appeals to copyright owners, but not subscribers

Reasonable steps:

- The draft Initial Obligations Code does not provide guidance on reasonable steps, and neither does it require the Appeals Body to issue such guidance
- Ofcom has not responded to the concerns voiced by a wide range of stakeholders who will be regarded as subscribers; under the Act, and that the draft Initial Obligation Code will create significant legal uncertainty for consumers, business and public bodies which provide internet access, and in particular for open WiFi providers

WiFi providers, businesses and public bodies providing internet access to consumers:

- The draft Initial Obligations Code does not provide legal certainty to WiFi providers, business and public bodies as to their status under the Digital Economy Act 2010
- The Ofcom proposal for public bodies to contact their qualifying ISPs to secure acceptance for their status as 'upstream ISP' is likely to impose a disproportionate cost on public bodies and lead to a chilling effect on internet access provision to consumers
- The chilling effect that is likely to result as a result of Ofcom's proposals could disproportionately impact on low income consumers and consumers living in the 20 per cent of UK households which do not have internet access, as such consumers rely heavily on public bodies for essential internet access
- Ofcom has, while acknowledging the likely cost associated with its proposals, not assessed the cost to public bodies and small businesses, and neither has Ofcom come to a conclusion whether its proposals are proportionate in relation to what the Initial Obligations Code is intended to achieve
- The draft initial Obligations Code does not achieve what the Ofcom notice says it should achieve, and introduces further legal uncertainty for WiFi providers, business and public bodies which provide internet access to consumers

Evidential standards and transparency of the appeals process

Consumer Focus welcomes Ofcom's efforts to strengthen the standard of evidence provisions in the draft Initial Obligations Code. The last draft Initial Obligations Code that Ofcom consulted on in May–July 2010 contained only very weak provisions on the standard of evidence that copyright owners had to adduce to prove infringement. It comprised of copyright owners submitting a annual 'quality assurance report' to Ofcom outlining their evidence-gathering procedures and copyright owners self-certifying that in their reasonable opinion, such procedures were effective in collecting robust evidence of an apparent copyright infringement on a particular internet connection. There was no requirement for prior approval of the processes used by copyright owners, and furthermore subscribers would under the scheme not know on what basis they were accused of copyright infringement or the procedures used to detect online infringement.

Consumer Focus outlined our significant concerns about this weak self-certification process in our submission to Ofcom on the first draft Initial Obligations Code in July 2010. In April this year Consumer Focus submitted a legal opinion to Ofcom and DCMS on how the draft Initial Obligations Code self-certification process would comply with the requirements of the Digital Economy Act 2010 for the Initial Obligations Code to make provisions on the 'means of obtaining evidence' and the 'standard of evidence'. Consumer Focus also submitted a technical expert report, because in the May–July 2010 consultation Ofcom explained that it considers the proposed self-certification process 'objectively justifiable and proportionate' for a number of reasons, including that 'it does not involve the setting of arbitrary standards that we are not in a position to understand.'⁵

Assessing the provisions of the Digital Economy Act 2010 and other relevant material, the legal opinion concluded that the Initial Obligations Code needed to require copyright owners to adhere to external benchmark technical standards approved by Ofcom, and that evidence-gathering procedures needed to be transparent to consumers. The legal opinion found that on balance, the self-certification process did not comply with the requirements of the Digital Economy Act 2010, because of:

- 'The failure to impose standards for the gathering of evidence and an overall standard of evidence
- The self-certification process which merely requires a Qualifying Copyright Owner ('QCO') to state that in their reasonable opinion, their (or more likely, a third party's) procedures are effective in gathering accurate and robust evidence
- The lack of transparency resulting from the draft IOC not requiring that the evidence-gathering procedures used by the QCO are published or disclosed in the Copyright Infringement Report ('CIR')
- The lack of prior approval by Ofcom of the evidence-gathering procedures as self-certified in the Quality Assurance ('QA') report. Indeed, the lack of any need

⁵ [Online Infringement of Copyright and the Digital Economy Act 2010](#), Ofcom, May 2010, pg.19

for approval (whether prior or subsequent), as opposed to Ofcom's right to intervene'

On the basis that the Appeals Body is subject to principles of 'natural justice' on due process, the legal opinion also concluded that even if copyright owners were to self-certify compliance with standards set in the Initial Obligations Code, which would satisfy the requirements of the Digital Economy Act 2010, compliance with a standard approved pursuant to the Initial Obligations Code should in itself not lead to a presumption on appeal that a copyright infringement has taken place on an internet connection.

In addition to the legal opinion's view that the draft Initial Obligations Code did not meet the requirements of the Digital Economy Act 2010 on evidential provisions, the legal opinion also found that the draft Initial Obligations Code did not implement the burden of proof and grounds of appeal set out in the Digital Economy Act 2010 properly. In effect the provisions in the draft Initial Obligations Code created 'a real danger that they establish a default position that the self-certification by QCOs (namely, that in their reasonable opinion, their procedures are effective in gathering accurate and robust evidence) is sufficient evidence that a copyright infringement has occurred.' Lack of transparency in relation to how the evidence was gathered (information which the copyright owner only had to disclose to the subscriber on request), meant that evidence of infringement would only be capable of being properly tested on appeal. The legal opinion reiterated that it would be contrary to natural justice if a subscriber should have to second-guess the evidence that is to be used to determine that there appears to have been an infringement by means of the subscriber's internet connection. Natural justice requires a fair hearing, and as such the subscriber should have access to the same evidence that the copyright owner used to determine that there appears to have been an infringement of copyright by means of an internet connection.

The technical expert report found that Ofcom was in a position to set basic standards and requirements to ensure that copyright owners collect robust evidence of apparent copyright infringement on an internet connection by correctly identifying an IP address and the accurate time of the alleged infringement. The expert report, which we have now published, set out a range of standards which Ofcom should set in relation to alleged copyright infringement using peer-to-peer filesharing networks. The expert report concurred with the legal opinion, in recommending prior approval by Ofcom of evidence-gathering procedures. The collecting of evidence of infringement on peer-to-peer filesharing networks relies on untested technology, and has never been fully tested by a UK court. The legal opinion emphasised that it is well within the ability of Ofcom to assess the robustness and effectiveness of technological processes for determining online copyright infringement. If it cannot, Ofcom can appoint a competent independent party to benchmark such technological procedures.

Overall, Consumer Focus welcomes the fact that Ofcom has sought to address all the issues raised in the legal opinion. We also welcome Ofcom's explicit recognition that the Digital Economy Act 2010 imposes a legal duty on Ofcom to set a standard of evidence and make provisions on the means of obtaining evidence in the Initial Obligations Code. In relation to the new draft Initial Obligations Code we nevertheless still have a number of concerns, which we believe can be remedied by Ofcom. Our principal concern relates to the fact that Ofcom has opted to only require copyright owners only to have reasonable grounds to believe that an infringement has occurred on an internet connection, rather than believing so on the balance of probability. We are also concerned that in approving the evidence-gathering procedure of copyright owners, the draft Initial Obligations Code merely requires Ofcom to 'consider' whether the evidence gathered under the procedures submitted for approval give reasonable grounds to believe that an apparent copyright infringement has occurred on an internet connection.

In relation to how the draft Initial Obligations Code implements the burden of proof and the grounds for appeal, as mandated by the Digital Economy Act 2010, Consumer Focus is concerned about the way the draft Initial Obligations Code seeks to establish the grounds of appeal that the copyright owner or the ISP has contravened the Initial Obligations Code. In relation to transparency about the evidence-gathering procedure used to collect IP addresses, on the basis of which subscribers will be accused of copyright infringement, we welcome Ofcom's attempt to ensure that subscribers are aware of the procedures used. However, on a practical level, we believe Ofcom should make changes to the process. In light of the fact that subscribers will need legal and technical advice before bringing an appeal, Consumer Focus also believes that in order for the appeal to operate fairly, Ofcom should extend the time subscribers have to lodge a full appeal. Furthermore we are concerned that Ofcom has extended a right to copyright owners to appoint a representative body to handle appeals, but has not extended the same right to subscribers.

Consumer Focus is concerned that:

- Ofcom does not set the overall standard of evidence for copyright infringement report on the 'balance of probability', instead it has opted for the weaker 'reasonable grounds'
- Ofcom has not implemented the burden of proof requirements of the Digital Economy Act 2010 correctly, especially in relation to the ground for appeal that the copyright owner or ISP has contravened the Initial Obligations Code
- Ofcom does not give subscribers enough time to lodge a full appeal with all supporting documents
- Ofcom has extended a right to appoint a representative body for appeals to copyright owners, but not subscribers

Requirement to establish a standard of evidence for an apparent infringement on the 'balance of probability'

Consumer Focus welcomes the fact that Ofcom has thought to make a provision which establishes an overall standard of evidence in the draft Initial Obligation Code. Therefore seeking to give effect to the Digital Economy Act 2010 section 124E(2)(b) requirement to make such a provision. As such Ofcom has thought to remedy a significant deficiency of the last draft Initial Obligation Code it consulted on. Paragraph 4 of the draft Initial Obligations Code now provides that:

'Copyright Infringement Reports

Issue of copyright infringement reports

4.—(1) If a qualifying copyright owner wishes to send a copyright infringement report it must comply with the provisions of this Code.

(2) A qualifying copyright owner may only send a copyright infringement report to a qualifying ISP during a notification period if it complies with each of the two requirements in this paragraph.

(3) The first requirement is that—

(a) it has established an estimate in relation to that qualifying ISP and that notification period; and

(b) that estimate was provided to the qualifying ISP and to OFCOM in writing at least two months before the beginning of the notification period to which it relates, except in the case of the first notification period, when it must be so provided before such day as OFCOM may determine.

(4) The second requirement is that the qualifying copyright owner holds evidence gathered in accordance with procedures approved by OFCOM under paragraph 6 which gives reasonable grounds to believe that—

(a) a subscriber to an internet access service has infringed the owner's copyright by means of the service; or

(b) a subscriber to an internet access service has allowed another person to use the service, and that other person has infringed the owner's copyright by means of the service.

(5) A copyright infringement report made under sub-paragraph (1) must be sent to a qualifying ISP within the period of one month beginning with the day on which the evidence of the apparent infringement was gathered.

(6) A qualifying copyright owner must—

(a) send a copyright infringement report under this Code—

(i) by electronic means;

(ii) in a data format that the qualifying ISP can use to transfer that data electronically onto its electronic databases;

(b) present the information required under paragraph 5 in a uniform format in every copyright infringement report it sends.' (emphasis added)

Consumer Focus is satisfied that paragraph 4(1), (2) and (4) effectively establish an overall standard of evidence for copyright owners who wish to send CIRs, and that failure to comply with this overall standard of evidence can be effectively addressed by Ofcom as non-compliance with the Initial Obligations Code. The legal opinion we submitted explained that because copyright owners were merely required to self certify that in their reasonable opinion their procedures established robust evidence, Ofcom could have only enforced the Initial Obligations Code against copyright owners if it could have shown that at the time they were wrong to be of that opinion. Effectively Ofcom was left with nothing to enforce against. We believe that this issue has been effectively addresses in the new draft Initial Obligations Code.

Ofcom's new draft Initial Obligation Code furthermore ensures that copyright owners may only send CIRs if their procedures have received prior approval by Ofcom. Paragraph 6 of the draft Initial Obligations Code provides that:

'Procedures and reports

6.— (1) A qualifying copyright owner must establish and follow procedures for gathering and verifying evidence of copyright infringement which have been approved by OFCOM.

(2) Before the day on which a notification period begins, a qualifying copyright owner must give to OFCOM for approval a report providing details of—

(a) the procedures;

(b) the systems introduced by the qualifying copyright owner to ensure the application of these procedures in each case;

(c) if these systems include a regular audit or monitoring exercise, a description of these and the intervals at which they will occur; and

(d) any changes made by the qualifying copyright owner to these procedures and systems during the current notification period.

(3) A report given to OFCOM must be published by the qualifying copyright owner as soon as is reasonably practicable following delivery of the report to OFCOM in such manner as is appropriate to bring it to the attention of subscribers and internet service providers.

(4) A qualifying copyright owner may exclude confidential information from a report published pursuant to sub-paragraph (3).

(5) In deciding whether to approve the report, OFCOM must consider whether evidence gathered under the procedures and systems described will give reasonable grounds to believe that—

(a) a subscriber to an internet access service has infringed the owner's copyright by means of the service; or

(b) a subscriber to an internet access service has allowed another person to use the service, and that other person has infringed the owner's copyright by means of the service.' (emphasis added)

However, Consumer Focus believes that Ofcom has set the overall evidence standard for CIRs too low, by requiring that the evidence-gathering procedures give 'reasonable grounds to believe' that a copyright infringement has occurred on an internet connection. Consumer Focus is of the opinion that Ofcom must set the overall standard of evidence for CIRs on the 'balance of probability'. As such we are concerned that Ofcom has again not properly implemented section 124K(5) of the Digital Economy Act 2010. According to the legal opinion we submitted to Ofcom and DCMS, the first draft Initial Obligations Code also did not properly implement section 124K(5) of the Digital Economy Act 2010:

'As a preliminary point, I am concerned that the draft IOC does not properly implement s.124K(5) as it concerns burden and standard of proof. The phrase 'sufficient evidence' in paragraph 7.23 could be misinterpreted as meaning that it is only necessary for the QCO to establish evidence which would permit a reasonable tribunal to find that the alleged infringement was committed by means of the subscriber's internet access service. In my opinion it is clear that s.124K(5) requires that the IOC imposes the burden of proof on the QCO to show on the balance of probabilities that an apparent infringement was indeed an infringement and that such act related to the subscriber's IP address. In the absence of the QCO, or the ISP, proving this, s.124K(5) provides that the Appeals Body must determine an appeal on any ground in favour of the subscriber. In my view, the draft IOC fails to transpose these requirements clearly and unambiguously. It should be remembered that although characterised as an appeal, in reality the appeal is the Subscriber's *first* opportunity to prevent his or her inclusion in a CIR (which may lead to his or her inclusion in a Copyright Infringement List).'

⁶

Therefore Consumer Focus is concerned that section 124K(5) has not been properly implemented in this draft Initial Obligations Code in relation to the overall standard of evidence set. The explanatory notes to the Digital Economy Act 2010 state that in relation to the technical obligations 'the intention is that copyright owners would be held to the same standards of evidence of copyright infringement as for the initial obligations, and that the procedure for reporting infringement of copyright would be the same as well.'

⁷ This in itself places the onus on Ofcom to set the overall evidence standard on the 'balance of probability' in the Initial Obligations Code, rather than the legally weaker 'reasonable grounds'.

