



MOTION PICTURE ASSOCIATION (MPA)
Response to Consultation on Online Infringement of Copyright
and the Digital Economy Act 2010
Draft Initial Obligations Code
July 2012



July 26th 2012

MPA RESPONSE TO Ofcom CONSULTATION ON THE INITIAL OBLIGATIONS CODE

This document offers a response from the Motion Picture Association (“MPA”) to the document entitled “Online Infringement of Copyright and the Digital Economy Act 2010” (the “Code Consultation Document”) which was published by Ofcom on June 26th 2012 and which requested responses by close of business on July 26th 2012.

As the Code Consultation Document does not offer any specific questions to which stakeholders are invited to respond, MPA has chosen to comment on the points that Ofcom calls out in Section 1.9 of the June 26th document – and, where necessary, to refer to Ofcom’s more detailed proposals on specific subjects as they are laid out elsewhere in the Code Consultation Document.

Note that text found in Section 1.9 and other Sections of the Code Consultation Document is reproduced in standard font – and MPA’s suggested comments to form our response to the Consultation are included in ***bold italic*** font.

- We have amended the definition of the internet access services and internet access providers that are within scope of the Code to clarify that only providers of fixed internet access supplying services over more than 400,000 broadband-enabled lines will be subject to the initial obligations. Internet access providers which do not meet these criteria (for example, mobile network operators and providers of Wi-Fi services) are outside the scope of the Code. This is on the basis that costs of participation would be disproportionately high compared to the expected low reduction in overall levels of online copyright infringement that participation would bring:

We agree that significant volumes of Peer to Peer (P2P) activity occur on fixed line networks and via Residential ISP accounts where, inside the residence or other physical location, access to the Internet is provided via a Wireless Router as detailed in Paragraph 3.98 of Section 1.9 of the June 26th document (“... fixed internet access service which is conveyed via “physical means (for example copper, fibre or cable) to the subscriber’s premises ...”). That said, we are concerned that consumers’ habits have changed since May 2010 and that, increasingly, similar activity occurs on mobile and using Wi-Fi service providers. Accordingly we intend to monitor this activity over the next few months in order to provide more specific data to Ofcom and we intend to provide any such concerning data to Ofcom as soon as it is available in order that it may be considered in the Review on this issue that Ofcom is proposing for six months after the Phase One DEA programme is implemented. Based on information available to us already (which indicates a considerable amount of infringing activity detected on mobile networks) and given the fact that Ofcom’s own estimate is that earliest implementation of the initial phase of the DEA is projected for the first



quarter of 2014, we believe that activity on mobile and Wi-Fi networks will increase from current levels. This is expected because we believe that consumer behavior is likely to change – migrating to greater use of mobile and Wi-Fi networks. That statement is based on the expectation that such non-wired/fixed networks will be available increasingly to the general public (and likely at low or even no cost) - and also because we anticipate that it will be clear to consumers that these non-wired/fixed services are, at least initially, excluded from the DEA mandates.

In addition we remain concerned about the many libraries, cafes and similar entities which receive their internet access via fixed line services from a Qualifying ISP but which, then, provide internet access to customers or members of the general public via Wireless Routers which are connected to that fixed line service.

We do not agree (as suggested by some respondents to the May 2010 Consultation) that it would be appropriate not to forward and process CIRs and Notifications which relate to such an entity – especially given the fact that the Phase One DEA programme is intended to have primarily an educational focus.

So our position is that educational notices sent to such an entity should provide an incentive for the responsible parties there to take reasonable steps to avoid receiving further Notifications and, potentially, having details of their account listed on a Copyright Infringer List.

