Online Infringement of Copyright and the Digital Economy Act 2010

Notice of Ofcom's proposal to make by order a code for regulating the initial obligations. Interim statement and notice of a proposal to make an order

TalkTalk Group submission

Non-confidential version

2 August 2012

1 Introduction

1.1 This is TalkTalk Group's ('TalkTalk') response to Ofcom's Notice of proposal to make by order a code for regulating the initial obligations of the DEA 2010 dated 26 June 2012 (we refer to this as the Consultation).

1.2 This submission is being made after the closing data of 26 July 2012. Notwithstanding this late submission, TalkTalk expects that Ofcom take full account of its representations. The deadline Ofcom set of 4 weeks was unreasonable given the importance/complexity of the issues under consultation and the fact that the consultation was taking place during a holiday period. In the specific case of TalkTalk it was practically impossible for TalkTalk to respond within the deadline: the only person able to respond to this consultation was on leave for the last 3 weeks of the 4 week consultation period and prior to this they were heavily involved in preparing a court submission (in support of Ofcom)[1]. Further, Ofcom gave no material advance notice of the publication of this consultation. TalkTalk has made every reasonable effort to make this submission as early as possible.

1.3 Given the limited time available TalkTalk has not commented on all aspects of the proposals and has sought to focus on the more important points. It has also sought to not duplicate points that it raised in the initial obligation code consultation (in July 2010). However, particularly to place new issues into proper context, some duplication is unavoidable.

1.4 We would be very happy to provide Ofcom additional information to help in its consideration of these issues.

2 General comments

2.1 This consultation includes a number of improvements to the original proposals and we welcome these – e.g. no additional specification of letter content by Ofcom, Ofcom rightly avoided unfounded implication that a subscriber is vicariously liable for other users of their connection. However, we note that the scheme remains fundamentally flawed and unjust particularly in that innocent customers will be threatened (depending on letter content) and will have their details placed on the CIL.

2.2 Overall it is disappointing that in many key areas Ofcom has not used the consultation to provide additional clarity for instance in respect of the definition and classification of different types of customers, treatment of intermediaries, data protection and appeal process. Ofcom should be cognisant that this approach that it has chosen to take increases uncertainty, risk and cost for ISPs, copyright owners and customers and will only serve to cause delay.

[1] Statement of Intervention in support of Ofcom's Defence in BT's appeal of the LLU/WLR Charge Control (case number: 1193/3/3/12)

2.3 There is in a number of key areas precious little reasoning or evidence to support Ofcom's proposals e.g. in selection of the 400,000 threshold, that non-qualifying ISPs will not want 'infringers' on their network. In the case of the threshold, the key pieces of evidence that Ofcom does point to – £400m figure for displaced sales and 30% to 70% impact of notifications – are flawed and/or insufficient and/or unreliable: for example: the £400m figure has been prepared solely for the content players and they have been unwilling to have it scrutinised; no comprehensive qualitative cost benefit analysis (i.e. comparing costs and benefits) has been done – these pieces of evidence are merely possible building blocks; and, no solid evidence has been advanced regarding the impact of notifications. It is particularly disappointing that Ofcom – an evidence based regulator – uses such flawed data since by doing so might give it credence that is not warranted. We comment below on further on the threshold issue and the evidence that is required to properly make a decision.

2.4 We note that – like DCMS – Ofcom has sought (§2.4) albeit less overtly to place 'blame' for the delay in progress of the DEA on the Judicial Review that BT and TalkTalk brought. This is somewhat misplaced and disingenuous:

2.4.1 First, the Government could have but chose not to progress with the implementation of the DEA during the Judicial Review. We understand that the reason that it chose not to progress implementation in the interim was that it was concerned that the DEA would be overturned. Ofcom/DCMS cannot reasonably blame BT/TalkTalk for challenging an Act that the Government itself thought might be unlawful and indeed was unlawful in a number of areas

2.4.2 Second, during the Judicial Review period much progress could have been made in planning for implementation (e.g. fees, appeal process, definitions) but it appears that there has been little progress

2.4.3 Third, the Judicial Review was completed in early March and implementation could have 'restarted' immediately rather than waiting almost 3 months (as has happened)

2.5 Thus whilst the Judicial Review may have contributed to the expected four year gap between enactment and the launch of the scheme (April 2010 to March 2014) there are many other factors that have contributed to the delay not least the fact that the initial legislation was so ill-thought through (and unlawful in parts) a fact that the current Secretary of State himself accepted.