Adding to this, under the Initial Obligations Code, copyright owners are expected to take out Norwich Pharmacal orders against subscribers on the copyright infringement list, and

⁶ Guy Tritton, Legal opinion on Digital Economy Act evidential standard requirements, 18 April 2012, para 80

⁷ [Digital Economy Act explanatory notes](#), para.38

take subscribers to court for civil copyright infringements. In court, copyright owners would have to prove on the balance of probability that an internet connection has been used to infringe copyright, and in turn that an individual has committed the alleged infringement. When copyright owners take out Norwich Pharmacal orders, they must persuade the court that there are, at least, arguable grounds for supposing that an actionable wrong has been committed. Consumer Focus does not believe that it is acceptable that consumers should have technical measures imposed on them on the basis of an evidence standard which is not sufficient to obtain a finding of copyright infringement, and is merely sufficient to obtain a disclosure order from a court which would allow copyright owners to contact a subscriber under the pre-action protocol. Being placed on a 'copyright infringement list' under the Initial Obligations brands the subscriber as a repeat infringer, and under the technical obligations makes the subscriber subject to technical enforcement action. This is even if it has never been proven in court that the subscriber, or anybody else in the household, has committed an infringement. Therefore Ofcom must set the overall standard of evidence on the 'balance of probability'.

There are also a number of Government statements which support the argument that the overall standard should be set on the 'balance of probability', not the much weaker 'reasonable grounds'. The last consultation before the bill was laid before Parliament stated 'The standard of evidence required from rights holders should, as a minimum, establish an infringement on the balance of probabilities.'⁸ The standard of evidence was discussed at length during the passage of the Digital economy Bill in the House of Lords. Lord Young, on behalf of the Government reassured the Lords that:

'I recognise that the apparent infringements are not tested and proved to court standards. It will not be possible at the time the copyright infringement report is made to be able to declare with legal certainty that an infringement has occurred or that the IP address in the reports was responsible. Given this, clearly it is of the utmost importance that the standards of evidence surrounding the identification of both the infringement and the IP address of the infringing account should be as high as possible. I certainly concur with the points that the noble Lord, Lord Clement-Jones, made in relation to the standard of evidence and not presuming this is an open-and-shut case; and indeed with the point that the noble Lord, Lord De Mauley, made about speculative allegations-in other words, what is important is the standard of proof and evidence.

New subsection (3) in Clause 4 already expressly recognises that the infringement described in a copyright infringement report is, as the noble Lord, Lord De Mauley, reminds us, only 'apparent'. Equally I think that the copyright infringement reports amount to more than mere allegation. New paragraph (b) requires the copyright infringement report to include, 'a description of the apparent infringement', as well as evidence that shows the subscriber's IP address and the time at which the evidence was gathered, so that there will be-I stress this-a clear and robust audit trail. The CIR will also have to comply with any other requirements imposed by the code to be approved by Ofcom. We provided last week an outline draft code that will help to give the Committee an idea of what the code will cover.

All this will require the copyright owner to have rather more confidence in, and evidence of, the existence of the infringement and the IP address of the infringing account than is implied by the term 'allegation' or even the words, 'in the reasonable opinion of'.⁹

Consumer Focus is also concerned that upon closer reading of paragraph 6(5), Ofcom, in approving the evidence-gathering procedures, merely has to 'consider', among other things, whether the procedures will give reasonable grounds to believe that an infringement has been committed on an internet connection. This provision, in our view,

⁸ [Consultation on legislation to address illicit peer-to-peer \(p2p\) filesharing](#), Department for Business, Innovation and Skills, 2009, pg.16

⁹ [Digital Economy Bill](#) HL Deb, 12 January 2010, c441

significantly weakens the overall evidence even further. We therefore recommend that Ofcom amend the draft Initial Obligations Code paragraph 4 and 6. Paragraph 4(4) should be amended to read:

‘The second requirement is that the qualifying copyright owner holds evidence gathered in accordance with procedures approved by OFCOM under paragraph 6 which it believes on the balance of probability establishes that— ‘

And paragraph 6(5) should be amended to read:

‘OFCOM shall not approve the report, unless the evidence gathered under the procedures and systems described will on the balance of probability establish that— ‘

Consumer Focus recommends that:

- Ofcom amends paragraph 4(4) and 6(5) to impose an overall evidence standard for copyright infringement reports on the balance of probability – being the civil standard
- Ofcom amends paragraph 6(5) so that Ofcom may only approve evidence-gathering processes which demonstrate that on the balance of probability an infringement has been committed on an internet connection

Burden of proof when appealing contraventions of the Initial Obligations Code

In relation the subscribers’ right to appeal a CIR on the basis that the copyright owner or the ISP has contravened the Initial Obligations Code, Consumer Focus is concerned about the way in which Ofcom has thought to implement the Digital Economy Act 2010 requirements. The ‘contravention of Initial Obligations Code’ ground for appeal is mandated by the Act, which states in section 124K(4) that:

‘The code must provide for the grounds of appeal to include contravention by the copyright owner or internet service provider of the code or of an obligation regulated by the code.’

Ofcom has implemented this ground of appeal in paragraphs 25 and 29 of the draft Initial Obligations Code, which provides that:

‘Grounds of appeal

25. The grounds of appeal which may be advanced by a subscriber are that—

(a) the apparent infringement to which a copyright infringement report relates was not an infringement of copyright;

(b) the copyright infringement report did not relate to the subscriber’s IP address at the time of the apparent infringement;

(c) the act constituting the apparent infringement to which a copyright infringement report relates was not done by the subscriber and the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service; or

(d) there was a contravention of this Code or an obligation regulated by this Code by either a qualifying copyright owner or a qualifying ISP.’ (emphasis added)

And:

‘Determination of Subscriber Appeals

29.—(1) An appeal on any grounds must be determined in favour of the subscriber unless, as respects any copyright infringement report to which the subscriber appeal

relates or by reference to which anything to which the appeal relates was done (or, if there is more than one such report, as respects each of them)—

(a) the qualifying copyright owner shows that the apparent infringement was an infringement of copyright; and

(b) the qualifying ISP shows that the copyright infringement report relates to the subscriber's IP address at the time of the infringement.

(2) An appeal on any grounds must be determined in favour of the subscriber if the subscriber shows that—

(a) the act constituting the apparent infringement to which the copyright infringement report relates was not done by the subscriber; and

(b) the subscriber took reasonable steps to prevent other persons infringing copyright by means of the internet access service.' (emphasis added)

We are concerned that Ofcom has, in the draft initial Obligations Code, applied the section 124K(6) burden of proof provisions of the Digital Economy Act 2010 (see in paragraph 29(2) of the draft Initial Obligations Code) to an appeal which is brought on the basis that a copyright owner or ISP has contravened the Initial Obligations Code. What this means in practice, is that even where a copyright owner or ISP have contravened the Initial Obligations Code, the appeals body's decision to uphold the appeal would be subject to the subscriber showing that they did not commit the alleged infringement, and took reasonable steps to prevent others from infringing on their internet connection.

If a copyright owner has contravened the Initial Obligations Code, for example by using an evidence-gathering process that was not approved by Ofcom, it should not matter whether the copyright owner has correctly identified an apparent infringement on the subscriber's connection. And neither should the subscriber be asked to prove that they did not commit the alleged infringement and took reasonable steps. If the Appeals Body finds that a copyright owner has contravened the Initial Obligation Code, the appeal should be upheld. Any contravention of the Initial Obligations Code should be treated with the upmost seriousness, and Ofcom should ensure that the Appeals Body can, once it has found a contravention of the Initial Obligations Code, uphold the appeal without any further consideration for whether the subscriber can disprove the copyright owners' allegation.

Consumer Focus notes that the burden of proof requirements of section 124K(6) in the Digital Economy Act 2010 does not apply to the grounds of appeal that the copyright owner or ISP have contravened the Initial Obligations Code. Ofcom has made the decision to apply this burden of proof requirement to the contravention of Initial Obligations Code ground of appeal. We believe that Ofcom's proposal puts the Appeals Body and subscribers in the difficult position where contravention of the Initial Obligation Code per se is not an automatic reason for upholding an appeal. The Digital Economy Act 2010 does allow Ofcom to provide that a contravention of the Initial Obligation Code means that an appeal should be automatically upheld. Short of that, Ofcom should not apply the burden of proof requirements for subscribers to this ground of appeal. Therefore Ofcom should amend paragraph 29(2) to start with the following wording:

'Where a ground mentioned in paragraph 25(a), (b) and (c) is relied on, an appeal on any grounds must be...'

In relation to the burden of proof requirements for copyright owners and ISPs, Consumer Focus also notes that Ofcom has not implemented these properly. The Digital Economy Act 2010 provides that:

'(5)The code must provide that an appeal on any grounds must be determined in favour of the subscriber unless the copyright owner or internet service provider shows that, as respects any copyright infringement report to which the appeal relates or by reference to which anything to which the appeal relates was done (or, if there is more than one such report, as respects each of them)—

- (a) the apparent infringement was an infringement of copyright, and
- (b) the report relates to the subscriber's IP address at the time of that infringement.'

While Ofcom has implemented this provisions as follows in the draft Initial Obligations Code:

'29.—(1) An appeal on any grounds must be determined in favour of the subscriber unless, as respects any copyright infringement report to which the subscriber appeal relates or by reference to which anything to which the appeal relates was done (or, if there is more than one such report, as respects each of them)—

- (a) the qualifying copyright owner shows that the apparent infringement was an infringement of copyright; and
- (b) the qualifying ISP shows that the copyright infringement report relates to the subscriber's IP address at the time of the infringement.' *(emphasis added)*

Consumer Focus believes that this amendment to the burden of proof possibly contravenes the Digital Economy Act 2010. On a practical basis, we are not convinced that Ofcom should only require the ISP to show that the CIR relates to the subscriber's IP address at the time of the apparent infringement. The Digital Economy Act 2010 actually provides that an appeal must be upheld, unless the copyright owner **or** the ISP show that the CIR relates to the subscribers IP address. As Richard Clayton has outlined, copyright owners may have identified an IP address correctly, but not recorded the time of the alleged infringement correctly. If this is the case, an ISP, which correctly matches the IP address at the time of the alleged infringement to subscriber details, would identify the wrong subscriber.

Therefore it is absolutely critical that the copyright owner establishes on the balance of probability to the Appeals Body that the right IP address was identified and the time of the alleged infringement was accurately recorded by the logging and detection software. It is also critical that the ISP establishes on the balance of probability that it has correctly matched an IP address at the time provided to them by the copyright owner. But under Ofcom's proposals the Appeals Body is unable to ask the copyright owner to show that they have correctly identified an IP address and accurately recorded the time of the alleged infringement. We do not believe that that this is in line with what the Digital Economy Act 2010 requires. Therefore Ofcom should reword paragraph 29(1)(a) and(b) to that they accurately reflect the burden of proof which the Digital Economy Act 2010 mandates.

Consumer Focus recommends that:

- Ofcom amends paragraph 29(2) of the draft Initial Obligations Code should be amended so it does not apply to appeals which are brought on the basis that the copyright owner or the ISP has contravened the Initial Obligations Code
- Ofcom amends paragraph 29(1) so that it implements the requirements of the Digital Economy Act 2010 correctly, and specifically requires copyright owners and ISPs to show that a copyright infringement report relates to the subscriber's IP address at the time of that infringement

Subscribers' right to appeal – transparency, time to lodge an appeal and representative bodies

In relation to transparency, namely the right of the subscriber to know on the basis of which evidence, and evidence-gathering processes, they are accused of copyright infringement, we welcome Ofcom's effort to establish transparency. However, we have some concerns about the practicality of Ofcom's proposal. In principle Ofcom provides that the copyright owner must publish the report, which outlines the evidence-gathering procedures approved by Ofcom. Ofcom then provides in paragraph 5(1)(e) that a CIR, and in turn a notification (paragraph 16(1)(c)), must include:

‘a description of the apparent infringement(b) and the evidence gathered of that apparent infringement, including information which would enable the subscriber to identify the means used to obtain evidence of the infringement of the copyright work;’

Consumer Focus does not understand why the subscriber is not send the full report, which Ofcom has approved. Alternatively the CIR and notification could include a link to the report, which outlines the evidence gathering procedure on the basis of which the CIR was issued. We also believe that the paragraph 6(3) requirement is in practice unworkable. It provides that:

‘(3) A report given to OFCOM must be published by the qualifying copyright owner as soon as is reasonably practicable following delivery of the report to OFCOM in such manner as is appropriate to bring it to the attention of subscribers and internet service providers.’

Before copyright owners have issued CIRs, when they must publish the report, they are hardly in a position to publish it in such a manner as to bring it to the attention of the subscribers who will be notified in the future. It would be more appropriate for the CIR and the notification to reference the appropriate report, which outlines how the evidence included in the CIR was gathered. This would mean the appropriate report is brought to the attention of the ISP and the relevant subscriber. It would also take account of situations where year on year the copyright owners change their evidence-gathering procedures – because it would link any CIR or notification in the system to the relevant report. Using the approved and published report as central reference point would furthermore guard against a situation where the description in the CIR and notification of the evidence-gathering processes, which is currently mandated by the draft Initial Obligations Code, does not fully or accurately summarise the processes outlined in the report.

The accused subscriber should have access to the report as approved by Ofcom. Under Ofcom’s proposals the CIR and notification may only contain a description of the evidence-gathering processes, but not necessarily a link to the full report. Consumer Focus also notes that there continue to be Digital Economy Act 2010 scams. Indeed Ofcom has recently issued another fraud warning in relation to emails claiming that subscribers have to pay a fine under the Digital Economy Act 2010. There is no indication that such scams will stop once the Initial Obligation Code is in force. Therefore Ofcom should consider publishing all approved reports on the Ofcom website, and as such provide an authoritative list of the copyright owners who can issue CIRs under the Act. This would allow consumers who receive notifications under the Digital Economy Act 2010 to check whether the copyright owner has the right to send CIRs under the scheme.

If Ofcom was to publish the approved reports on its own website, the CIRs and notifications could simply provide a link to the relevant report. We believe that this would ensure maximum transparency to subscribers, and it would help Ofcom to address attempts to defraud consumers with reference to the Digital Economy Act 2010. Therefore Ofcom should amend the draft Initial Obligation Code so that CIRs and notifications link to the relevant report, which outlines the approved evidence-gathering procedures on the basis of which the CIR was issued by a qualifying copyright owner.

In relation to transparency, we are furthermore concerned that paragraph 6(4) of the draft Initial Obligations Code allows copyright owners to ‘exclude confidential information from a report published pursuant to sub-paragraph (3).’ We are concerned that because the British Phonographic Industry (BPI) and Motion Picture Association of America (MPAA) have in the past argued that just about any information relating to their evidence-gathering processes is confidential, copyright owners will remove information which the subscriber should have access to. As Dr Richard Clayton has explained:

'87. If subscribers are taken to court for copyright infringement there are likely to be applications to the courts to have independent experts review the monitoring systems to assess whether their design, implementation and operation can be relied upon to produce valid results.

88. Therefore, monitoring systems should be designed in such a way as to clearly distinguish between:

- information that needs to be kept entirely secret – such as the IP addresses from which the monitoring is done, which if ever disclosed would render the monitoring ineffective;
- information that is merely proprietary – such as the system source code, whose disclosure could assist unscrupulous competitors, but that court appointed experts might reasonably be permitted to inspect;
- and, information which provides part of the trail of evidence that demonstrates that monitoring has been correctly performed. There should be no objection to providing this information to subscribers who are notified that their internet connection is believed to have been used for copyright infringement through peer-to-peer file sharing.¹⁰

Therefore copyright owners should only be allowed to exclude information from the report before publication which needs to be kept secret to maintain the effectiveness of the monitoring and proprietary information. In terms of subscribers' right to transparency and due process, it is absolutely critical that they are provided with all relevant information about how the evidence on the basis of which they are accused was gathered. Copyright owners have not shown themselves to be willing to ensure transparency, and even argued that their evidence-gathering procedures should be accepted by the Appeal Body as robust, without further scrutiny. Consumer Focus believes that copyright owner should only be allowed to remove information from the published report as directed by Ofcom. Therefore paragraph 6(4) should be amended to read:

'(4) A qualifying copyright owner may only exclude information as directed by Ofcom from a report published pursuant to sub-paragraph (3).'