We note that the reasonable steps that may be taken by a library or café that provides public internet access are likely to be established by the Appeals Body in due course. We also note that:

- (a) the fact that a public internet access service is identified on a Copyright Infringer List does not mean that such service will necessarily be subject to legal proceedings or any other measure;*
- (b) the fact that any internet subscriber (whether a library or any other internet subscriber) has not taken reasonable steps to prevent infringement does not mean that the subscriber will then automatically be liable for infringement of copyright. In fact, the issues in respect of the liability of a subscriber identified on a Copyright Infringement List are likely to be very fact sensitive and only to be clarified through the courts over time.*

Recognising these points and the need to ensure that an educative message is delivered as widely as possible, we are concerned to note that Ofcom considers that it is able to make a distinction between an undertaking receiving an internet access service for its own use and also making that internet access available to others (which entity Ofcom considers is to be regarded as a subscriber) and entities that receive an internet service “essentially and verifiably” for the purpose of providing it to third parties. Ofcom notes that, in such cases, “it would appear reasonable for their upstream ISP to treat them as an ISP or communications provider in relation to the application of the initial obligations”.



MPA are concerned that this assertion risks applying the definition of “communications provider” too liberally and deviating from its intended construction under the DEA and Communications Act 2003.

In the factsheet entitled ‘Online infringement of copyright: libraries, universities and Wi-Fi providers’, cited by Ofcom, Government clearly states its express decision not to provide an exemption for libraries, universities and other wifi-providers and only to provide an exemption to true “communications providers”. Enabling ISPs to apply too broad an interpretation to the term “communications provider” risks indirectly creating such an exemption and thus circumventing Parliamentary intention.

The factsheet acknowledges that “in some circumstances” a Wi-Fi provider “might be regarded as a communications provider”. This choice of language would indicate that such a determination should be reached in a minority of instances rather than being liberally applied.

In light of this, MPA asks that Ofcom provide greater clarification on how this definition should be applied and what type of entities may be within its ambit.

Further, as Copyright Owners will be required to pay for CIRs forwarded to ISPs, regardless of whether those CIRs lead to a Notice, MPA suggests that paragraph 8 of the Code should require the relevant ISP to provide adequate justification where it determines that a particular entity is not a “fixed subscriber” under paragraph 18(d), such justification to have regard to the guidelines that MPA suggests that Ofcom should produce.

- We have added in paragraph 2 of the Code a further qualification provision, that where all fixed ISPs within a Group (as defined in section 1261 of the Companies Act 2006) provide internet access services over more than 400,000 broadband-enabled lines in aggregate, they will each be qualifying ISPs. This removes ISPs’ ability to avoid the application of the Code by making changes to their corporate structure;

We agree with and welcome this modification.

- The Code now specifies that, in the event a qualifying ISP falls below the qualification threshold (for example as a result of customer churn), it will remain subject to the initial obligations for the duration of the notification period in which it ceases to meet the threshold and for the notification period which immediately follows. This is so that copyright owners which have funded ISP investment in CIR processing systems have a reasonable period during which they can benefit from this investment. We consider this reasonably balances the interests of the copyright owner and ISP;

We agree with and welcome this modification.



- In the May 2010 consultation we said that copyright owners must detail to Ofcom the processes that they have put in place to audit their evidence-gathering systems. We have now specified that copyright owners will be required to have their procedures approved by Ofcom before they can send any reports of apparent copyright infringement to ISPs. We expect that a copyright owner will be well placed to secure approval from Ofcom if it adopts evidence-gathering procedures that comply with a publicly-available specification which Ofcom is prepared to sponsor. ISPs are not required to have their subscriber identification processes approved by Ofcom, though failure to comply with the requirement for accurate address matching is likely to be considered a material breach of the Code, triggering enforcement action and a fine where appropriate. We believe that ISPs have clear incentives to ensure their processes are robust in order to avoid reputational damage with their subscribers. However, Ofcom also proposes to sponsor a specification for matching IP addresses to individual subscribers which we would encourage ISPs to adopt on a voluntary basis.

In our response to the May 2010 Consultation and during many discussions with senior representatives of the Ofcom team, MPA has made it clear that our policy is to use the most stringent processes available to ensure that any CIR that we would generate and forward to an ISP would be certain to pertain to a verified infringement of the copyright certification associated with at least one of our members' film or television content. Also we have described on multiple occasions the considerable efforts that MPA has made (and continues to make) in the UK to persuade other Rights Holders that they should adopt equally stringent methods. We do this both because we are committed to a robust and consistent technical approach so as to avoid mistakes and the resulting difficulties that they can create for non-infringers and to ensure the integrity of the process with its focus on education and behavioural change.