3 Approach to customers who are not 'Subscribers'

3.1 Ofcom accept that where a 'customer' of a connection that has been identified via a CIR is not a Subscriber but rather an Internet Service Provider or Communications Provider then it is not appropriate to send a notification letter to that 'customer' (§A5.39). This can happen in a number of circumstances – for instance, if the

customer is a public intermediary, coffee shop offering Wi-Fi access[2] or a reseller / retail ISP purchasing wholesale service from the qualifying ISP. Ofcom suggests that ISPs assess whether particular customers are Subscribers or Internet Service Providers / Communications Providers (see §A5.57). Further Ofcom states that in the case that a customer is considered an ISP then the qualifying ISP should provide details of that customer to the relevant copyright owner (see §A5.46 and draft Code §8(2)(b)). This last obligation is new. We have three main concerns with this.

3.2 First there remains a huge lack of clarity regarding definitions and Ofcom has not provided any greater certainty (in fact if anything it has been less specific): see §3.129. A House of Lords Committee recently noted the lack of clarity[3].

3.3 Second there is no clarity regarding the process of classifying customers. Ofcom has suggested that ISPs should develop policies and an approach to categorising customers (§A5.57). We understand that DCMS has suggested that such customers contact their ISP and 'negotiate' their status. It seems to TalkTalk to be inappropriate for ISPs to decide on the legal status of their customers. It may be most appropriate for there to be self-certification by customers. Further, and in any event, the costs incurred by ISPs in classifying customers should be included in Relevant Costs.

3.4 Third, we do not consider that the new (proposed) obligation to require ISPs to disclose customer details to copyright owners is appropriate for the following two key reasons:

3.4.1 We do not consider that Ofcom has the power under the DEA 2010 to impose this obligation on ISPs – we note that Ofcom does not highlight which part of the DEA provides it the necessary powers

3.4.2 Disclosure of this information raises complex issues regarding commercial confidentiality of data, privacy and data protection and disclosure may be unlawful. Ofcom has not discussed these matters at all

3.5 In respect of this second point it is worth noting that ISPs are generally not required (and indeed not allowed) to provide customer details to third parties (such as copyright owners) and only provide such information if there is a court order obliging the ISP to do so. Such court orders sometimes include strict data protection and confidentiality protections and conditions as to the use of the data (e.g. in the recent Golden Eye case disclosure to Ben Dover was only permitted if the letters that were sent to the customers pursuant to the disclosure met certain conditions and if certain confidentiality and data security conditions were met).

[2] See Consultation §A5.4 bullet 3

[3] Secondary Legislation Scrutiny Committee 7th Report of Session 2012-13. Draft Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order §§33, 34 2012http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/32/32.pdf

4 Threshold

4.1 Ofcom has maintained its previous position that the threshold for ISPs to qualify is 400,000 fixed subscribers thereby excluding smaller fixed ISPs and mobile operators. Ofcom claim that it is 'objectively justifiable' and 'proportionate' to do so (see §3.83). However, we consider that Ofcom's position is neither objectively justifiable nor proportionate – we explain why below.

4.2 Ofcom's reasoning appears to focus on several areas of evidence/argument[4]:

- 4.2.1 The cost per subscriber will be 'proportionately higher' (§3.113) for excluded ISPs since[5]:
  - 4.2.1.1 some costs are fixed
  - 4.2.1.2 there are additional costs for mobile ISPs due to their use of network address translation (NAT) (§3.87)
- 4.2.2 the threshold of 400,000 subscribers will address most infringement
  - 4.2.2.1 there are lower levels of infringement per subscriber on mobile networks
  - 4.2.2.2 the larger ISPs account for most (94%) of the broadband market

4.3 However, this manifestly fails to demonstrate that that it is <u>not</u> proportionate to include smaller fixed ISPs / mobile operators. Rather, all that Ofcom's evidence demonstrates is that it is <u>less</u> proportionate to include smaller ISPs/mobile operators than larger ISPs. Thus the 400,000 fixed subscriber threshold is an arbitrary number plucked out of the air – Ofcom has not provided any justification that including the other ISPs is disproportionate (or indeed that including [say] O2 is proportionate). Its only merit in this particular threshold is that there is a large gap between the smallest qualifying ISP and largest non-qualifying ISP but this does nothing to prove that the threshold is proportionate.

4.4 Given that Ofcom has had over two years to consider this issue properly the absence of a proper analysis is very disappointing.