Consumer Focus is furthermore concerned that Ofcom is not giving subscribers enough time to lodge a full appeal. Ofcom is proposing that a subscriber has 20 working days to submit a full appeal, with all supporting documents, as per paragraph 26(3). We note that in *Golden Eye International versus Telefonica UK* (2012) the High Court ruled that 28 calendar days are appropriate for an ordinary consumer to respond to an allegation of copyright infringement under the Pre-Action Protocol. 20 working days are practically equivalent to 28 calendar days, however, under the pre-action protocol subscribers are not expected to file a full response to an accusation of copyright infringement. Subscribers can, if necessary, ask the copyright owner for more information, or alternatively send a holding message, acknowledging receipt and stating that they will fully respond at a future date after they have obtained legal advice. This system takes account of the fact that a full response may require information which the copyright owner has not provided up front, or alternatively, that the subscriber may require additional time to obtain legal advice. A subscriber is likely to require technical and legal advice to come to a decision on whether they want to appeal a notification, and to put together the supporting documents for such an appeal. Therefore we believe Ofcom should provide subscribers with 20 working days to declare their intent to appeal a notification, from the day they received the notification. Ofcom should provide a further 20 working days for the subscriber to lodge all the supporting documents with the appeals body.

¹⁰ Richard Clayton report

In relation to subscriber appeal, and the possibility of the subscriber receiving assistance from a consumer body, such as Citizens Advice, to appeal a notification, we are concerned that Ofcom has decided to give copyright owner the right to appoint a representative body for the purpose of appeals, but has not extended the same right to subscribers. Paragraph 27(4) reads:

‘(4) Any written submissions made by a qualifying copyright owner pursuant to sub-paragraph (3) must include a statement by the qualifying copyright owner or a person authorised by the qualifying copyright owner for such purposes that the information contained in the submissions is true to the best of that person’s knowledge and belief and may include—’ [emphasis added]

Under the Digital Economy Act 2010, the ‘qualifying copyright owner’ is either a copyright owner as per the Copyright, Designs and Patents Act 1988, or alternatively ‘someone authorised by that person to act on the person’s behalf’. However, in paragraph 27(4) of the draft Initial Obligations Code, Ofcom introduced the possibility of another representative body, authorised by the qualifying copyright owner, responding to appeals. We do not understand why Ofcom believes this is necessary or appropriate. Or why Ofcom does not extend the right to appoint a representative body for appeals to consumers. Unlike the BPI and MPAA, which will in all likelihood act on behalf of their members as ‘qualifying copyright owners’, subscribers do not have the benefit of an in-house legal team or technical expert consultants. Consumers are already put at a disadvantage by having to disprove allegations by copyright owners, and will face the difficult task of finding reliable and affordable legal and technical advice. In reality the Appeals Body, and the entire process, do not ensure equality of arms. If anything, it should be subscribers who are given the right to appoint a representative body for the purpose of appeals. Consumer Focus strongly recommends that Ofcom remove this provision from paragraph 27. Furthermore, if Ofcom feels inclined to ensure equality of arms, it should extend the right to appoint a representative body for the purpose of appeals to subscribers.

Consumer Focus recommends that:

- Ofcom amends paragraph 6(4) should be amended to so that the qualifying copyright owner may only exclude information as directed by Ofcom from a report outlining evidence-gathering processes approved by Ofcom
- Ofcom amends paragraph 26(3) should be amended to provide subscribers with 20 working days to declare their intent to appeal a notification, and a further 20 working days to lodge all the supporting documents with the appeals body
- Ofcom amends paragraph 27(4) should be amended to remove the right of the qualifying copyright owner to appoint a representative body for appeals. Instead Ofcom should consider extending such a right to subscribers, to ensure equality of arms

Lack of legal certainty in relation to reasonable steps

Consumer Focus is concerned that Ofcom has decided to not define reasonable steps in this draft Initial Obligations Code. A wide range of stakeholders, who may be regarded as subscribers if they receive internet access from what will be one of the six qualifying ISPs, have made submission on this issue when Ofcom last consulted on the draft Initial Obligations Code. Ofcom acknowledges this in the notice, however it has decided against providing legal certainty about what may constitute reasonable steps in this draft Initial Obligations Code. Ofcom explains in its notice that:

‘7.44 A number of respondents asked for specific detail on the definition of ‘reasonable steps’ taken to prevent others infringing copyright using a subscriber’s connection. In relation to the appeals process, the draft Code sets out a framework in paragraph 27 for the handling of subscriber appeals by the appeals body but it is for the appeals body to determine its rules of procedure within this framework. Those rules will be subject to approval by Ofcom. The determination of appeals is also for the appeals body, subject to the requirements of the DEA provisions, which we describe in paragraphs 7.26 and 7.27 above. Section 124K(2)(c) CA03 requires that the appeals body is independent of Ofcom as well as copyright owners and ISPs in relation to the determination of subscriber appeals. Therefore Ofcom cannot direct or seek to influence the appeals body as to how it should determine substantive issues, such as the actions which amount to reasonable steps for the purposes of s.124K(6) CA03, which may come before it.

7.45 We have, however, included a provision in the draft Code that requires the appeals body to issue guidance on its approach to the determination of subscriber appeals and to publish a summary of its findings from time to time. This requirement should allow the appeals body to indicate clearly to subscribers, copyright owners and ISPs how it will approach the determination of appeals and to develop a bank of precedent which will assist in this process.

7.46 Several respondents commented in particular on the need for guidance on the status of open Wi-Fi networks run by subscribers. We have set out in Annex 5 to this Interim Statement our understanding of the relevant definitions in the DEA provisions. However, ultimately, the application of the DEA provisions to open Wi-Fi networks is likely to be an issue that the appeals body will be required to determine.’¹¹

Consumer Focus notes that the draft Initial Obligations Code in paragraph 23 only requires that:

‘(2) The appeals body must prepare and publish guidance on its approach to the determination of subscriber appeals in advance of the first notification period.’

While, as the Ofcom notice states, such a provision would allow the Appeals Body to issue guidance on reasonable steps, the draft Initial Obligations Code does not require the Appeals Body to issue guidance on reasonable steps. Ultimately this means that the entire notification scheme may go operational without any binding or authoritative guidance on reasonable steps. Consumer Focus believes that Ofcom needs to mitigate the chilling effect on internet access provided to consumers by WiFi providers,

¹¹ [Ofcom notice – Online Infringement of Copyright and the Digital Economy Act 2010](#), Ofcom, June 2012, pg.76

businesses and public bodies that would result from lack of guidance on reasonable steps. Ofcom should provide legal certainty in the Initial Obligations Code, particularly in relation to open WiFi.

Consumer Focus and Article19 intervened in the judicial review of the Digital Economy Act on behalf of consumers, who risk being denied essential internet access because of the lack of legal certainty in the Digital Economy Act. We submit our intervention as part of this consultation response, in the Annex. Central to our submission was the concern about subscribers not knowing what reasonable steps they could or should take to prevent others from using their internet connection. There is not even an indication as to what steps the Appeals Body is likely to accept as 'reasonable'. Among others, our submission to the Administrative Court relied on submissions libraries and businesses made to Ofcom when it consulted on a draft Initial Obligations Code in May–July 2010. Consumer Focus is concerned that Ofcom, in this draft Initial Obligations Code, has not addressed the concerns of businesses or public bodies, and thus failed to mitigate the likely chilling effect on internet access provision to consumers.

Consumer Focus and Article19 submitted to the Administrative Court that:

'35. Unlike under existing copyright law, subscribers will be liable under the DEA for inclusion on a CIL for 'apparent infringements' of copyright carried out by third parties even if the infringement was made without their knowledge or authorisation. The subscriber's appeal against inclusion on a CIL in such circumstances requires the subscriber to establish that the infringement was not carried out by the subscriber and that the subscriber had taken reasonable steps to prevent it: see s.124K(6). The burden of proof has been reversed, with the copyright owner now absolved of proving an infringement by a given person (as they would have to do under the 1988 Act) but able to rely on the fact that a link has been made between an apparent infringement and an IP address.

36. If the IP address and subscriber can be linked, the subscriber is then called upon to prove a negative – namely that he did not carry out the apparent copyright infringement. It is notoriously difficult for any person to prove a negative and the situation of subscribers whose internet access has been used by third parties is no exception. Short of providing definitive proof that the subscriber has not used his internet connection at the material time it is very difficult to see how this burden could be discharged. The third party, whether a person using a subscriber's open WiFi without his knowledge, a teenage son engaging in peer-to-peer file-sharing in his bedroom or a student using the campus computer, is hardly likely to volunteer his involvement in the apparent infringement to the subscriber.'¹²

Dr Richard Clayton, in his expert report on online traceability confirmed this legal analysis from a technical perspective. He concluded that subscribers, be they consumers, businesses or public bodies will not be able on a technical basis to establish which machine, or which individual, is responsible for a copyright infringement that has been identified to have occurred on an internet connection. Neither will the subscriber be able to prove on a technical level that it was not their computer, or themselves as a person, who committed the copyright infringement. This puts the subscriber at a significant disadvantage in relation to subscriber appeals, though the subscriber may be able to establish by non-technical means that they did not commit the alleged infringement. For example if they can show that they were not at home at the time of the alleged infringement, in the case of a domestic household, or in the case of a library, if the infringement occurred on an internet connection used by members of the public, rather than the staff of the library.

However, as our submission to the judicial review outlines, in the absence of any guidance on what reasonable steps a subscriber should take to prevent others from

¹² Consumer Focus/Article19 intervention

infringing in order to win an appeal against a CIR, subscribers face significant legal uncertainty and don't know how to regulate their conduct. Consumer Focus and Article 19 submitted to the Administrative Court that:

'38. But even if the subscriber was able to discharge the burden of proof by showing that he did not carry out the infringement himself, this is not sufficient; he must also show that he took 'reasonable measures' to prevent it: see s.124K(6). The term 'reasonable measures' under s. 124K(6) is therefore of crucial importance under the DEA, as it is potentially determinative of which subscribers will find themselves included on copyright infringement lists and hence relevant subscribers for the purpose of technical measures. But 'reasonable measures' is nowhere defined in the Act, not even by reference to any factors that a court should take into account when making that judgment. Neither is the term 'reasonable measures' defined by OFCOM in the Draft Initial Obligations Code.

39. It is submitted that the absence of any definition of 'reasonable measures' results in a lack of legal certainty – the procedures that have been adopted are not predictable and foreseeable by those to whom they are applied. The Act provides for two types of appeals: an appeal to an appeals body for inclusion on a CIR and an appeal to an appeals body, and thereafter to a First-tier Tribunal, in cases involving technical measures. But the Act gives no indication at all as to the factors that the appeals body and/or the First-tier Tribunal would take into account when determining what a 'reasonable measure' might be for the purpose of appeals against inclusion on a copyright infringement list or in respect of technical measures being imposed on the subscriber, including the suspension of internet access. Hence the contested provisions render the circumstances under which individuals and organisations will incur liability under the Act highly uncertain. Subscribers providing internet access to other individuals in their household or those in the immediate surroundings through Open WiFi do not know how to regulate their conduct so as to protect themselves against potential liability and technical measures.'¹³

Ultimately, subscribers whose internet connection has been used by other people to infringe copyright without their knowledge or authorisation lack clear and adequate safeguards to prevent themselves from being labelled as infringers. They are unable to regulate their conduct so as to protect themselves against potential liability, and technical measures further down the line. Ofcom appears to have come to the conclusion that it cannot provide guidance on what reasonable steps subscribers may take to prevent others from infringing. However, in response to our submission Mr Eadie QC made the following oral submission on behalf of the Government to the Administrative Court:

'MR EADIE: Indeed, those notifications and other 25 accompanying educational measures are likely to play a pretty important role in removing the uncertainty or any uncertainty about what is or might be thought to be legal and illegal. As far as the risks of use by others is concerned, again, at the moment, all that is being envisaged is that the subscribers themselves, whether family, library or otherwise, simply have to take reasonable steps to prevent infringements by others. (inaudible) going to assume that that is going to require people to engage in great expense and to approach strangers to monitor their internet use and so on. Can I just give you a reference so far as the treatment of open WiFi networks like libraries and so on is concerned, see Rachel Clark's second witness statement, paragraphs 10 to 11. Finally, in relation to that, if there turns out to be genuine uncertainty and difficulty about the concept of what reasonable steps might require, that could, if necessary, be dispelled by provisions in the code. There is no difficulty with that sort of clarification going in the code.

¹³ Consumer Focus & Article 19 intervention, [British Telecommunications Plc & Anor, R \(on the application of\) v The Secretary of State for Business, Innovation and Skills](#) [2011] EWHC 1021 (Admin) (20 April 2011)

MR JUSTICE PARKER: The tribunal, presumably, will say develop some principles --

MR EADIE: Of course it will become clear over time, but if there are difficulties which you do not anticipate there will be, they can be clarified.

MR JUSTICE PARKER: Yes. I think the general thrust here is that there is a recognised phenomenon if you introduce something like this, that certain individuals or enterprises will be, perhaps, unduly risk averse. This is the overkill effect. The WiFi cafe that says, 'I want to make absolutely sure that we do not get any letters like this'. So it's that overkill.

MR EADIE: My Lord, of course --

MR JUSTICE PARKER: I think it was suggested that that sort of overkill effect had not been taken into account or sufficiently taken into account before the measure -

MR EADIE: My Lord, the time for taking it into account is in developing reasonable steps.

MR JUSTICE PARKER: Mm-hm.

MR EADIE: It is very difficult to see how one can castigate any provision that requires reasonable steps to be taken. The reality is that, if there is serious concern along those lines, and people who would otherwise do it are dissuaded from doing it, then no doubt the code can make clear what is and isn't reasonable in this context. And it may vary depending upon who you are. What is a reasonable step for a parent may be different to what a reasonable step is for a library or an internet cafe or something. But that is not a mechanism for asserting disproportionality of the legislation. All the legislation does is to require that there should be, as it were, a defence to what would otherwise be -- or provides in the appeal rights, as you have seen them.¹⁴

But the draft Initial Obligations Code as notified by Ofcom does not provide guidance on reasonable steps, and neither does it place a positive obligation on the Appeals Body to provide such guidance. Consumer Focus believes that this is a significant shortcoming, and we will formally write to the Secretary of State, advising that the Initial Obligations Code as drafted should not be approved, and that Ofcom should be directed to provide guidance on reasonable steps in the Initial Obligations Code with a view to provide legal certainty to subscribers.

