

ONLINE INFRINGEMENT OF COPYRIGHT: IMPLEMENTATION OF THE ONLINE INFRINGEMENT OF COPYRIGHT SHARING OF COSTS ORDER 2012

Introduction

1. The Association of Learned and Professional Society Publishers (ALPSP) is the international organization for non-profit publishers and those who work with them. It has a broad and diverse membership of over 310 organizations in 38 countries who collectively publish over half of the world's total active journals as well as books, databases and other products. ALPSP's mission is to connect, train and inform the scholarly and professional publishing community and to play an active part in shaping the future of academic and scholarly communication.
2. ALPSP is pleased to respond to Ofcom's consultation on the Sharing of Costs.
3. As with the Initial Obligations Code itself, we are seriously concerned that the vast majority of small and medium-sized (SME) publishers and perhaps some larger publishers also, will be unable to access this legislation.
4. The majority of businesses (76%) in the publishing sector have fewer than 10 employees¹. However, many more publishing businesses (besides these micro businesses) will be unable to access this legislation; according to the Annual Business Survey² and the Business Register Employment Survey³ there are nearly 5,000 book and journal publishers, employing around 140,000 people in the UK. This means that at very least, 3,800 businesses are excluded from this legislation because they do not have the resources (human or financial) that would allow them to.
5. The scale of the problem that this legislation is seeking to address is not a small one; the Publishers Association Copyright Infringement Portal⁴ has issued over 147,000 take down notices to date in 2012. The smallest of publishers are the least well resourced to tackle this problem due to the resources issues mentioned above and detailed throughout.

Access to the DEA

6. Exactly the same issues apply to the Costs of Sharing Order as apply to the previous consultation on The Obligations Code. Much of it is reiterated here.
7. Most, if not all, SME publishers are unable to monitor infringement of both their and their authors' copyright material. Staff resources are not available; it is unrealistic to suggest that they can achieve the same output as dedicated, specialist teams in larger organisations.

¹ <http://www.bis.gov.uk/analysis/statistics/business-population-estimates>

² <http://www.ons.gov.uk/ons/rel/abs/annual-business-survey/2010-revised-results/index.html>

³ <http://www.ons.gov.uk/ons/rel/bus-register/business-register-employment-survey/2010/index.html>

⁴ <http://www.copyrightinfringementportal.com/>

8. Many such businesses have narrow margins and comparatively little scope for investment in the systems required to detect infringement. SMEs tend to discover infringements by chance; as a result, it could be argued that this group is already at a disadvantage compared to the larger market players.
9. The technology required to detect infringing activity and the resources required to monitor it are out of the reach of most SME scholarly publishers. The technology may be there to do it, but SMEs are unable to make the investment. ALPSP publisher members are able to register at reduced rates to the Publishers Association Copyright Infringement Portal; however, even with that discount, many are unable to make use of this important industry initiative, because they do not have the financial resources and/or because they do not have the staff resources to monitor online infringement.
10. It seems that the large players with departments dedicated to detecting infringing activity and the resources to take legal action against persistent infringement activity are to be the ones who will be able to access this legislation provided by the DEA. It can be argued therefore, that the implementation of the legislation has failed the majority of businesses who suffer from infringing activity. The Government has failed to help the small and medium sized businesses who Government themselves have repeatedly stated are the key to economic recovery.
11. SME publishers, perhaps all, will not have access to this legislation. Does the UK Government and Ofcom intend for majority of the scholarly and professional publishing industry to be removed from the process?

Cost of involvement

12. Notwithstanding the barriers to accessing the legislation outlined above, the fact that the majority of costs will be borne solely by the copyright owner will prevent most SMEs from being involved, and would certainly price many authors out of this legislation also.
13. As already stated, many SME publishers have very small margins and they simply do not have the financial resources to allow them to access this legislation. Many SME publishers are also part of Learned Societies and provide their surplus to those Societies; on-going utilization of a sizable portion (if not all) of any surplus will prevent the Society from providing support to their members in academic institutions. In the biosciences alone, such contributions have been estimated to provide around £3.9 million in additional support for Higher Educational Institutions (HEIs)⁵. Given the current funding restraints for HEIs, this support from Learned Societies is of significantly increasing in importance.
14. We are extremely frustrated to see that this legislation provides for those who already have the resources to detect, follow up and prosecute persistent copyright infringers.
15. It is interesting to note that the House of Lords Merit Committee on Statutory Instruments also questions whether the legislation has the potential to achieve its policy objectives⁶.