4.5 Ofcom's analysis of the threshold has also failed to properly take account of the economic harm and competitive distortion that Ofcom's use of a high threshold causes due to the extra cost and increased churn. This results from two factors:

- 4.5.1 <u>Higher overall costs</u>: a higher threshold results in higher churn increasing overall costs to society (i.e. reduces welfare)

[4] admittedly Ofcom does not lay out its reasoning in this way but this appears to be what Ofcom is getting at (see §3.83 to 3.127)

[5] Ofcom also argues that making the necessary investments 'may be uneconomic and unaffordable' for smaller/smallest ISPs (§3.113). However, the relatively larger costs can be offset by Ofcom setting a higher tariff for smaller ISPs as it is permitted to do and indeed as it has done for O2 and EverythingEverywhere – see Draft Code §33(2)). Thus it can ensure that the scheme is not distortional as between different sized ISPs in that the cost burden per subscriber will be the same.

4.5.2 Increased distortion: a threshold and so different treatment of different ISPs results in some (qualifying) ISPs bearing additional costs (net compliance and churn costs) whereas non-qualifying ISPs do not incur these costs and in fact benefit from customers churning from qualifying ISPs. Reducing the threshold from 400,000 is likely to reduce the cost of distortion

4.6 Ofcom makes no meaningful response on the question of competitive distortion and/or the impact of a 400,000 threshold on this. Ofcom's response to the question of churn seems to be several-fold:

4.6.1 There are limits to churning since there are barriers to churn (fixed term contracts and bundling) (§3.116)

4.6.2 Non-qualifying ISPs will not actively pursue customers who dislike the possibility of notifications since it is not profitable to do so (§3.117)

4.6.3 Ofcom does not have evidence regarding the likely level of switching (§3.118)

4.7 This is a wholly inadequate approach:

4.7.1 Ofcom does have some evidence. As we have pointed out to Ofcom before, during the MOU trial in 2008 some [✂✂✂] of customers who received a letter churned away from Tiscali. Thus churn is potentially a very significant issue. However, though Ofcom has had over two years to gather the evidence it has failed to do so. The lack of additional evidence is squarely due to Ofcom's inaction

4.7.2 Whilst there might be limits to churn it does not follow that churn will not happen – Ofcom cannot 'wish away' the fact that churn will occur. In any case, and quite rightly, Ofcom is pushing to make switching easier

4.7.3 Ofcom has not provided a shred of evidence to demonstrate that the customers who might switch are not profitable (again even though Ofcom has had two years to do so). Instead Ofcom has made an un-evidenced claim (see footnote 47). We think this claim is incorrect. There will be two types of customers who might want to avoid a qualifying ISP – accounts holders who have/might receive a notification (since infringing activity occurred on their connection) and account holders who just want to avoid the risk of a letter (but do not know or do not have infringing activity on their connection). In the latter case, customers will be as profitable as other customers. In the former case since bandwidth costs are not large these customers are likely to be profitable.

4.7.4 Even if non-qualifying ISPs do not advertise the fact they are non-qualifying (and therefore that customers will not receive notifications) it is easy for customers to find out and it is likely to be well publicised and well known

4.8 The correct approach to setting the threshold is to gather the necessary evidence and complete a proper analysis as soon as possible so that the appropriate threshold can be set prior to launch of the scheme. If Ofcom chooses not to do this then it must do two other things:

4.8.1 First, allow a soft launch to the notification programme so that the level of churn can be monitored and assessed and remedial measures taken (e.g. adapting the letters, changing the threshold); and,

4.8.2 Second, at its review of the threshold after 6 months (see §1.15) do a proper analysis that quantitatively assesses the level of benefits and costs at different thresholds so as to determine the appropriate threshold[6]. The cost and benefits that need to be assessed include:

4.8.2.1 The costs of complying

4.8.2.2 The benefits from reduced infringement (which will increase with a lower threshold due to less circumvention)

4.8.2.3 The level / cost of churn (which will reduce with a lower threshold)

4.8.2.4 The cost of competitive distortion as between ISPs resulting from the net cost of compliance and the cost of churn (this will reduce with a lower threshold)

4.9 This second area is particularly important since there may be a temptation for Ofcom to avoid adapting the threshold by relying on the difficulty of gathering evidence and/or the benefits of (temporal) regulatory consistency. Therefore, Ofcom must make a clear and binding commitment now to this analysis else larger ISPs may feel more inclined to challenge the current approach given the lack of confidence that Ofcom will properly review the issue in future. The commitment must include: (a) that it will complete a proper analysis; (b) that it will gather the necessary evidence and (c) the timing by which it will be completed (which should be no more than 12 months after the start of the scheme). If these commitments are not met then ISPs should be permitted to suspend the sending of notifications.