Consumer Focus is concerned that:

- the draft Initial Obligations Code does not provide guidance on reasonable steps, and neither does it require the Appeals Body to issue such guidance
- Ofcom has not responded to the concerns voiced by a wide range of stakeholders who will be regarded as subscribers; under the Act, and that the draft Initial Obligation Code will create significant legal uncertainty for consumers, business and public bodies which provide internet access, and in particular for open WiFi providers

Consumer Focus recommends that:

- Ofcom provides legal certainty in the Initial Obligations Code, particularly in relation to open WiFi providers, by defining reasonable steps or providing guidance on reasonable steps

¹⁴ **British Telecommunications Plc & Anor, R (on the application of) v The Secretary of State for Business, Innovation and Skills** [2011] EWHC 1021 (Admin) (20 April 2011)
Hearing transcript day 3, para 120-122

Lack of legal certainty and proportionality in relation to WiFi providers, businesses and public bodies which provide internet access to consumers

Our submission focuses in large part on the provision of internet access to consumers through private and public intermediaries because there is a significant risk of a chilling effect on internet access provision to consumers. As previously mentioned, we intervened in the judicial review of the Digital Economy Act on behalf of consumers, who risk being denied essential internet access because of the lack of legal certainty in the Digital Economy Act. Our submission related to the legal certainty arising from the lack of guidance on what reasonable steps a subscriber could take to prevent others from infringing, as well as the lack of certainty over whether WiFi providers, businesses and public bodies which provide internet access are ‘subscribers’ or ‘internet service providers’ under the Act. Consumer Focus and Article19 submitted that:

‘40. Another area of legal uncertainty of particular concern to public intermediaries and those providing open WiFi is the question of whether they meet the definition of ‘internet service provider’ or of ‘subscriber’ under s.124N of the Act. The material definitions are as follows:

‘internet service provider’ means a person who provides an internet access service;

‘internet access service’ means an electronic communications service that—

- (a) is provided to a subscriber;
- (b) consists entirely or mainly of the provision of access to the internet; and
- (c) includes the allocation of an IP address or IP addresses to the subscriber to enable that access;

‘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;’

41. In the simple model of an individual subscriber with a static IP address who has contracted for services from a commercial internet service provider these definitions give rise to little difficulty. But in the case of a public intermediary, such as a library or a university, these definitions are highly problematic, as it would seem that they could qualify as both internet service providers and subscribers under the above definitions, as they are both providers of internet access services to third parties and recipients of such services under their contracts with commercial internet service providers. If public service intermediaries were to be defined as subscriber or ISPs, with all the obligations that follow under the Act, the costs implications would be highly significant, all the more so at a time of public spending cuts.

42. In the absence of legal certainty in respect of the definition of ISP and its application to public service intermediaries under the Act it was left to OFCOM to provide some clarity to these definitions so that the position of public service intermediaries was clear. OFCOM's pragmatic solution in the Draft Initial Obligations Code was that the Code should apply in the first instance only to ISPs with more than 400,000 subscribers. If this position is maintained and public service intermediaries are classified as ISPs for the purpose of the Act, it would appear that most public service intermediaries will not be classed as qualifying ISPs under the Act initially. However, OFCOM has stated that it will review on a regular basis whether to extend coverage of the Code, so the legal uncertainty would persist.

43. The consequence of these developments is again clear spelt out in the submissions of the British Library to OFCOM, 'We are very concerned that there is a high risk that public intermediaries like libraries, universities, local authorities, museums and schools will incur significant and disproportionate costs in 'second guessing' what obligations and responsibilities will be required of them. Having spoken to public library employees many are concerned that in a period of fiscal restraint the confusion created by the Act may lead some local authorities to evaluate the pros and cons of continuing to offer internet services to their users. Clearly any decision to withdraw services would have grave implications for the local community as well as the government's digital inclusion agenda.'¹⁵

Consumer Focus and Article 19 also submitted that:

'46. Bringing public service intermediaries within the scope of the DEA is itself disproportionate. There is no evidence that there are significant levels of copyright infringement across public intermediary networks; on the contrary, what evidence is available suggests that there is minimal copyright infringement on such networks. The problem is compounded by the legal uncertainties surrounding the definitions of ISP and subscribers in this context, as well as the uncertainties over what constitutes 'reasonable measures'.¹⁶

In response to our submission, and that of other stakeholders, Rachel Clarke, the civil servant responsible for the implementation of the Digital Economy Act 2010 made the following submission to the Administrative Court on behalf of the Government:

'10. Andrew Heaney claims that open WiFi networks will not be exempt from the Initial Obligations. The important issue to open WiFi networks will be affected by the Initial Obligations provisions is not specified by the Act. That is because it will be dealt with by the as yet unpublished Initial Obligations Code, rather than the primary legislation under review in the present claim.

11. However, notwithstanding the uncertainty until the Initial Obligations Code comes into effect, although libraries and other such open WiFi providers are not exempt in principle from the legislation, their position will be carefully considered by Ofcom in drawing up the Code. As I have indicated previously, the Secretary of State is highly unlikely to approve any Code that did not take the position of such bodies into account. It is also worth noting that there is no necessity in principle that public WiFi networks or any other institution should be formally exempt – in either the Act or the Code – in order for the details of the Code to render them out of scope of the Initial Obligations. We are clear in our understanding that the intentions of Ofcom in this area are that such bodies will not be considered to be subscribers for

¹⁵ Consumer Focus & Article 19 intervention, [British Telecommunications Plc & Anor, R \(on the application of\) v The Secretary of State for Business, Innovation and Skills](#) [2011] EWHC 1021 (Admin) (20 April 2011)

¹⁶ Ibid

the purpose of the Act and that they will be highly likely to fall below the subscriber number threshold for ISPs that will be set in the first Initial Obligations Code.¹⁷

This section of her witness statement was referred to by Mr Eadie QC, who acted on behalf of the Government during the judicial review (see quote above). On the basis of the reassurances the Administrative Court received from the Government that Ofcom would provide legal certainty to WiFi providers, and public intermediaries such as libraries, in the Initial Obligations Code, the Administrative Court concluded in relation to the concerns raised in our submission that:

'Returning to the more general point, I accept that the 'chilling effect' is now a well documented phenomenon, and I acknowledge that the concerns of the Interveners are genuine and that there is in the present context a risk of some chilling effect. The difficulty again is to assess, at this stage, the likely magnitude of such an effect. I must bear in mind that the measures are not yet even operative, and no experience has been accumulated of their effects in practice. It is also expected that the Code will deal explicitly with the position of such subscribers as libraries and internet cafés so that the regulation works fairly and reasonably. Furthermore, the regulatory regime can seek to respond to particular difficulties that have arisen of the kind foreshadowed by the Interveners' evidence and submission. Although, therefore, I do not dismiss this point as insubstantial, it seems to me premature to conclude that any chilling effect that might arise as a result of the contested measures is likely to be such that the social costs of such measures so plainly exceeds the likely benefits (in terms of enhanced copyright protection) that they are disproportionate.'¹⁸

However, the draft Initial Obligations Code does not 'deal explicitly with the position of such subscribers as libraries and internet cafés so that the regulation works fairly and reasonably.' Therefore the draft Initial Obligations Code does not mitigate the risk of a chilling effect on internet access provision to consumers.

Ofcom has told us that it has come to the conclusion that it has no legal power to provide legal certainty to libraries and universities in relation to whether they are an 'internet service provider', 'communications provider' or 'subscriber' on the face of the Initial Obligations Code. However, section 403 of the Communications Act 2003, under which Ofcom gives this notice and will make the code, provides that: 'This section applies to any power of OFCOM to make regulations... every power of OFCOM to which this section applies includes power... to make different provision for different cases (including different provision in respect of different areas)' and 'to make provision subject to such exemptions and exceptions as OFCOM think fit'.¹⁹ Section 124D(6) of the Digital Economy Act 2010 states that 'OFCOM must not make a code under this section unless they are satisfied that it meets the criteria set out in section 124E.' The section 124E(1) criteria include among others:

- '(j) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;
- (k) that those provisions are proportionate to what they are intended to achieve; and
- (l) that, in relation to what those provisions are intended to achieve, they are transparent.'

Consumer Focus believes that Ofcom must assess the impact of the Initial Obligations Code on internet access provision to consumers. Ofcom should only make this draft Initial Obligations Code if it is satisfied that any likely or foreseeable reduction in internet access

¹⁷ Rachel Clark, Witness statement 2, [British Telecommunications Plc & Anor, R \(on the application of\) v The Secretary of State for Business, Innovation and Skills](#) [2011] EWHC 1021 (Admin) (20 April 2011)

¹⁸ [British Telecommunications Plc & Anor, R \(on the application of\) v The Secretary of State for Business, Innovation and Skills](#) [2011] EWHC 1021 (Admin) (20 April 2011), para 240

¹⁹ <http://www.legislation.gov.uk/ukpga/2003/21/section/403>

provision is proportionate in relation to what the Initial Obligations Code is intended to achieve. We are concerned that while Ofcom has acknowledged the likely cost its draft Initial Obligations Code would impose on WiFi providers, business and public bodies which provide internet access, it has not quantified this cost, and has not conducted a proportionality assessment.

Our concerns in relation to the provisions the draft Initial Obligations Code makes in relation to WiFi providers, business and public bodies which provide internet access are set out in greater detail below. However by way of example, at a meeting with libraries on 19 July 2012, Ofcom acknowledged that public bodies which receive internet access from a qualifying ISP will need to negotiate with their qualifying ISPs to secure the status of 'upstream ISP'. Ofcom acknowledged that qualifying ISPs may not acknowledge public bodies' status as 'upstream ISP' and that there is a risk that public bodies may reduce internet provision or cease providing internet access altogether because of the cost and risk involved. Ofcom said that public bodies whose qualifying ISP fails to acknowledge their status as 'upstream ISPs', and thus treat them as subscribers, pass on notifications of CIRs and place these public bodies on 'copyright infringement lists', could either complain to Ofcom that the qualifying ISP is contravening the Initial Obligations Code, or appeal to the Appeals Body on the same basis. Ofcom also highlighted that it is subject to judicial review.

The cost to public bodies, which range from a local public library to large institutions such as the Tate Modern, arising from the scheme Ofcom envisages is likely to be significant and needs to be quantified. Expecting a local library which receives internet access from BT to negotiate its status with BT under the Act, and if necessary complain to Ofcom, appeal a notification or bring a judicial review is, we think, not proportionate. Ofcom must come to a conclusion as to whether this cost, and the risk of a chilling effect on internet access provision by public bodies, is proportionate in relation to what the Initial Obligations Code intends to achieve.

In relation to Ofcom's power to decide which ISPs are qualifying ISPs for the purpose of the Initial Obligations Code, and thus will have such Initial Obligations imposed on them, the Digital Economy Act 2010²⁰ and Government statements during the passage of the Bill require that Ofcom must not impose obligations on ISPs which have low levels of copyright infringement on their network. This is because the cost to the ISP of imposing such Initial Obligations would be disproportionate. Consumer Focus believes that Ofcom ought to apply the same cost-benefit analysis in relation to WiFi providers, business and public bodies which are subscribers to qualifying ISPs. Ofcom acknowledges in the notice that the levels of copyright infringement on library networks are likely to be low, and that the levels on infringement on WiFi networks are also likely to be low.²¹ Thus, the reduction in copyright infringement that may arise from libraries ceasing to provide internet access to consumers, and WiFi hotspots closing down because they are notified as subscriber, is very unlikely to justify denying consumers who don't infringe copyright internet access service.

We are concerned that the chilling effect on internet access likely to arise from Ofcom's proposal would in particular affect low-income consumers and those consumers living in the 20 per cent of UK households which do not currently have internet access.²² Libraries provide vital and essential internet access to particularly low-income consumers, who now need internet access to find a job, find accommodation and more generally participate in social and economic life. If Ofcom makes an Initial Obligations Code which has a chilling effect on internet access provision by public bodies which serve low-income consumers or those who do not have internet access at home, we believe that Ofcom risks unduly discriminating against these types of consumers.

²⁰ See section 124C(3)

²¹ [Ofcom notice – Online Infringement of Copyright and the Digital Economy Act 2010](#), Ofcom, June 2012, para.3.93-3.98

²² The [Communications Market - Internet \(July 2012\)](#), Ofcom, 2012,

In addition to the concerns we have about the scheme Ofcom sets out in its notice, Consumer Focus has significant concerns about the draft Initial Obligations Code itself. These concerns are set out in greater detail below and relate in principle to the fact that the draft Initial Obligations Code does not achieve what Ofcom says in its notice it should achieve. Ultimately the draft Initial Obligations Code, if made, will be interpreted on its own, and we believe that the provisions of the draft Initial Obligations Code introduce significant legal uncertainty for WiFi providers, businesses and public bodies which provide internet access to consumers. For example, the notice indicates that Ofcom intended to give some certainty to public intermediaries such as universities and libraries by allowing qualifying ISPs to not pass on notifications if their subscriber is an 'upstream ISP'.

Aside from our concerns about Ofcom's suggestion that universities and libraries have to negotiate their status with their qualifying ISP, as outlined above, we are concerned that the draft Initial Obligations Code does not actually give qualifying ISPs a legal basis to not notify subscribers because they are 'upstream ISPs'. Contrary to what the notice states, paragraph 18 of the draft Initial Obligations Code does not provide a legal basis for qualifying ISPs to reject CIRs for 'upstream ISPs'. Similarly, the paragraph 18 provisions which would allow qualifying ISPs to not notify subscribers of CIRs if they receive fixed internet access to enable non-fixed internet access to others, does not achieve what the Ofcom notice says it sets out to achieve. More specifically, the draft Initial Obligations Code does not allow qualifying ISPs to reject CIRs on the basis that they are 'non-qualifying ISPs', contrary to what the Ofcom notice states.

In summary, Consumer Focus is concerned that the scheme proposed by Ofcom whereby public intermediaries negotiate their status with their qualifying ISPs would create significant legal uncertainty and cost for public intermediaries. Furthermore we are concerned that the draft Initial Obligations Code itself creates significant legal uncertainty, most significantly in relation to 'upstream ISPs'. If Ofcom decides to make this draft Initial Obligations Code without providing legal certainty to WiFi providers, businesses and public bodies which provide internet access to consumers, it must conduct a full economic impact assessment. This must quantify the cost to public bodies and small businesses, and the risk of a chilling effect on internet access provision to consumers, particularly those on low incomes and those who do not have internet access at home. On the basis of this impact assessment Ofcom must then satisfy itself that the Initial Obligations Code is proportionate. At this stage Consumer Focus has serious concerns about the fact that Ofcom has not assessed the cost of its provisions, or impact on internet access provision to consumers.