We were surprised that Ofcom's previous position was that it would not sponsor or operate any form of pre-approval for Content Owners' or ISPs' technical methods for fulfilling their DEA obligations (and, in fact, encouraged Ofcom to consider recommending the standards-based approach that MPA adopted more than 2 years' ago and enforces strictly). However, given Ofcom's then current proposal, we did support the self-certification model that was proposed in the May 2010 document as we were confident that our methodology would be as robust and consistent as required.

Now that Ofcom's position has changed with regard to pre-approving Content Owners' methodologies, we remain confident that our approach will be sufficient to meet any requirements that may be presented. However we are extremely concerned that Ofcom's proposal does not require ISPs' methodology to be reviewed formally and approved by Ofcom or its representative and that ISPs' compliance with a '... specification for matching IP addresses to individual subscribers ...' is proposed to be voluntary. Given Ofcom's point that the reputation of the notification scheme under the Code and its likely effectiveness are key considerations, MPA urges Ofcom to ensure a similarly robust approach to ISP processes. There are three major reasons for MPA's concern:

- MPA's experience in the United States and other markets is that, of those issues that do arise with the delivery of CIRs (or their equivalents) to ISPs' subscribers, more are caused by incorrect matching of the IP address to a subscribers' account because the*



ISPs' processes are not sufficiently reliable – and not by inaccurate identification of IP addresses or verification of unauthorised copies of content.

- ii. Similarly, in many cases and for various reasons, some ISPs' infrastructures may not be sufficient to match all, or a significant number of IP addresses at all. In the case of the proposed UK model, this would result in CIRs being "wasted" because the ISP is not able to determine if and to whose account they should be associated. Given the DEA model which requires Content Owners to pay for CIRs forwarded to ISPs, regardless of their fate, this uncertainty remains a major concern. Furthermore, it is really not any comfort to know that an ISP could be subject to a review and a potential fine if it fails to match some arbitrary percentage of IP addresses – since, by then, our members' funds would have been allocated to pre-pay for those CIRs and we assume that we would not receive any of the money paid to settle the fine.***
- iii. Ofcom's June 26th document and the incorporated BWCS report both lay out in some detail the various functions that an ISP must deliver in order to meet the requirements of the DEA – including IP Address matching, managing data related to CIRs and Notifications, producing required reports including Copyright Infringer Lists, managing communications with subscribers who contact Call Centres and other support resources etc. – but without the risk that subscribers' personal information will be exposed inappropriately. Also Ofcom lays out in the Code Consultation Document several specific points related to the matching and forwarding processes (for example, in Section 5.11 and adjacent sections of the Code Consultation Document and also in Section 5.26 and adjacent sections of the Code Consultation Document). So MPA's position is both that Qualified ISPs should be subject to a pre-approval process to confirm compliance with a published specification (as will Copyright Owners or their representatives) and that this specification and consequent review should address all of the responsibilities that fall to the ISPs¹.***
- The Code now clarifies the standard for obtaining evidence of copyright infringement. It now specifies that a copyright owner may only send a CIR if it has gathered evidence in accordance with the approved procedures which gives reasonable grounds to believe that:

 - a subscriber to an internet access service has infringed the owner's copyright by means of the service; or
 - has allowed another person to use that service and that person has infringed the owner's copyright by means of that service.

¹Clarification of these responsibilities is proposed in the consultation document entitled "Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012" (the "Costs SI Consultation Document") - to which MPA will be responding in due course. For clarity, MPA's position is that ISPs' responsibilities include at least (but are not limited to exclusively) the receipt, assimilation and processing of CIRs, the matching of IP Addresses to Subscriber accounts, the forwarding of Notices to Subscribers, the various reporting requirements, the various data retention and management requirements etc.



