

We welcome that many of our concerns as expressed in our response to the draft initial obligations code consultation in July 2010 have been met.

The most important is that Ofcom will now audit copyright owners' evidence gathering systems. As Ofcom knows, uncertainty about the reliability of evidence lay at the heart of the civil enforcement cases brought by Davenport Lyons and ACS Law against thousands of consumers from approximately 2008-10 on behalf of their copyright owner clients. Consumers need to be completely confident that, if they receive a notification letter under the DEA2010, it has been sent to the account holder of the correctly identified IP address.

We agree therefore that the Code now clarifies that copyright owners must have reasonable grounds to believe that either an ISP subscriber has infringed or they have allowed another person to use their internet connection and that that person has infringed. The latter point is key because in many cases the alleged infringement will not have been done by the subscriber but someone else without the account owner's knowledge. In some cases, for example where the internet connection is unsecured, the use of the internet connection by a 3rd party will not have been 'allowed' by the subscriber.

We also welcome that Ofcom will sponsor a specification for matching IP addresses to subscribers. We however think that ISPs should be required to meet this standard. We also consider that a failure to comply with the requirement for accurate address matching should be a material breach of the Code rather than that it is likely to be.

We welcome the clarification that a CIR must specify a time at which the infringement took place as well as when the evidence was collected. While this date and time may be same, providing the time at which the infringement took place is clearer for consumers to then judge whether they were at home or who was at home on that date and time. Obviously, it is important the time is in the appropriate time format; i.e. GMT or summertime.

We agree that the amended definitions of internet access services and providers more clearly apply to ISPs with over 400,000 subscribers and we note that Ofcom will, sensibly, keep under review the impact on ISPs with less than this number of subscribers in case illegal and unlawful file sharing just shifts from larger ISPs to smaller ones.

Despite the clarification that providers of wi-fi services and mobile services are excluded, we note there remains uncertainty whether universities and libraries and other public and private intermediaries are treated as subscribers or upstream ISPs.

The most important issue of concern for Which? relates to the failure to mandate standard notification letters as we argued in our July 2010 submission to the draft code. We note that Ofcom considers that this falls outside of the powers granted to them by the DEA2010. While we are reassured that the tone and style of the letters, in particular the first letter, is intended to be educational and informative, unless this is mandated it is possible that consumers will receive different messages from each ISP. We hope that Ofcom can ensure that the ISPs subject to the Code will work together to ensure consistency.

We are generally content with the amended timescales outlined in the Code with one exception. We think that 20 days is not sufficient time for an appeal by a subscriber. We suggest it should be one

calendar month or 4 weeks. We suggest this because if a subscriber has been on holiday for 2 weeks they might have as little as 6 days to digest the implications of the notification letter and make the decision to appeal.

Our views on how the appeals body should be constituted were set in detail in our July 2010 submission to the draft code. As Ofcom knows, we oppose the Government's proposal to levy a £20 fee to appeal.

Our final point is that we would welcome a clear statement from Ofcom as to why Government has instructed Ofcom to remove the ability of subscribers to appeal on 'any other ground on which they choose to rely' as this is fundamental to a subscriber's ability to deny personal liability for the actions of another person, not least as that other person may be someone unknown to them or may be a minor.

Which? 25.7.12