Consumer Focus is concerned that:

- The draft Initial Obligations Code does not provide legal certainty to WiFi providers, businesses and public bodies as to their status under the Digital Economy Act 2010
- The Ofcom proposal for public bodies to contact their qualifying ISPs to secure acceptance for their status as 'upstream ISP' is likely to impose a disproportionate cost on public bodies and lead to a chilling effect on internet access provision to consumers
- The chilling effect that is likely to result as a result of Ofcom's proposals could disproportionately impact on low income consumers and consumers living in the 20 per cent of UK households which do not have internet access, as such consumers rely heavily on public bodies for essential internet access
- Ofcom has, while acknowledging the likely cost associated with its proposals, not assessed the cost to public bodies and small businesses, and neither has Ofcom come to a conclusion whether its proposals are proportionate in relation to what the Initial Obligations Code is intended to achieve

- The draft initial Obligations Code does not achieve what the Ofcom notice says it should achieve, and introduces further legal uncertainty for WiFi providers, businesses and public bodies which provide internet access to consumers

The lack of legal certainty for WiFi providers

According to the Ofcom market report, internet access to consumers is commonly provided through WiFi. The standard router issued to consumers who subscribe to fixed internet access from the six qualifying ISPs is a wireless router. This is because it enables consumers using multiple devices to use the same connection within a household, without the messy cable salad. Businesses and public bodies commonly provide WiFi because it enables consumers to go online using their own computers and internet enabled devices. Unless this WiFi is enabled through mobile broadband, it is enabled through fixed internet access provision to the premises.

At the heart of the problem in relation to WiFi providers, businesses and public bodies which provide internet access to consumers are unworkable definitions in the draft Initial Obligations Code, which do not reflect the way internet access is provided. At a meeting on the 19th July 2012 Ofcom explained that it has no power to decide who is what under the Digital Economy Act 2010, i.e. whether a particular internet intermediary, who may receive internet access from a qualifying ISP, is a subscriber, internet service provider or communications provider for the purpose of the Act. Ofcom maintains that it cannot change the definition of 'internet service provider', 'communications provider' or 'subscriber' in the Act. It is only empowered to make provisions which impose the Initial Obligations on certain ISPs, which will be qualifying ISPs for the purpose of the Act.

In relation to establishing who will be qualifying ISPs, Ofcom proposes in the draft Initial Obligations Code that the Initial Obligations should apply to an ISP if 'it provides fixed internet access service over more than four hundred thousand broadband enabled lines in the United Kingdom' or 'is a fixed internet service provider within a group that provides fixed internet access service over more than four hundred thousand broadband lines in the United Kingdom'.²³ The Initial Obligations Code defines 'fixed internet service provider' as an 'internet service provider' within the meaning of section 124N Digital Economy Act that provides fixed internet access service. Fixed internet access service is defined as 'internet access service which is conveyed by wire, cable fibre or other material substance to the subscriber's address.' Therefore, according to the draft Initial Obligations Code, anyone, be they a domestic household, business or public body, which receives fixed internet access from a qualifying ISP is what the draft Initial Obligations Code terms fixed subscriber, ie they will be notified if a copyright owner submits a CIR to the ISP, and placed on a 'copyright infringement list' if the notifications reach the threshold set in the Initial Obligations Code.

Ofcom confirmed that its interpretations in the notice have no legal weight. It is on the basis of the Initial Obligations Code, i.e. secondary legislation, that the status of internet intermediaries must be established on a case by case basis. Ofcom also explained that it does not have the power to determine in the Initial Obligations Code who is an 'Internet Service Provider'. However, in the notice Ofcom states that 'WiFi providers' are in its view non-qualifying ISPs, because they do not provide fixed internet access. Ofcom's views in this respect are significant, because the draft Initial Obligations Code provides that Ofcom will 'publish a list of each qualifying ISP', but Ofcom is not empowered by the draft Initial Obligations Code to publish a list of non-qualifying ISPs.²⁴ Thus, as Ofcom has maintained, it will not be able to designate WiFi hotspots as 'non-qualifying ISPs' in the Initial Obligations Code or otherwise.

Ofcom does not define WiFi providers, in the notice or the draft Initial Obligations Code, but explains in the notice that:

²³ Draft Initial Obligations Code, para.2(1)

²⁴ Draft Initial Obligations Code, para.2(3)

'3.94 We do not have direct evidence about the levels of online copyright infringement taking place on Wi-Fi networks. However, like mobile broadband, public Wi-Fi speeds are typically limited by contention and have higher congestion rates. Furthermore, we understand that session times are limited on some public Wi-Fi services, and that people often use 'hotspots' for short periods, for example while in the lobbies of hotels or public buildings, making the transfer of larger files less convenient. We further note that in many cases Wi-Fi users of Peer-To-Peer software may have difficulty in establishing incoming connections, and may even fail to share content correctly. For all these reasons, we consider that public Wi-Fi is potentially less conducive for infringing activity than fixed networks.

3.95 With regard to cost of compliance, we accept that mobile broadband and Wi-Fi services face similar technical issues in relation to identifying an individual subscriber from an IP address. We understand that Wi-Fi providers typically use Network Address Translation, which would usually require them to modify their systems to allow the logging and retention of the data necessary to enable them to comply with the Code. We understand that the costs of these developments are likely to be high.

3.96 Furthermore, BT (one of the main providers of public Wi-Fi via its OpenZone and FON products) says that the 'vast majority' of OpenZone users purchase on a pay-as-you-go basis, rather than via a subscription. Where providers offer Wi-Fi in this way, in many instances the subscriber address data collected for pay-as-you-go users will be neither reliable nor easily verifiable. For the reasons set out below at paragraph A5.43, we accept that we cannot require that ISPs collect this information as a consequence of being subject to the initial obligations.

3.97 We have therefore concluded that it is also appropriate to exclude Wi-Fi providers from the scope of the Code on the basis that inclusion is likely to lead to them incurring substantial costs to achieve a minimal reduction in overall levels of online copyright infringements. Again, if our review of the scope of the Code finds that there is evidence of significant online copyright infringement on networks currently outside the scope of the Code, we will consider extending the coverage of the Code.' (emphasis added)

The notice indicates that Ofcom regards WiFi hotspots, such as provided by BTOpenZone, as 'internet service providers' and for the purpose of the Initial Obligations Code as 'non-qualifying ISPs'. However, Ofcom also seeks to clarify in the notice that:

'3.98 To be clear, the initial obligations will still apply to the provision of a fixed internet access service which is conveyed by physical means (for example, copper, fibre or cable) to the subscriber's premises, but where the subscriber makes use of Wi-Fi for conveyance within the premises.'

Thus it appears Ofcom regards WiFi hotspots as non-qualifying ISPs, but other WiFi, provided through a standard wireless router in a pub, library or domestic household, as subscribers. This is, in practice, unworkable and irrational, because WiFi hotspot providers such as BTOpenZone and TheCloud provide WiFi hotspot services to pubs and hotels. For example in May this year TheCloud announced that:

'Greene King, one of the biggest pub retailers in the UK, has signed a deal with WiFi provider TheCloud to bring free WiFi access to all of its pubs, restaurants and hotels, including the Hungry Horse and Loch Fyne brands – covering up to 2,400 venues around the UK.'²⁵

This means that TheCloud will provide fixed internet access to 2,400 premises in the UK, which the pubs, restaurants and hotels then provide to consumers within the premises using wireless router provided by TheCloud as part of the hotspot. BTOpenZone also

²⁵ WiFi with your print: Greene King rolls out free WiFi to its pubs, restaurants and hotels with TheCloud, TheCloud, 21 May 2012

provides hotspots to pubs, restaurants and hotels. On the other hand, many pubs, restaurants and hotels receive fixed internet access from qualifying ISPs and pass that on to consumers via a wireless router, without purchasing the services of a hotspot. For example, a pub may receive fixed internet access from BT and pass that on as WiFi, without being a BTOpenZone customer.

The way in which the Ofcom notice seeks to interpret the provisions of the draft Initial Obligations Code is in practice unworkable. Ofcom envisages that BT should be a qualifying ISP in relation to non-BTOpenZone customers, who would be treated as what the draft Initial Obligations Code describes as 'fixed subscribers'. As such BT would pass on CIRs received as notifications and maintain 'copyright infringement lists' in relation to these subscribers. But the Ofcom notice proposed that BT should treat customers of BTOpenZone as 'non-qualifying ISPs', since they provide wireless internet access to consumers as WiFi hotspot providers. In reality both BTOpenZone customers and non-BTOpenZone customers who provide WiFi for use within the premises by consumers, receive fixed internet access from BT. It is plainly irrational that pubs, restaurants and hotels which are not BTOpenZone customers should be treated as 'fixed subscribers', but pubs, restaurants and hotels which are BTOpenZone customers are regarded as 'non-qualifying ISPs'. However, as Ofcom has no power to determine who is what under the Act, it will be left to BT to make the distinction on the basis of the draft Initial Obligations Code provisions.

Under paragraph 18 of the draft Initial Obligations Code a qualifying ISP would have a legal obligation to pass on CIRs as notifications, unless:

'(c) the IP address contained in a copyright infringement report was not allocated to a fixed subscriber to enable access to a fixed internet access service'

'(d) the subscriber which is the subject of a copyright infringement report is not a fixed subscriber of the qualifying ISP'²⁶ (emphasis added)

Thus under paragraph 18(c) of the draft Initial Obligations Code it appears a qualifying ISP can refuse to pass on a notification, if the CIR relates to a fixed subscriber, but that fixed subscriber does not enable fixed internet access, ie if the IP address was allocated to the fixed subscriber so that the fixed subscriber enables WiFi access, it appears the qualifying ISP has no statutory duty to notify that fixed subscriber of the CIR. Therefore it appears that under the draft Initial Obligations Code BTOpenZone customers, such as pubs, restaurants and hotels, who receive fixed internet access and pass that on via a hotspot for use on their premises, would be fixed subscribers under the draft Initial Obligations Code, thus would also not fall within the paragraph 18(d) exemption. But they would fall under the paragraph 18(c) exemption, because they are not enabling access to a fixed internet access service. Therefore BT could legally disregard its statutory obligation to notify fixed subscribers of CIRs received in relation to their IP addresses, if these subscribers receive fixed internet access in order to provide non-fixed internet access, such as WiFi, to consumers. BT would be free to apply the paragraph 18(c) exemption to all its fixed subscribers who pass on WiFi to consumers, not only BTOpenZone customers.

However, paragraph 18 does not provide BT, or any other qualifying ISP, with a legal basis to treat pubs, restaurants and hotels which receive fixed internet access to pass on WiFi to consumers as 'non-qualifying ISPs', whether they are use WiFi hotspot products such as BTOpenZone, or use standard wireless routers to pass on WiFi. BTOpenZone is a product of BT, the draft Initial Obligations Code does not provide BT with a legal basis to treat this part of its fixed internet access provision to subscribers as 'non-qualifying ISP'. Thus the draft Initial Obligations Code does not achieve what the notice says it should achieve. In relation to TheCloud, which provides fixed internet access which is then passed on as WiFi through hotspots in pubs, restaurants and hotels, the situation under the draft Initial Obligations Code is less clear. It exemplifies the legal uncertainty

²⁶ Draft Initial Obligations Code, para.18(c)&(d)

Ofcom would introduce, if it decides to make the draft Initial Obligations Code un-amended.

TheCloud is a BSkyB subsidiary since early 2011. BSkyB provides fixed internet access to TheCloud, which then passes it on as fixed internet access to pubs, restaurants and hotels, which in turn provide WiFi through hotspots to consumers. It is not clear under the draft Initial Obligations Code whether the TheCloud would fall under the paragraph 18(c) exemption, because BSkyB passes on fixed internet access to TheCloud which in turn provides a fixed internet access service to pubs, restaurants and hotels. But because TheCloud is a WiFi hotspot service which passes fixed line internet access to its customers to enable non-fixed internet access, from BSkyB's perspective, it allocates IP addresses to TheCloud to enable fixed internet access, thus TheCloud strictly speaking would not fall under the paragraph 18(c) exemption. However, because BSkyB would know that TheCloud provides fixed internet access, and allocates IP addresses to enable non-fixed internet access hotspots in these pubs, restaurants and hotels, BSkyB may argue that the paragraph 18(c) exemption applies. BSkyB would certainly have a business interest in doing so, as it would spare TheCloud, which is a BSkyB business, the cost associated with being a subscriber, eg appealing notifications and taking reasonable steps to prevent others from infringing on their network. However, to complicate things further, under the draft Initial Obligations Code an ISP is one which 'is a fixed internet service provider within a group that provides fixed internet access service to over more than four hundred thousand broadband lines in the United Kingdom'. TheCloud is a fixed internet access provider to pubs, restaurants and hotels, and part of the BSkyB group, which is a qualifying ISP. Thus if TheCloud is regarded as a qualifying ISP, because it provides fixed internet access and is part of the BSkyB group, TheCloud may rely on the paragraph 18 (c) exemption and thus not notify its fixed subscribers, i.e. TheCloud hotspot customers such as pubs, restaurants and hotels, of CIRs. This would spare TheCloud customers the cost associated with being treated as fixed line subscribers, but TheCloud would still incur the cost associated with being a qualifying ISP, although it would not actually have to pass on CIRs to its customers.

In summary, we believe that the draft Initial Obligations Code does not achieve what the Ofcom notice states it ought to achieve. The draft Initial Obligations Code provides qualifying ISPs with a legal basis to not pass on CIRs as notifications to any of their fixed line subscribers who provide WiFi, be that through a hotspot or wireless router. The distinction Ofcom tries to draw in the notice between hotspots in hotels, and WiFi provided in hotels through wireless routers, is irrational, because in both cases the hotel would receive fixed internet access which is provided as WiFi to consumers. In so far as the draft Initial Obligations Code creates legal certainty for WiFi providers, it is to the extent that if they receive fixed internet access from a qualifying ISP, and pass that on as WiFi to consumers, they are 'fixed subscribers' and fall under the paragraph 18(c) exemption, but only if the qualifying ISP recognises them as such.

In principle Consumer Focus does not believe that it is proportionate to treat all WiFi providers as subscribers, which would make them subject to notifications. It should be noted that the threshold of three CIRs within 12 months set in the draft Initial Obligations Code for inclusion on a copyright infringement list could be reached easily by pubs, restaurants and hotels, even if the overall level of copyright infringement on their networks is low. This is because during the course of 12 months hundreds or thousands of consumers frequent a medium sized pub or hotel. Consumer Focus does not believe that pubs, restaurants or hotels should be treated as subscribers under the Act. Treating such businesses as subscribers or ISPs under the Act could only be possibly justified by Ofcom if there is any significant level of copyright infringement on their networks, and if making them subject to the Act would achieve the aim of reducing copyright infringement. As per the Ofcom notice, Ofcom does not believe that there are significant levels of infringement on such networks because of the transient nature of consumers' internet use when visiting such businesses.

The Ofcom notice suggests that subscribers, which believe they should not be notified of CIRs should contact their qualifying ISP, and secure a recognition of their status by the qualifying ISP. This amounts to persuading the qualifying ISP that the paragraph 18(c) exemption applies. Consumer Focus does not believe that it is proportionate for Ofcom to expect all businesses and public bodies which receive fixed internet access to facilitate WiFi internet access to consumers to contact their qualifying ISP to negotiate their status. The cost of doing so, and the risk associated with not being recognised by a qualifying ISP as falling under the paragraph 18(c) exemption could in itself lead to a chilling effect on internet access service. Businesses and public bodies which provide internet access service to consumers should be provided with legal certainty and clearly exempt from the draft Initial Obligations Code. We believe this should be the case not only in relation to fixed subscribers which pass on WiFi, but also in the case of fixed subscribers which pass on fixed internet access to consumers (which would not all under the paragraph 18(c) exemption under the draft Initial Obligations Code).