Section 124 A(1) of the DEA prescribes that a copyright owner may only send a CIR if it “appears” that a subscriber has acted in the manner detailed in that section.

MPA notes that Ofcom accepts that it is unable to place a higher evidential standard on copyright owners beyond that specified by section 124A(1) of the DEA. MPA is concerned that Ofcom’s proposed departure from the clear terms of the DEA may lead to uncertainty and would not reflect Parliament’s intention or the terms of the DEA. It is MPA’s position that such a departure is not permissible under the Act.

MPA strongly agrees that any action taken in accordance with section 124A(1) must be robustly evidence based. However, the requirement that such evidence must yield “reasonable grounds to believe” exceeds the constraints imposed by the DEA and imposes a material departure that has the potential to undermine the purpose of the Digital Economy Act.

As Ofcom acknowledges, the repeated reference to an “apparent infringement” in the DEA, reflects the Parliamentary intention that a copyright owner should not have to establish or demonstrate (to the civil standard) that a subscriber has infringed copyright or that the subscriber has allowed the internet service to be used to infringe.

Rather, the intention has been to ensure that the copyright owner must have reasonable grounds to believe that an infringement has been identified but only that it should “appear” that the infringement that is identified is by the subscriber or by someone allowed to use the service by the subscriber.

Given that a subscriber may not be the person who has used the internet access service to infringe copyright and given that there may be some suggestion that the word “allowed” involves some element of permission and – on this point, as indicated above, MPA is concerned that Ofcom’s position and proposals may not be permissible under the Act.

MPA supports Ofcom’s desire to impose an objective, evidence based standard for the sending of CIRs but notes that such a standard must fall within the parameters imposed by the DEA, i.e. that on the evidence gathered, it appears to the copyright owner that the necessary criteria has been met.

In light of this, MPA considers that the Code should continue to provide that a copyright infringement report may be sent if “the qualifying copyright owner holds evidence (collated in accordance with the approved procedures)... from which it appears that-...”

This would be consistent with the Parliamentary intention for the legislation, would ensure that the Code accords with the DEA and would also avoid any inconsistency between the Grounds of Appeal and the threshold criteria for reports to be sent under the Code.

MPA notes that the constraints imposed by the DEA on the evidential standard that the Code may require, and the points raised above, are also applicable to the standard Ofcom must adopt in deciding whether to approve a report under paragraph 6(5) of the Code.



- In the May 2010 consultation, we proposed that a copyright owner could only participate in the notification scheme if it had paid the fees due to ISPs and Ofcom under the cost-sharing arrangements made by the Secretary of State. The Code no longer makes advance payment of these fees a qualifying condition which a copyright owner must satisfy in order to be able to send CIRs to an ISP. In the interests of improving certainty as to the identity of copyright owners which are participating in the scheme, it now provides that until the copyright owner pays the fees due to the ISP in full, the ISP is not required to send notifications to its subscribers in relation to that copyright owner's CIRs. A failure to pay the fees due to Ofcom will not impede the processing of CIRs but is likely to lead to enforcement action by Ofcom against the copyright owner for recovery of the amount owed.

In general we agree with this modification to the proposed language. However we believe that it should be extended further to clarify that the copyright owner must have fulfilled all other pre-requirements of the legislation (including pre-approval of evidence gathering methodologies) before paying for and sending any CIRs.

Also we would remind Ofcom of MPA's general concern (articulated in our previous submissions and on which issue we expect to comment further in the Costs SI Consultation Document) about the percentage of initial and ongoing programme costs which is proposed to be allocated to copyright owners and also the facts both that there is a request for major portions of these costs to be committed and (still, to some extent) paid in advance of the initial DEA programme being implemented.