Specific Consultation Questions

16. *Q3.1 Do you have any comments on the principles set out above; if you consider there are other economic principles to which we should have regard in setting fees, please identify these?*

⁵ <http://uksg.metapress.com/content/rt327514t0126320/?p=25d59027b8364ed5809c25e103c8470d&pi=0>

⁶ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/>

17. It is clear that the legislation only considers those with the resources to detect and monitor large-scale infringement, as reflected in the lowest band identified for the number of total Copyright Infringement Reports expected to be sent in one month, at 70.
18. The Government's target area for growth and regeneration of the economy are ignored in this legislation. SMEs do not have the resources to detect infringement and generate CIRs on this scale.
19. *Q4.1 Do you have any comments on the proposed process for establishing CIR estimates and costs; do you have evidence which would suggest that a different process should be adopted?*
20. We have no comment on the process. The scholarly and professional publishing industry will not be well represented in this legislation and a disproportionately small number of businesses will be bearing the costs.
21. We are very keen to ensure that any statistics resulting from the Obligation Code procedures explicitly state that they account for only a small proportion of the scholarly and professional publishing industry.
22. *Q4.2 Do you have any comments on the proposed process or timetable for establishing the appeals body*
23. We find it odd that costs that are to be incurred by Copyright Owners will not be known at the time they apply to be Qualifying Copyright Owners. This uncertainty will only add to the exclusion that SME publishers face.
24. *Q 4.3 Do you agree that Qualifying ISPs should have 9 months from the point at which estimates are finalised to prepare for the operation of the DEA scheme?*
25. It appears that ISPs have been consulted on this timescale and consideration has been given to their responses. As they are already identified as Qualifying ISPs, we would hope, as indicated in the consultation document, it is reasonable to expect that they will have plans in place for the required system changes.
26. *Q4.4 In light of the evidence above, do you agree that the first notification period should start on March 1st 2014 and end on March 31 2015; do you have evidence which would suggest that different dates are feasible and preferable?*
27. We have no further comment on this.
28. *Q4.5 Do you agree with the proposed industry payment schedules for fees in respect of Initial and Qualifying Costs.*
29. We have no further comment on this.
30. *Q5.1 Do you have any comments on the activities which we anticipate carrying out under the DEA amendments which will give rise to Qualifying Costs in the First notification period?*
31. The costs are currently an estimate. An increase or decrease will impact on those with access to the legislation and notification of changes from these estimates. Full reporting on such costs will obviously be a necessity.
32. *Q5.2 Do you agree with our proposed approach to the costs incurred by the appeals body during a notification period?*
33. As above, we would expect the costs to be fully transparent and a clear notification of changes from existing estimates provided as soon as possible to those already signed up to the legislation.
34. *Q6.1 Do you agree that all initially Qualifying ISPs will face the same model of efficient costs in carrying out the Initial Obligations and hence should be treated as having the same model of Relevant Costs for the purpose of setting a notification fee? If not, please provide your reasons for that view.*
35. We have no further comment on this.

36. *Q6.2: Do you agree that we should apply the full automated cost model to all Qualifying ISPs for the full range of monthly activity from 2,500 to 200,000 CIRs per month? Do you have evidence that an alternative approach to costs should be adopted for any levels of CIR activity; and any evidence about what costs should be for those levels?*
37. We have no further comment on this.
38. *Q6.3 Do you agree that the Relevant Costs for the first notification period should include 100% of ISP relevant capital expenditure?*
39. It is still surprising that Copyright Owners should be expected to cover all the costs of Qualifying ISPs. All the costs are currently estimates and therefore those Copyright Owners able to access the legislation are signing up on the assumption that these costs are reasonably accurate. It makes budgeting very difficult and once again, adds to the exclusion of SMEs from this legislation.
40. *Q6.4 Do you agree with our assessment of the fixed costs which will be reasonably and efficiently incurred by a Qualifying ISP in carrying out the Initial Obligations? Do you have evidence to suggest amounts attributed to these costs may be incorrect?*
41. We have no further comment on this.
42. *Q6.5 Do you agree the proposal that we set two notification fees, one for O2 and Everything Everywhere and the other for the larger Qualifying ISPs?*
43. ALPSP continues to be disappointed that the different sizes of ISPs are recognised by this legislation and the challenges they will meet have been considered by this two tier system and by the specific exclusion of certain ISPs by size. The challenges facing SME publishers in online infringement of their and their authors' copyright have not been considered or addressed.
44. *Q7.2 Do you agree with the proposals for the ISP cost items to be counted as part of the Relevant Costs; do you have evidence to support alternative approaches?*
45. We have no further comment on this.
46. *Q7.2 Do you agree our proposals in relation to the activities which give rise to variable Relevant Costs and the proposed values of those relevant cost items? Please provide reasons and evidence to support any different assessment of the variable cost element of Relevant Costs and/or alternative values?*
47. We have no further comment on this.
48. *Q7.3 Do you with agree the proposed values for the operational ratios? Can you provide evidence to support alternative values?*
49. We have no further comment on this.

Conclusion

50. We are deeply concerned and frustrated that ALPSP SME member publishers will be unable to access this legislation. The proposals as they stand will be a significant barrier to commercial growth or competitive success and pose a real risk to jobs and organisational security due to their impact on costs and resources.
51. ALPSP is prepared to work with other organisations to try to establish mechanisms which may enable SMEs to be brought into scope. It seems an industry solution is required given that existing legislation does not consider or address their needs.
52. Ofcom needs to recognise the industrial structure in the sector and work with ALPSP and its members to find a constructive solution. ALPSP would be delighted to host further consultation with our members to discuss the challenges and options for SME publishers.