Ofcom should also note that the paragraph 18(c) exemption could be effectively applied to most domestic households, which by and large now receive fixed internet access which is shared within the household via a wireless router. It is plain from the Ofcom notice that this is not what Ofcom intended.

Consumer Focus recommends that:

- The Initial Obligations Code should make explicit provisions for WiFi providers, businesses and public bodies which provide internet access
- The Initial Obligations Code should effectively exempt businesses and public bodies which provide WiFi to consumers, as well as businesses and public bodies which provide fixed internet access to consumers

The lack of legal certainty for public bodies providing internet access

In relation to public bodies which provide internet access to consumers via WiFi, and receive fixed internet access from a qualifying ISP, their situation is as described above for pubs, restaurants and hotels. Their situation is entirely unsatisfactory. As with pubs, restaurants and hotels, qualifying ISPs which provide internet access to public intermediaries such as libraries and universities have the option under the draft Initial Obligations Code of not notifying a fixed subscriber of a CIR, if the fixed subscriber receives fixed internet access to facilitate non-fixed internet access. Thus it appears, in relation to a university or library, a qualifying ISP may choose not to pass on notifications in relation to WiFi provided by the library and university, but needs to pass on notifications in relation to the fixed internet access libraries and universities provide to their users and students. This is absurd and not workable in practice.

However, Ofcom adds further confusion by suggesting in its notice that public intermediaries such as universities and libraries, which receive internet access from a qualifying ISP, are also ISPs, or more specifically what the notice describes as 'downstream ISPs'. In the notice Ofcom explains that:

'3.128 The definitions of 'internet service provider', 'subscriber' and 'communications provider' are set out in the DEA provisions and cannot be subject to amendment in the Code. Nonetheless, their interpretation is relevant to the application of the Code and has been the subject of considerable stakeholder comment both in responses to the May 2010 Consultation and subsequently. In particular, we are aware that public intermediaries, such as libraries and universities whose activities include the provision of internet access services, have a number of concerns about their status.

3.129 A summary of stakeholder comments on this issue and our understanding of how the definitions apply is set out in Annex 5 to this document, with a view to assisting stakeholders understand how the DEA provisions may apply to them. While we cannot fetter our discretion in relation to the future revision of the ISP

qualification threshold, we also set out the issues that might be relevant in the event we consider its extension to public intermediaries.²⁷

Annex 5 of the Ofcom notice states:

‘A5.2 In particular, we are aware that public intermediaries, such as libraries and universities whose activities include the provision of internet access services, have a number of concerns about their status. As set out in Section 3, these bodies do not meet the ISP qualification threshold and therefore will not be subject to the initial obligations in the initial phase of implementation. They have nonetheless requested clarification as to whether they might become subject to the obligations when the threshold is reviewed and the extent to which they might be treated as a subscriber by their upstream ISP.

A5.38 The relevant definitions in the DEA provisions and CA03 are:

- Internet service provider - ‘a person who provides an internet access service’ (Section 124N CA03);
- Internet access service - ‘an electronic communications service that – (a) is provided to a subscriber; (b) consists entirely or mainly of the provision of access to the internet; and (c) includes the allocation of an IP address or IP addresses to the subscriber to enable that access’ (Section 124N CA03);
- Subscriber – ‘in relation to an internet access service... 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’ (Section 124N CA03); and
- Communications provider – ‘a person who (within the meaning of section 32(4)) provides an electronic communications network or an electronic communications service’ (Section 405 CA03).

A5.40 Providers of internet access fall within the definition of internet service provider where the service is provided by means of an agreement with the subscriber, even where this is oral or implicit. This will mean that a very broad range of providers are ISPs for the purposes of implementing the DEA provisions (though they may not be qualifying ISPs, as discussed above in Section 3). For example, a commercial enterprise like a hotel or café providing Wi-Fi to its customers is likely to be an ISP; similarly, public bodies like libraries or universities are likely to be ISPs, providing internet access under an agreement with their readers or students respectively.

A5.41 There may be circumstances where there is a question as to whether the agreement for goods or services extends to the use of the internet access service. However, the initial threshold set in the Code for determining a qualifying ISP will exclude many operators for which this is an issue on the grounds of scale. Operators of such services therefore have clarity as to whether or not the Code applies to them or will be applied to them in the immediate future.²⁸ (emphasis added)

Confusingly, Ofcom seeks to explain how the definitions of the Act, rather than the amended definitions it introduced in the draft Initial Obligations Code apply to universities and libraries. However, Ofcom then changes course, and maintains that the Act recognises what it terms ‘downstream ISPs’, or alternatively ‘retail ISP’, in the Ofcom notice, and explains that the draft Initial Obligations Code makes provisions for such ‘downstream ISPs at the retail level’:

²⁷ Ofcom notice – Online Infringement of Copyright and the Digital Economy Act 2010,

Ofcom, June 2012, pg.36

²⁸ Ibid, pg.98 and 99

'A5.44 It is clear from the definitions in the DEA provisions that when there is a wholesale and a retail provider of internet access, the wholesale provider does not have obligations as it is providing a service to a downstream communications provider rather than a subscriber. However, the downstream communications provider may well be an ISP (on the basis that it provides an internet access service to one or more subscribers) and may therefore be subject to obligations, in the event that it meets the criteria as a qualifying ISP.

A5.45 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. In this situation, where there clearly is an agreement to provide an internet access service to a subscriber at the retail level, we would consider the retail provider to be the ISP with an obligation to process CIRs. If it does not hold sufficient information to process the CIRs the Code requires it to ensure that it is able to do so. While it is for the qualifying ISP to determine how this is best achieved in relation to its own circumstances, one means of meeting this requirement might be to enter into a contract for processing services with their wholesale access provider.

A5.46 The Code also makes specific provision for the circumstance when a qualifying ISP is also operating as a wholesale ISP. Under the provisions of Part 5 of the Code, a qualifying ISP is not required to process a CIR where 'the subscriber which is the subject of a copyright infringement report is not a fixed subscriber of the qualifying ISP' (paragraph 18(d)). If this is the case because the qualifying ISP has allocated the IP address on behalf of the downstream ISP, it will be required to inform the qualifying copyright owner that it has rejected the CIR for this reason and identify the downstream ISP at the retail level (paragraph 8(2)(b)), whether or not that downstream ISP is itself a qualifying ISP.

A5.47 The scope for CIRs to be sent to the wrong ISP would be minimised, if qualifying ISPs endeavour to provide copyright owners with information about the blocks of IP addresses which their subscribers use. More broadly, the provision of accurate and precise information about the allocation of IP ranges by qualifying ISPs will be important for the effective operation of the process of estimating CIR volumes, and correct addressing of CIRs. Ofcom will seek to collaborate with qualifying ISPs and copyright owners to secure this outcome.'²⁹ (emphasis added)

In relation to the position of libraries and other public intermediaries, Annex 5 of the Ofcom notice asserts:

'A5.48 Whilst it was clearly the intention of Government that libraries and other similar bodies which provide internet access services should not be exempted as ISPs permanently from the Code, Ofcom does have discretion in determining which ISPs should be subject to the obligations (i.e. qualifying ISPs). The qualification criteria that Ofcom has set in the Code will not catch public intermediaries, such as libraries and universities, as they do not have sufficient number of broadband lines. Any revision of those criteria is likely to be based on evidence of the levels of infringement taking place on an ISP's network. There is a reasonable hypothesis they would not qualify even if the criteria were revised in this way. Many public intermediaries tell us they take active measures to minimise infringement on their networks, and if that is right, they may continue to fall outside the scope of the Code. Even if they did meet a revised threshold, we would still need to consider the proportionality of subjecting different types of ISP to the Code, for example by assessing the conduciveness of their network for infringement, the costs of implementing the systems necessary to comply, and the impact on any of the objectives to which we are required to have regard as part of our general duties in carrying out our functions.

²⁹ **Ofcom notice – Online Infringement of Copyright and the Digital Economy Act 2010**, Ofcom, June 2012, pg.100

A5.49 As regards cost, we believe libraries do not generally record or retain records of the internet access sessions of their users; and requiring them to do so would entail significant operational and capital investment, compared to a small scale but standard ISP.³⁰ *(emphasis added)*

Thus Ofcom confirms that it has no power to determine who is what under the Act, but asserts that libraries and universities 'do not meet the ISP qualification threshold and therefore will not be subject to the initial obligations in the initial phase of implementation'. So clearly Ofcom assumes they are ISPs for the purpose of the Act because, as the Ofcom notice asserts, 'where there clearly is an agreement to provide an internet access service to a subscriber at the retail level, we would consider the retail provider to be the ISP with an obligation to process CIRs.' But Ofcom again clarifies to the reader of the notice that it is not for Ofcom to decide who is an ISP, saying 'while it is for the qualifying ISP to determine how this is best achieved in relation to its own circumstances, one means of meeting this requirement might be to enter into a contract for processing services with their wholesale access provider.'

Such a scenario is not supported by the Act, under which a subscriber is simply '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'. So for the purpose of the Act, anybody who receives internet access under an agreement from a qualifying ISP, is a subscriber. However, Annex 5 of the notice asserts that on the basis of the Digital Economy Act 2010 definitions, 'it is clear... that when there is a wholesale and a retail provider of internet access, the wholesale provider does not have obligations as it is providing a service to a downstream communications provider rather than a subscriber. However, the downstream communications provider may well be an ISP (on the basis that it provides an internet access service to one or more subscribers) and may therefore be subject to obligations, in the event that it meets the criteria as a qualifying ISP.' Thus Ofcom appears to suggest that where a subscriber to a qualifying ISP provides internet access under an agreement to someone who in turn provides internet access to others under an agreement, the subscriber of the qualifying ISP becomes an ISP. This is not apparent from the definitions of the Act, which simply do not recognise an 'upstream ISP' and 'downstream ISP' scenario. Nevertheless Ofcom seeks to rely on the definitions of the Act when it tries to explain how 'downstream ISPs at retail level' can demonstrate that they are ISPs to their qualifying ISP.

Ofcom argues that intermediaries which receive internet access from a qualifying ISP and pass internet access to others can be ISPs under the definitions of the Act because: 'providers of internet access fall within the definition of internet service provider where the service is provided by means of an agreement with the subscriber, even where this is oral or implicit. This will mean that a very broad range of providers are ISPs for the purposes of implementing the DEA provisions (though they may not be qualifying ISPs, as discussed above in Section 3). For example, a commercial enterprise like a hotel or café providing Wi-Fi to its customers is likely be an ISP; similarly, public bodies like libraries or universities are likely to be ISPs, providing internet access under an agreement with their readers or students respectively.' However, this plainly contradicts what the Ofcom notice says in relation to WiFi providers and hotspots, where Ofcom ignores the fact that WiFi is provided to consumers by businesses and public bodies under an oral or implicit agreement, and states that:

'To be clear, the initial obligations will still apply to the provision of a fixed internet access service which is conveyed by physical means (for example, copper, fibre or cable) to the subscriber's premises, but where the subscriber makes use of Wi-Fi for conveyance within the premises.'

Nevertheless, the Ofcom notice explains that the draft Initial Obligations Code 'makes specific provision for the circumstance when a qualifying ISP is also operating as a

³⁰ [Ofcom notice – Online Infringement of Copyright and the Digital Economy Act 2010](#), Ofcom, June 2012, pg.101

wholesale ISP. Under the provisions of Part 5 of the Code, a qualifying ISP is not required to process a CIR where 'the subscriber which is the subject of a copyright infringement report is not a fixed subscriber of the qualifying ISP' (paragraph 18(d)). If this is the case because the qualifying ISP has allocated the IP address on behalf of the downstream ISP, it will be required to inform the qualifying copyright owner that it has rejected the CIR for this reason and identify the downstream ISP at the retail level (paragraph 8(2)(b)), whether or not that downstream ISP is itself a qualifying ISP.'

To some extent the Ofcom notice acknowledges that the concept of upstream ISP is not supported in the Act or the draft Initial Obligations Code when it states at the end of Annex 5 that:

'A5.56 There are likely to be many bodies who take an internet access service from a qualifying ISP, and who will be perceived as subscribers by that qualifying ISP, but, as discussed above, may fall within the definition of ISP or communications provider. This means that (subscriber) notifications may be sent to recipients which are in fact ISPs/communications providers. A body which believes it should be treated as an ISP rather than as a subscriber should initially contact its upstream ISP and explain why it believes it should not be treated as a subscriber. If the upstream ISP considers that its customer should be viewed as an ISP rather than a subscriber, the Code makes clear (at paragraph 18) that it may reject a CIR on this basis.'³¹

Thus the Ofcom notice asserts that under paragraphs 8 and 18 of the draft Initial Obligations Code, qualifying ISPs have the power to decide which of their subscribers, to whom they provide fixed internet access, is an 'Internet Service Provider' for the purpose of the Act, and then have the power to disregard their legal obligations to pass on notification of CIRs to these customers. This cannot be the paragraph 18(c) and (d) exemptions, because they apply to subscribers only. Instead the notice points to a paragraph 8 provision of the draft Initial Obligations Code, which states:

'8.—(1) Except where any of the circumstances listed in paragraph 18 exist, a qualifying ISP in receipt of a copyright infringement report must identify the fixed subscriber to which the IP address related at the time when the apparent infringement detailed in the copyright infringement report took place.

(2) Where any of the circumstances listed in paragraph 18 exist, the qualifying ISP must inform the qualifying copyright owner which issued the copyright infringement report as soon as reasonably practicable and in any event within the period of ten working days beginning with the day of receipt of the copyright infringement report and—

(a) specify which of the matters listed in paragraph 18 are relied upon by the qualifying ISP; and

(b) if paragraph 18(b) is relied on because the IP address contained in the copyright infringement report was allocated by the qualifying ISP to another internet service provider at the time of the apparent infringement, include the identity of the other internet service provider to whom the IP address is allocated.' (emphasis added)

Under paragraph 18(b) the draft Initial Obligations Code states that qualifying ISPs must not pass on a CIR as a notification, if:

'(b) the IP address contained in a copyright infringements report was not allocated to the qualifying ISP at the time of the apparent infringement'

This provision makes no sense in relation to the definitions contained in the Digital Economy Act 2010. Under the Act, an 'ISP' is 'a person who provides an internet access service' which is defined as 'an electronic communications service that – (a) is

³¹ Ofcom notice – Online Infringement of Copyright and the Digital Economy Act 2010, Ofcom, June 2012, pg.102

provided to a subscriber; (b) consists entirely or mainly of the provision of access to the internet; and (c) includes the allocation of an IP address or IP addresses to the subscriber to enable that access.’ Thus under the Act, if BT provides internet access to a library, and as part of that allocates a bank of IP addresses to the library, BT is an ISP, and the library is a subscriber, as it receives internet access service under an agreement.