5 Drafting error in §18

5.1 There appears to be a drafting error / inconsistency in §18 and §8(2)(b) of the draft Code.

5.2 Paragraph 18 describes scenarios where a qualifying ISP does not need to send a notification. §18 appears to be missing the scenario (referred to for example in §A5.54) where the IP address was allocated (initially) to the Qualifying ISP but was then used by a customer that is defined as an ISP (e.g. reseller, public intermediary). It may be that §18(c) and/or §18(d) (in the case of a reseller) is intended to cover these scenarios but it is not clear.

5.3 §8(2)(b) says that §18(b) is a circumstance where the IP address in the CIR was allocated to the qualifying ISP[7]:

[6] By threshold we include both the subscriber threshold for fixed ISPs as well as whether mobile operators are included

[7] We are not sure what is meant by 'allocation by the ISP' – do Ofcom mean in effect secondary allocation

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.

5.4 Yet the circumstance of §18(b) is where the IP address in the CIR was not allocated to the qualifying ISP:

The circumstances referred to in paragraphs 8, 11, 12, 13, 14, and 17 are circumstances where […] (b) the IP address contained in a copyright infringement report was not allocated to the qualifying ISP at the time of the apparent infringement;

5.5 It appears to us that the correct approach to address these flaws is as follows:

5.5.1 Introduce a new scenario in §18 (§18(j)) that clearly covers all scenarios where a customer is an ISP or Communications Provider says:

(j) the IP address contained in a copyright infringement report was allocated to the qualifying ISP at the time of the apparent infringement but it was in use by another ISP or Communications Provider;

5.5.2 §8(2)(b) should then refer to this §18(j)

6 CIRs required to trigger CIL listing

6.1 TalkTalk suggested a 'hybrid' approach for triggering notifications and inclusion in the CIL (it is hybrid in the sense that it had volume and timing triggers) whereby:

6.1.1 five CIRs would be need in a particular (month long) period to trigger a notification letter

6.1.2 three notification letters (within a six month period) would be needed to trigger inclusion in the CIL

6.2 Ofcom agreed that this had merit (§5.81) yet Ofcom declined to adopt it since the volume of CIRs might be set 'too high' and there is no evidence on which to set the CIR volume threshold.

6.3 It is worth noting that Ofcom has itself in effect adopted a hybrid approach itself yet has used a CIR volume of one. By Ofcom's own reasoning there is a risk that one CIR is too low as a CIR volume threshold. We would respectfully suggest that Ofcom in time equips itself with the necessary evidence to assess the appropriate CIR volume threshold and, if necessary, adjusts it.

7 System accuracy

7.1 Ofcom states that (§5.37) in respect of ISPs matching systems:

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.

7.2 It should be recognised that there may be some inaccuracy in matching IP addresses to subscribers. The level of accuracy achieved should be considered compliant provided that the systems used by the ISP for matching are the same as those used for providing details to law enforcement.

7.3 We consider that Copyright Owners detection systems should be subject to the same accuracy requirement and that failure to comply with the requirement for accurate evidence gathering is likely to be considered a material breach of the Code.

8 Commission of copyright infringement

8.1 The draft Code states at §11(2)(c) that:

> *A notification under this paragraph must include[…] (c) a statement that the commission of copyright infringement can give rise to a claim before a court by a copyright owner.*

8.2 It is not clear what 'commission' means and how it relates to 'authorising' (see CDPA s16(2)) or 'allowing' (§4.41) infringement. This should be clarified.

9 Litigation action

9.1 Ofcom rightly highlights at §1.16 that:

> *… there are clear expectations that copyright owners will […]Take targeted legal action against serious infringers, increasing the credible threat of further action against those who persist in infringing copyright.*

9.2 In respect of this we make two comments:

9.3 First, Ofcom's description is possibly incorrect. If Ofcom is talking about taking action against persons on the CIL then they cannot be described as 'serious infringers'. Rather they are the account holders of connections that are alleged to have been used on several occasions for copyright infringement.

9.4 Second, it would be useful for Ofcom (and/or DCMS) to explain the likely consequences of copyright owners not taking such action. Will ISPs cease to be required to prepare CILs? Can notification letters be amended accordingly? Will any consideration of 'technical measures' be taken off the table?