- We initially proposed that CIRs must be sent within ten days of the evidence of infringement being gathered. To bring this into line with the DEA provisions, the Code now requires that CIRs must be sent within one month of the evidence being gathered. We also require that CIRs are submitted in an electronic format and using a standard form. We have also removed provisions in the May 2010 consultation draft requiring notifications to take account of guidance that Ofcom may issue in relation to the form and content of such notifications and to comply with any directions that Ofcom may make. This is on the grounds that it is doubtful that this is within the scope of the powers conferred on Ofcom by the DEA provisions;

While we believe that it is important for consumers to receive notices as soon as possible after an incident has been detected and verified, we understand that some types of content may require more time. We intend to forward CIRs as quickly as possible – likely within minutes to hours of detection and verification. Accordingly we would request that the language would make it clear that Copyright Owners are encouraged to forward CIRs to ISPs as soon as possible and no later than one month after the infringement was detected.

With regard to the format of CIRs, we have proposed already adoption of the ACNS standard and intend to use that unless there is some direct indication against that in the standard specification that will emerge from Ofcom's proposed process.



- Similarly, in the May 2010 consultation we proposed that ISPs should have ten days from receipt of a CIR to send a notification to the relevant subscriber. We have now altered this to one month to bring the Code into line with the DEA provisions;

Again we think that it is critical that notifications should reach consumers as close to the infringement activity point as possible. So, while the regulation may permit a one month period for processing, we would urge Ofcom to make it clear - within the language of the code and via other means - that ISPs, using the automated infrastructures for which Content Owners will be paying the majority of the costs, are encouraged to ensure that those systems are able to process CIRs as quickly as possible.

Please refer to our previous statements on this issue as referenced in Section 5.14 of the Code Consultation Document.

- In the light of responses to the May 2010 consultation we have removed ISPs' discretion under the Code to reject CIRs as invalid based upon their "reasonable opinion" on the basis that this provides an overly broad discretion;

We agree with and welcome this modification.

- We initially proposed that first and second notifications could be emailed by ISPs to subscribers, and that the third notification should be posted by recorded delivery. But because of concerns that ISPs may not always have the relevant email address for subscribers and, in relation to the third notification, the expense of recorded delivery, we have now decided that all notifications should be posted using first class mail;

We believe that ISPs have already (via their billing systems and for other reasons such as for marketing purposes) taken steps to obtain useful email addresses for the majority of their customer base – and that, if they have not, there is time in the process now to do this before full implementation of the DEA process. Also we do not feel that it is less likely for a child or teenager to intercept a notification letter than an email to the responsible subscriber – and that in fact the reverse may be the case. So we would urge Ofcom to reconsider this decision – and to, perhaps, provide that ISPs should use whatever communication method the ISP is most certain will reach the Subscriber and may use a letter ONLY when they believe that they do NOT have a useful email address for the account holder.

- We have also removed a provision in the May 2010 consultation enabling us to give directions to the ISP as to the form of the notification since the DEA provisions do not confer this power on us. Notifications must be in writing and each qualifying ISP must have a standard form in relation to each type of notification which should be in plain English and consistent, as far as possible, with the other types of notification;

While we understand Ofcom's position on this, we do believe that the Agency has an obligation to ensure that the language used by the ISPs does include all required components and also does not disparage either the legislation itself or the actions of Content Owners. The threat of a later review and potential fine would not seem sufficient to us to avoid damage that may have been done already by notifications that are worded inappropriately.



- We have added a further requirement that notifications must state the number of CIRs held by the qualifying ISP at the time of sending the notification which relate to IP addresses allocated to the subscriber. This is intended to provide more complete information to the subscriber about allegations of infringement that have been made to their ISP and help them assess whether to seek copies of these additional CIRs;

We agree with and welcome this modification. However we think that it is critical that this provision is strengthened by making it clear that ISPs must also provide mechanisms both online and via their Customer Support teams to ensure that subscribers may access copies of those other CIRs for purposes of review and, when needed, support of or inclusion in an Appeal case.

We would also propose that notifications should inform subscribers of the potential for a Court Order directed at the use of their account under section 97A of the CDPA as part of the information regarding potential legal action required by paragraph 16(1)(f). In order for the notifications to yield the desired educational effect, it is important that subscribers are fully aware of the potential consequences of infringement using their internet account.