However, paragraph 8(2)(b) in combination with paragraph 18(b) suggests that if BT provides internet access to a library, and as part of that allocates IP addresses to the library, the library would be an ISP as well if it allocates these IP addresses in turn to its own users. Therefore BT could refuse to notify the library of a CIR on the basis that the IP addresses were not allocated to BT at the time of the alleged infringement. However, the definitions of the Act do not support these provisions in the draft Initial Obligations Code. BT can only allocate IP addresses to its subscribers to enable internet access which have been allocated to BT. It is because these IP addresses were allocated to BT to begin with that BT would receive a CIR from the copyright owner in relation to the IP addresses which BT has allocated to the library. This is because in the UK large banks of IP addresses are allocated to about 80 different ISPs, which may in turn allocate these to their subscribers on a permanent or dynamic basis.

ICANN, the internet's authority for names and numbers, delegates authority for the management and creation of IP addresses to a body called the Internet Assigned Numbers Authority (IANA). IANA allocates blocks of addresses to one of five Regional Internet Registries, including RIPE in Europe. In turn, RIPE allocates banks of IP addresses to UK ISPs. Copyright owners, who collect IP addresses which have been allocated to subscriber internet connections as evidence of alleged copyright infringement by consumers, know which UK ISP to send the CIR to, because they can access information about which IP addresses RIPE has allocated to which UK ISP. The information about which ISP has allocated which IP address to its subscribers, is not publicly available, and would need to be obtained by copyright owners through a Norwich Pharmacal order. It is not logical to argue that if a qualifying ISP under the draft Initial Obligations Code has allocated IP addresses to their subscribers, which ISPs have to in able to enable internet access, and the subscriber has allocated IP addresses in turn to its users, these IP addresses are no longer allocated to the qualifying ISP. And thus, the qualifying ISP should regard the library as a non-qualifying ISP.

The paragraph 18(b) exemption would most likely apply where the copyright owner has not matched the IP addresses correctly to the RIPE registry and, for example, sent a CIR to BT (qualifying ISP) relating to an IP address which has been allocated by RIPE to Demon or another smaller UK ISP, which are non-qualifying ISP under the draft Initial Obligations Code because they have less than 400,000 fixed subscribers. In this case BT could refuse to pass on the CIR as notification and inform the copyright owner that the IP address to which the CIR relates was not allocated to BT by RIPE. This would indicate that the CIR is invalid, thus the ISP is relieved of its legal obligation to pass on the CIR as notification.

In summary, the draft Initial Obligations Code suggest that where public bodies such as libraries or universities receive fixed internet access from a qualifying ISP, and in turn provide fixed internet access to consumers, the qualifying ISP could refuse to notify the library or university of the CIR under the paragraph 18(c) exemption. In relation to fixed internet access a university or library provides to its users and students, there is no such exemption, and the qualifying ISP would have a legal duty to notify the library or university of CIRs. The Ofcom notice suggests that libraries and universities which receive fixed internet access from a qualifying ISP should contact that qualifying ISP and obtain recognition that they are an ‘upstream ISP’. The concept of ‘upstream ISP’ is simply not supported by the definition of the Act or the draft Initial Obligations Code. Even if a qualifying ISP would accept that one of its subscribers, who receive internet access

under an agreement, is a 'upstream ISP', there is no provision under paragraph 18 of the draft Initial Obligations Code which would allow it to not notify CIRs.

The draft Initial Obligations Code plainly does not achieve what the Ofcom notice says it does. Instead the draft Initial Obligations Code creates an unsatisfactory position for any business or public body providing WiFi. As described above, Ofcom cannot possibly think that it is proportionate to ask all private businesses or public bodies providing WiFi to contact their qualifying ISP to secure an exemption under paragraph 18(c). Furthermore the draft Initial Obligations Code provides no paragraph 18 exemption for private or public bodies which provide fixed internet access to consumers or users. As set out above, we believe this is unsatisfactory. Therefore Consumer Focus asks Ofcom to provide legal certainty to businesses and public bodies which provide internet access service to consumers by clearly exempting them from the draft Initial Obligations Code.

Consumer Focus recommends that:

- The Initial Obligations Code should provide legal certainty by making clear provisions which would allow qualifying ISPs to not pass on 'copyright infringement reports' as notifications if they relate to businesses or public bodies providing internet access to consumers

Appendix

CO/7354/2010

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

The Queen

On the application of

BRITISH TELECOMMUNICATIONS PLC

TALKTALK TELECOM GROUP PLC

Claimants

-and-

THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

Defendant

SKELETON ARGUMENT ON BEHALF OF CONSUMER FOCUS AND ARTICLE 19

1. INTRODUCTION

1. This case involves a challenge brought by two telecommunications companies to sections 3 to 18 of the Digital Economy Act 2010 (“the contested provisions”), which concern the online infringement of copyright.
2. Consumer Focus and Article 19, the Global Campaign for Free Expression, intervene to make submissions about the potential impact of the “contested provisions” on the right to freedom of expression. Consumer Focus and Article 19 were granted permission to intervene in these proceedings by the order of Mrs Justice Davies on 28 February 2011, such permission being limited to filing and serving evidence in a witness statement (see the witness statement of Saskia Walzel) and written submissions limited to 15 pages. Throughout this document references to e.g. “SW/1” are references to exhibits to Saskia Walzel's witness statement.

2. CONSUMER FOCUS AND ARTICLE 19

3. Consumer Focus (“CF”) is the National Consumer Council in England, Wales and Scotland, with a statutory duty for post in Northern Ireland. It was established by the Consumers Estate Agents and Redress Act 2007 and is a designated consumer body under the Enterprise Act 2002. CF is funded through a levy on energy companies and Royal Mail in relation to its statutory duties concerning energy and post, and receives funding from the Department for Business, Innovation and Skills (BIS) for work on other consumer issues.
4. CF is tasked with representing the interests of consumers, particularly vulnerable and low income consumers, and has a statutory duty to advise the Government and regulators on consumer matters.
5. CF has been actively working on issues relating to copyright enforcement and peer-to-peer file-sharing since 2008 at UK and EU level. It has responded to all consultations leading up to the drafting of the Digital Economy Bill, was closely involved in the passage of the Bill through Parliament and is engaging with BIS and OFCOM on the implementation of the Digital Economy Act.
6. ARTICLE 19, the Global Campaign for Free Expression, is an international human rights organization focused on protecting and promoting the right to freedom of expression. ARTICLE 19 is a registered UK charity (No. 32741) with headquarters in London, and field offices in Kenya, Senegal, Bangladesh, Mexico and Brazil.
7. ARTICLE 19 frequently submits written comments/amicus curiae to international and regional courts as well as to courts in national jurisdictions in cases that raise issues touching on the international guarantee of freedom of expression. It is widely considered as a leading expert globally on the issue.
8. ARTICLE 19 has undertaken extensive analytical and advocacy work concerning international human rights standards on applying free expression to information and communications technologies in its offices around the world.

3. APPLICABLE LAW

3A. The right to freedom of expression

9. Freedom of expression is a fundamental common law right. Even before the coming into force of the Human Rights Act 1998, the right to freedom of expression had attained the status of a constitutional right with high normative force (*Reynolds v Times Newspapers* [2001] 2 AC 127, 207G-H per Lord Steyn).

10. The right to freedom of expression has been described as “the primary right in a democracy; without it an effective rule of law is not possible” (*R v Home Secretary ex parte Simms* [2000] 2 AC 155 (“*Simms*”), 125G, per Lord Steyn). In *Simms*, Lord Steyn explained the importance of freedom of expression as follows (p.126F-G):

“Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), “the best test of truth is the power of the thought to get itself accepted in the competition of the market:” *Abrams v. United States* (1919) 250 U.S. 616, 630, per Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see Stone, Seidman, Sunstein and Tushnet, *Constitutional Law*, 3rd ed. (1996), pp. 1078-1086.”

11. The common law right is now buttressed by Article 10 of the European Convention of Human Rights (“ECHR”), incorporated into domestic law by the Human Rights Act 1998 (“HRA”). Under the Human Rights Act the court must, when interpreting Convention rights, take into account the jurisprudence of the European Court of Human Rights (s2(1)), read and give effect to primary legislation in a way which is compatible with human rights (s.3) and make a declaration of incompatibility where it is satisfied that a given provision is incompatible with a Convention right.

12. Article 10 ECHR provides as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of

information received in confidence, or for maintaining the authority and impartiality of the judiciary.

13. The right to freedom of expression under Article 10(1) ECHR is of very wide application. First, it is a right enjoyed by “everyone”, including both natural persons and legal persons such as corporations. Secondly, it includes communications of any kind, including spoken or written words, film, video, sound recordings, pictures and images. Thirdly, the content of the expression falling within the scope of Article 10 is extremely wide, including not only political expression, artistic expression and commercial expression but any form of information and ideas. The only speech which would appear not to be afforded any protection under Article 10 is hate speech, by virtue of Article 17 ECHR.
14. The Article 10 right to freedom of expression involves two distinct rights: a right freely to impart information and ideas and a right freely to receive information and ideas (*Sunday Times v UK (No 1)* (1979) 2 EHRR 245, paras 65-66). It therefore includes both the right of the person freely to communicate information to a willing recipient and the right of the recipient to receive it.

3B. Restrictions on freedom of expression

15. Under Article 10(2), however, there are a number of prescribed restrictions on freedom of expression in respect of which the European Court of Human Rights has established a number of fundamental principles. In summary, freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for individual self-fulfilment. Any restriction on this right must therefore be “prescribed by law”, serve a legitimate aim, be necessary in a democratic society in terms of corresponding to a “pressing social need” and be proportionate to the legitimate aim pursued. Exceptions to freedom of expression must be narrowly interpreted and convincingly established on the evidence, while national authorities must adduce relevant and sufficient reasons to support them (*Sunday Times v UK (No 2)* (1991) 14 EHRR 16 (“the Spycatcher case”), para 50).
16. As Lord Nicholls succinctly put it in *Reynolds v Times Newspapers* [2001] 2 AC 127 at p.1203B, “To be justified, any curtailment of freedom of

expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.”

17. One of the legitimate aims on the basis of which freedom of expression may be restricted under Article 10(2) includes “the rights of others”. Actions to defend copyright from infringement qualify as “the rights of others” (*Chappell v The United Kingdom* [1989] 10461/83 ECHR 4 at para. 51) and more generally intellectual property, including copyright, enjoys protection under Article 1 of Protocol 1 of the ECHR, that is the right of “Every natural or legal person is entitled to the peaceful enjoyment of his possessions” (*Anheuser Busch Inc v Portugal* [2007] 73049/01 ECHR 40 at para.47).
18. The ECHR mandates the balanced protection of the interests which underlie the protection of copyright and that of freedom of expression. Private law remedies already exist at common law to protect the rights of copyright owners and EU law neither mandates nor prohibits conditions limiting end-users’ access to, and/or use of, communication services and applications to protect the rights of copyright owners (see Article 1(3) of Directive 2002/22/EC as amended by Directive 2009/136/EC). Article 1(3a) of Directive 2002/21/EC as amended by Directive 2009/140/EC states that any measures regarding end-users’ access to, or use of, electronic communications networks liable to restrict fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the ECHR. The crucial question for the court in the present context is therefore whether the contested provisions, designed to protect the rights of copyright owners, strike the right balance between these competing interests and meet the requirements of legal certainty, necessity and proportionality.

3C. The principle of legal certainty

19. Any restriction on freedom of expression under Article 10(2) must be “prescribed by law”. This expression, or its close equivalent “in accordance with the law”, is common to all of the qualified rights under the ECHR (Articles 8 - 11) and is the subject of a considerable body of Strasbourg jurisprudence. It refers not merely to existence of a proper legal basis for any restriction on a Convention right under domestic law but also to the quality of that law, which must be formulated with sufficient precision so as to be reasonably certain and foreseeable, enabling a person affected by the law to regulate his conduct and providing adequate safeguards against abuse (*Sunday Times v UK (No 1)* (1991) 14 EHRR 16, para 49).
20. As Lord Bingham observed in *R(Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148 (at para 34), the requirement that any interference with a Convention right must be “in accordance with the law” is “intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied.”

3D. The chilling effect

21. The term “chilling effect” was coined in the United States in litigation relating to the exercise of First Amendment freedoms, where it was used to describe the negative impact on freedom of expression of overbroad and/or vague laws. The central problem identified in that body of case law is the chilling effect of such laws on freedom of expression created by the threat of sanctions, whose effects tend to be felt far beyond the specific mischief they seek to prevent by deterring people from exercising their legitimate free speech rights, to the detriment of society as a whole (see e.g. *Dombrowski v Pfister* (1965) 380 US 479, per Brennan J at 487-489).
22. The concept of a chilling effect on free speech is now very well-developed in European and UK jurisprudence and has been invoked in a very wide variety of different contexts.

23. In Strasbourg, for example, the European Court of Human Rights has found violations of Article 10 in the following situations (given by way of example):
- (1) The rigid application of competition laws prohibiting advertising against a veterinary surgeon, who had made critical comments about out-of hours services in a newspaper, threatened to deter other professionals from speaking out on matters of public concern (*Bartold v Germany* (1985) 7 EHRR 383, para 58);
 - (2) A private prosecution for criminal defamation against a journalist reporting on a political scandal involving a leading politician threatened to deter other journalists from reporting matters of legitimate public concern (*Lingens v Austria* (1986) 8 EHRR 103, para 44);
 - (3) Punishing a journalist for racist remarks made by interviewees in a television programme would deter other journalists from reporting on matters of important public concern through the carrying out of interviews (*Jersild v Denmark* (1994) 19 EHRR 1, para 44).
 - (4) Forcing journalists to disclose their sources had a chilling effect on freedom of expression by deterring people from giving information to journalists (*Goodwin v UK* (1996) 22 EHRR 123).
 - (5) A defamation action brought by McDonalds against two impecunious activists threatened to have a chilling effect on others who might wish to circulate information and ideas about powerful corporate entities (*Steel & Morris v United Kingdom* (2005) 41 EHRR 22).
24. In domestic jurisprudence, the concept of a chilling effect on freedom of expression has profoundly influenced the development of the law in a number of significant areas (again by way of example):
- (1) Governmental bodies such as local authorities do not have standing to bring claims for defamation because of the chilling effect this would have upon the reporting of political issues (*Derbyshire County Council v Times Newspapers* [1992] QB 770);
 - (2) Excessive compensatory awards in defamation cases and exemplary damages had a chilling effect on freedom of expression, resulting in the issuing of judicial guidelines on quantum in defamation cases (*John v MGN Ltd* [1997] 1 QB 429);

- (3) The blanket ban on interviews with prisoners was held to be incompatible with freedom of expression because of the chilling effect it would have on the ability of prisoners to draw public attention to alleged miscarriages of justice (*R v Home Secretary, ex parte Simms* [2000] 2 AC 115).
- (4) Concern about the chilling effect of costs arising from conditional fee agreements in defamation cases led the court to identify measures to impose advance cap costs in libel cases (*King v Telegraph Group* [2005] 1 WLR 2282).
- (5) The rule in *Bonnard v Perryman* limiting the circumstances in which injunctive relief could be obtained against the media in defamation cases was affirmed post-HRA because of the chilling effect of interim injunctions on the media (*Greene v Associated Newspapers* [2005] QB 972).
25. Section 12(4) of the Human Rights Act 1998 requires the courts to have “particular regard to the importance of the Convention right to freedom of expression.” As set out at paragraph 18 above, restrictions on the right to freedom of expression must satisfy the principles of legal certainty and proportionality. British courts have recognised that these principles apply when interpreting and applying legislative restrictions (*R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL)); and restrictions imposed by the common law (of libel) (*Derbyshire County Council v Times Newspapers* [1993] AC 534 (HL); *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL), and by equity (protecting private information) (*Re S (A Child)(Identification: Restrictions on Publication* [2005] 1 AC 593).

4. SUBMISSIONS

26. The purpose of the DEA is to address the problem of online copyright infringement, particularly the phenomenon of peer-to-peer file-sharing. That specific problem is but one aspect of a much broader societal phenomenon, which is the increasingly indispensable role of the internet as a means for accessing e.g. goods and services, news and current affairs, education, jobs, housing and government services including advisory and support services, such as public health and employment advice provided

on the NHS and JobCentre Plus website. The increasing importance of public service provision online is amplified by recent Cabinet Office announcements that many public services will increasingly in future be provided as online-only services, or “digital by default”. The internet also plays a key role in facilitating democratic participation, playing a central part in modern election campaigns and a means by which citizens can engage with the political process through e.g. contacting their MP, responding to Government consultations and participating in online debates.

27. In its report Internet Access 2010³² the Office of National Statistics reveals that 73% of households in the UK now have internet access and that 30.1 million adults used the internet every day or nearly every day in the 12 months under review. Some 17.4 million adults used the internet to watch television or listen to the radio, while 31 million people bought or ordered goods or services online. The rapid growth in demand for internet services is illustrated by the fact that since 2006 an extra 5 million households now have internet access. Some 90% of individuals with internet access had used it to send/receive email, 54% had used the internet for online banking, 39% used it to seek health-related information, 35% used it the purpose of learning, and 26% used the internet to look for a job, or send a job application. Internet access is also part of official Government policy concerning “digital inclusion”, where increasing internet access in disadvantaged communities is seen as an important part of combating social and economic exclusion.
28. The use of the internet by both individuals and organisations engages their right to freedom of expression; the right both to receive and to impart information and ideas. This was expressly recognised by the European Parliament in its Directive 2009/140/EC providing for a common regulatory framework for electronic communications networks, the preamble of which recognises that the internet is “essential for education and for the practical exercise of freedom of expression” (recital 4). The directive amends Directive 2002/21/EC to the effect that measures taken by Member States regarding end-user access to, or use of, the internet must respect human rights and may only be imposed if they are appropriate, necessary and proportionate within a democratic society (new Article 1(3a)). As the

³² Exhibit “SW/2”.

internet has become one of the primary means for communication in the modern world, it is self-evident that any measure which could deter or inhibit internet usage requires the most careful scrutiny, particularly in terms of its proportionality. It is submitted that the DEA is a prime example of a measure which would deter or inhibit internet use in ways that go far beyond the aim of preventing online copyright infringement.

29. The DEA marks a radical departure from the way in which copyright law has hitherto been protected in this jurisdiction. In summary, the Copyright, Designs and Patents Act 1988 (“the 1998 Act”) already provides a mechanism for copyright owners to bring civil proceedings against online infringers of their copyright, enabling them to obtain injunctive relief, damages and an account of profits against them. Under the 1988 Act copyright owners bear the burden of proving that a defendant has infringed their copyright or authorised third parties to do so. Section 16 of the 1998 Act establishes civil liability if a person “without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright”. The 1988 Act also provides for a range of criminal offences against persons who are both commercially and knowingly involved in copyright infringement.
30. Under copyright law an individual is not liable for the infringement committed by other persons, unless he has authorised that infringement. In this context, where a third party uses the internet connection of a subscriber to infringe copyright without the subscribers knowledge or consent, the subscriber will not be liable for that copyright infringement, because they have not authorised it: *CBS v Amstrad* [1988] AC 1013 (per Lord Templeman at p.1058 E-H); *Media CAT v A* [2010] EWPCC 17 (per HHJ Birss QC, paras 6, 27-30).
31. Under the DEA, however, both individuals and organisations who subscribe to internet services will be liable to be included on a copyright infringement list (“CIL”) if an IP address associated with them has been connected to an apparent infringement. Inclusion on a CIL is a precursor to enforcement action at the instance of their internet service provider (as opposed to a court of law), who may be required to impose technical measures including suspending internet access altogether. The circumstances in which a

subscriber may be included in a CIL and the grounds of appeal against such inclusion are therefore of central importance.

32. A subscriber may in some instances be a single individual who has a contract with an internet service provider and who is the only person to use that internet connection. But in many other instances, this will not reflect the reality of internet use and the critical question, in relation to subscribers, is the position of an individual or undertaking which both receives internet access as an end-user, and also makes it available to others. In a family household, there will typically be one subscriber but a number of different users in the household; the mother may be the subscriber, but the users may be the father, children and other relatives and on occasions their friends as well. In a shared flat one of the tenants will frequently be the subscriber, with other tenants using their own computers to access the internet connection. Landlords may be the subscriber of an internet connection which is used by the tenants. Internet connections are now frequently provided through wireless routers, which can be accessed by several computers and devices at the same time, hence the subscriber will frequently not have any physical control over the computers used to access the internet.
33. Furthermore, a significant number of consumers, businesses and public intermediaries leave their WiFi connection open (i.e. no password protection), to allow others free access to the internet. This is called “open WiFi”. If a subscriber in a residential household maintains an open Wifi their internet connection can be used by persons in their household as well as persons unknown to them in the surrounding area. Some public intermediaries and businesses also provide open WiFi to their customers; for example the Cardiff Central Library and the Apple Store in Regent Street both provide open WiFi.
34. For public intermediaries, such as libraries and universities, the essentially bipartite relationship envisaged under the Act between a commercial ISP and an individual or household does not reflect the reality of how they provide internet access. As the British Library has pointed out in its evidence to OFCOM, “Schools and public libraries for example may or may not know who accessed the internet at a particular point in time, they may assign a single IP address to a whole building or swathe of computer

banks, and who in the network hierarchy subscribes to broadband access contractually will vary from institution to institution and local authority to local authority. Much of the problem with stretching the Act beyond a commercial ISP / individual customer relationship comes from the fact that the definitions and concepts in the Act do not countenance the complexity of the user / intermediary / upstream provider relationship.”³³

35. Unlike under existing copyright law, subscribers will be liable under the DEA for inclusion on a CIL for “apparent infringements” of copyright carried out by third parties even if the infringement was made without their knowledge or authorisation. The subscriber’s appeal against inclusion on a CIL in such circumstances requires the subscriber to establish that the infringement was not carried out by the subscriber and that the subscriber had taken reasonable steps to prevent it: see s.124K(6). The burden of proof has been reversed, with the copyright owner now absolved of proving an infringement by a given person (as they would have to do under the 1988 Act) but able to rely on the fact that a link has been made between an apparent infringement and an IP address.
36. If the IP address and subscriber can be linked, the subscriber is then called upon to prove a negative – namely that he did not carry out the apparent copyright infringement. It is notoriously difficult for any person to prove a negative and the situation of subscribers whose internet access has been used by third parties is no exception. Short of providing definitive proof that the subscriber has not used his internet connection at the material time it is very difficult to see how this burden could be discharged. The third party, whether a person using a subscriber’s open WiFi without his knowledge, a teenage son engaging in peer-to-peer file-sharing in his bedroom or a student using the campus computer, is hardly likely to volunteer his involvement in the apparent infringement to the subscriber.
37. As the British Library has stated, “In the short term we are very concerned that as from 2011 such bodies [as themselves] will be viewed by ISPs and copyright holders as subscribers. This will mean that public intermediaries will be subject to copyright infringement reports, the appeals process and at some point in the future potentially “technical measures”. Given that the appeals process requires proof that an IP address is that of the accused

³³ Exhibit “SW/3”, General Comments, page 2, para 1.

subscriber we believe it will be far easier to prove a particular computer owned by a public intermediary equated to the infringing IP address, rather than pursuing the individual concerned. Clearly the costly pursuit of intermediaries being held responsible for the activities of their users is a grave concern and a situation we are very keen to avoid.”³⁴

38. But even if the subscriber was able to discharge the burden of proof by showing that he did not carry out the infringement himself, this is not sufficient; he must also show that he took “reasonable measures” to prevent it: see s.124K(6). The term “reasonable measures” under s. 124K(6) is therefore of crucial importance under the DEA, as it is potentially determinative of which subscribers will find themselves included on copyright infringement lists and hence relevant subscribers for the purpose of technical measures. But “reasonable measures” is nowhere defined in the Act, not even by reference to any factors that a court should take into account when making that judgment. Neither is the term “reasonable measures” defined by OFCOM in the Draft Initial Obligations Code.
39. It is submitted that the absence of any definition of “reasonable measures” results in a lack of legal certainty – the procedures that have been adopted are not predictable and foreseeable by those to whom they are applied. The Act provides for two types of appeals: an appeal to an appeals body for inclusion on a CIL and an appeal to an appeals body, and thereafter to a First-tier Tribunal, in cases involving technical measures. But the Act gives no indication at all as to the factors that the appeals body and/or the First-tier Tribunal would take into account when determining what a “reasonable measure” might be for the purpose of appeals against inclusion on a copyright infringement list or in respect of technical measures being imposed on the subscriber, including the suspension of internet access. Hence the contested provisions render the circumstances under which individuals and organisations will incur liability under the Act highly uncertain. Subscribers providing internet access to other individuals in their household or those in the immediate surroundings through Open WiFi do not know how to regulate their conduct so as to protect themselves against potential liability and technical measures.

³⁴ Exhibit “SW/3”, General Comments, page 3, para 7.

40. Another area of legal uncertainty of particular concern to public intermediaries and those providing open WiFi is the question of whether they meet the definition of “internet service provider” or of “subscriber” under s.124N of the Act. The material definitions are as follows:

“**internet service provider**” means a person who provides an internet access service;
“**internet access service**” means an electronic communications service that—
(a) is provided to a subscriber;
(b) consists entirely or mainly of the provision of access to the internet; and
(c) includes the allocation of an IP address or IP addresses to the subscriber to enable that access;
“**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;”

41. In the simple model of an individual subscriber with a static IP address who has contracted for services from a commercial internet service provider these definitions give rise to little difficulty. But in the case of a public intermediary, such as a library or a university, these definitions are highly problematic, as it would seem that they could qualify as both internet service providers and subscribers under the above definitions, as they are both providers of internet access services to third parties and recipients of such services under their contracts with commercial internet service providers. If public service intermediaries were to be defined as subscriber or ISPs, with all the obligations that follow under the Act, the costs implications would be highly significant, all the more so at a time of public spending cuts.³⁵
42. In the absence of legal certainty in respect of the definition of ISP and its application to public service intermediaries under the Act it was left to OFCOM to provide some clarity to these definitions so that the position of public service intermediaries was clear. OFCOM’s pragmatic solution in the Draft Initial Obligations Code was that the Code should apply in the first instance only to ISPs with more than 400,000 subscribers. If this position is maintained and public service intermediaries are classified as ISPs for the purpose of the Act, it would appear that most public service intermediaries will not be classed as qualifying ISPs under the Act initially. However, OFCOM has stated that it will review on a regular basis whether to extend coverage of the Code, so the legal uncertainty would persist.

³⁵ Exhibit “SW/3”, General Comments page 2, para 3.

43. The consequence of these developments is again clear spelt out in the submissions of the British Library to OFCOM, “We are very concerned that there is a high risk that public intermediaries like libraries, universities, local authorities, museums and schools will incur significant and disproportionate costs in “second guessing” what obligations and responsibilities will be required of them. Having spoken to public library employees many are concerned that in a period of fiscal restraint the confusion created by the Act may lead some local authorities to evaluate the pros and cons of continuing to offer internet services to their users. Clearly any decision to withdraw services would have grave implications for the local community as well as the government’s digital inclusion agenda.”³⁶
44. For the avoidance of any doubt it is not contended on behalf of Consumer Focus and Article 19 that the right to freedom of expression entitles internet users to infringe copyright online. The concern of Consumer Focus and Article 19 is the proportionality of the contested provisions, because ultimately if technical measures such as restricting or suspending internet access are imposed, their impact is not limited to the legitimate aim of preventing online copyright infringement; in reality such measures will impact on the internet access of individuals and households generally, including access to all the vital services which the internet provides. It is striking that even in the criminal law context, where the courts have been empowered to impose orders limiting internet access against convicted sex offenders, the courts have shied away from imposing sanctions that suspend internet access altogether.³⁷
45. In summary, it is submitted that the contested provisions are a disproportionate response to the specific problem of online copyright infringement. Shifting the burden to subscribers to prove that the act constituting the apparent infringement was not done by the subscriber and that they took reasonable measures to prevent other persons infringing copyright by mean of their internet connection, particularly in circumstances where there is no definition of reasonable measures at all, is disproportionate and creates legal uncertainty. It means that subscribers whose internet connection has been used by other persons to infringe

³⁶ Exhibit “SW/3”, Specific Comments, page 3, para 2.

³⁷ Exhibit “SW/4”.

copyright without their knowledge or authorisation lack clear and adequate safeguards to prevent themselves from being labelled as infringers and are unable to regulate their conduct so as to protect themselves against potential liability and technical measures.

46. Bringing public service intermediaries within the scope of the DEA is itself disproportionate. There is no evidence that there are significant levels of copyright infringement across public intermediary networks; on the contrary, what evidence is available suggests that there is minimal copyright infringement on such networks.³⁸ The problem is compounded by the legal uncertainties surrounding the definitions of ISP and subscribers in this context, as well as the uncertainties over what constitutes “reasonable measures”.
47. The term chilling effect describes the harm done to freedom of expression by the threat that sanctions will be imposed under overbroad or uncertain laws. It is submitted that the contested provisions do have the potential to impact on internet access and use far beyond the legitimate objective of penalising copyright infringement through peer-to-peer file-sharing, as they provide insufficient safeguards for individuals and organisations who may become liable under the Act for the acts of third parties which did they not authorise or condone. In these circumstances, the risk of incurring liability under the contested provisions has a real potential to chill internet usage by individuals and households, as well as the provision of internet access by public service intermediaries in the future.

GUY VASSALL-ADAMS

Doughty Street Chambers

10 March 2011

³⁸ See e.g. Exhibits “SW/6” and “SW/7”.



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to Ofcom notice on draft Initial Obligations Code, Digital Economy Act 2010

For more information please about this submission contact Saskia Walzel on 020 7799 7977 or email saskia.walzel@consumerfocus.org.uk

www.consumerfocus.org.uk

Published: July 2012

If you require this publication in Braille, large print or on audio CD please contact us.

For the deaf, hard of hearing or speech impaired, contact Consumer Focus via

Text Relay:

From a textphone, call 18001 020 7799 7900

From a telephone, call 18002 020 7799 7900

Consumer Focus

Fleetbank House
Salisbury Square
London EC4Y 8JX

Tel: 020 7799 7900

Fax: 020 7799 7901

Media Team: 020 7799 8004 / 8006

For regular updates from Consumer Focus sign up to our monthly e-newsletter by emailing enews@consumerfocus.org.uk