- We have introduced a requirement that the gap between the date on which the previous notification was sent and the date on which the evidence was gathered in relation to a subsequent infringement which triggers the next notification must be at least 20 days. This is to give the subscriber an opportunity to modify their behaviour (or secure their connection) before a subsequent notification is sent;

We believe that this 20 day period is too long and would propose a shorter period (i.e. a maximum of 10 days). Given the fact that the overall notice process includes a maximum of 3 notifications to an individual subscriber, a prolific infringer would be provided a period of two- three months before s/he would reach the end of the process. That is serious and could result in MANY infringements of various types of content whether or not the person is actually the subscriber or someone using the subscriber's network.

- Previously we proposed that copyright owners would only be able to request a copyright infringement list once within any three-month period, and that ISPs would have five days to provide the list. On the basis of submissions from copyright owners and ISPs we have now decided that copyright owners can request a list every month, and ISPs will have ten working days to provide it;

We welcome the improvement in this parameter. However we do not see any reason that access to these lists should not be on an "as needed " basis – without the requirement for a formal request from each copyright owner and a corresponding response from an ISP – and that, therefore, the stated requirement would be that ISPs must provide this information NO LESS FREQUENTLY than on a monthly basis.

We believe that the capability to make available the data required for the CILs can be provided by adoption of the ACNS standard or by some similarly designed approach that would facilitate ISPs delivering to a centralised location information for each CIR as and when it is processed – and from which all applicable copyright owners would be able to access the data as and when needed without further effort from the ISP.



- In the May 2010 consultation we did not specify the period of time that a subscriber has to make an appeal to the appeals body. We have now decided that this period will be 20 working days from the date of receipt of a notification or, in the absence of a notification, the date on which the subscriber became aware of the appealable act or omission. This is to provide a balance between the desirability of allowing subscribers a reasonable time to appeal and the certainty that comes from applying a reasonable limit;

We do not have any objection to this modification.

- We have amended the provision of the Code which specified that oral hearings should only be held in exceptional circumstances to reflect our view that this is a matter which is more appropriately dealt with in the appeals body's procedural rules;

We agree with and welcome the spirit of this modification – but feel that it should be adopted by the appeals body as proposed or that, better still (for reasons of cost and appropriate simplification of process), the appeals body's procedural rules should state that all cases will be handled electronically with no provision for oral hearings.

- We have introduced a requirement that a CIR must specify the time at which the evidence suggests that an infringement took place. This is in addition to the previous requirement that the CIR specify the time at which the evidence was gathered. This addition is in support of the requirement in the DEA provisions that the appeals body must find in favour of the subscriber unless the copyright owner shows that the apparent infringement was an infringement of copyright and the report relates to the subscriber's IP address at the time of that infringement;

We do not have any objection to this modification and would note that our current process meets this requirement.

- On the instruction of Government we have removed the ability for subscribers to appeal on any other ground on which they choose to rely;

We welcome and agree with this modification.

and

- On the instruction of Government we have removed the requirement for ISPs and copyright owners to provide a statement showing how their processes and systems are compliant with the Data Protection Act.

We welcome and agree with this modification.

MPA would like to make a final observation related to Ofcom's notes regarding hash codes which are included as Footnote 50 in the Code Consultation Document – and which are referenced from Section 4.3 of the Code Consultation Document. That footnote states that "A hash code is a unique identifier, associated with a digital content file. Within the context of P2P networks a hash code is created when a digital content file is shared via a P2P network. Alteration or modification of the content file, without creating a new hash will lead to a mismatch. Hash code matching can



also be used as part of the process of verifying the identity of a content asset. Cryptographic hash functions are used to identify files uniquely and to verify the integrity of the file.”

MPA believes that the description in the footnote is not completely accurate and that it is important for Ofcom to understand fully the nature of hash codes and the manner in which they are used to confirm the nature of a content file. For example, hash codes are calculated from actual digital content and not “created” for it – and it is this distinction which makes them reliable in identifying digital files and confirming that a specific digital file is or is not infringing.

MPA would be pleased to provide Ofcom with further information on this point if it would be helpful.