BBC Response to the Ofcom Consultation 'Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012'

18 September 2012

Overview

The BBC welcomes the Ofcom consultation, 'Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs Order) 2012'.

Copyright plays a critical role in the creative industries, fostering innovation, entrepreneurialism and growth. Copyright enables the BBC – a major rights holder and user of rights – to meet its public purposes and obligations set out in the Charter and the Agreement, and to provide audiences with high quality, diverse and original public service content that informs, educates and entertains. The BBC also relies on an effective copyright regime in its role as a major contributor to the UK creative sector and the wider economy[1]. And copyright is essential to BBC Worldwide, which represents an array of independent UK companies and producers in addition to the BBC and accounts for 10% of the DCMS categories of Creative Industries exports in which it is active.

As part of an effective copyright framework, we attach importance to addressing copyright infringement. In this respect, we have welcomed the Hargreaves Review[2] recommendation of an 'integrated approach' to addressing infringement, which emphasises the development of legitimate services, alongside education and enforcement. The rest of this section sets out our approach to addressing infringement using that framework.

Attractive content services

Although traditional live broadcasting through television and radio is still the norm, in an increasingly interconnected world, audience expectations of access to audiovisual content when and where they want it have grown enormously.

The BBC is meeting this need by distributing and syndicating our content online, to provide audiences with access to high quality, distinctive and original content across a range of platforms and devices, maximising delivery of public value.

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[1] Across all its activities, the BBC added over £8bn of value to the UK economy in 2009/10 – generating over two pounds of economic value for every pound of the licence fee. Gross Value Added (GVA) is an estimate of value generated for the UK economy as a result of an organisation's activity. BBC (2011) http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/creative_economy.pdf

[2] Professor Ian Hargreaves, Independent Report for the IPO, 'Digital Opportunity: IP and Growth', 2011 http://www.ipo.gov.uk/ipreview.htm

Recent developments include iPlayer apps for mobile and tablet devices, the availability of BBC archive content , partnership work including http://thespace.org, and the development of a new permanent download-to-own window for BBC content.

In helping audiences to understand and adopt emerging online technologies and services, the BBC has a role in demonstrating the power of the Internet as a platform for original content and helping to grow the legitimate online audiovisual market. We also contribute to industry's actions to address the question of repertoire imbalance between the online and offline worlds, often raised in relation to online infringement.

Work by the creative industries to increase the variety of attractive content available legitimately online will be furthered by copyright reform to modernise the licensing process, and in that context we welcome the Government's proposals on copyright in the Enterprise and Regulatory Reform Bill 2012, the IPO Consultation on Copyright, and the industry follow-on work to the Hooper Feasibility Study on a Digital Copyright Exchange.

Education

Copyright education is also an important element in addressing online infringement. This has been recognised by Government, and Ofcom is required under the Digital Economy Act 2010 to provide the Secretary of State with an annual description of the steps taken by copyright owners to inform, and change the attitudes of, members of the public in relation to infringement. Helping end-users to understand the differences between authorised and infringing sites is also important for media literacy and safety online.

More broadly, as acknowledged in the Hooper Feasibility Study[3], copyright education must be a priority for industry as a whole given its relevance to many aspects of everyday media use, in order to help creators and rights users to understand and navigate the world of copyright in general. In this way, education can support the developing legitimate market for online content services and the contribution of the creative industries to the health of UK cultural scene and to the UK economy. Although it makes sense for copyright owners to collectively undertake information campaigns, it can be difficult for rights holders who often have slightly different problems and priorities to coordinate their actions. One of the routes to provision is recommended to be the Copyright Hub, which is now for industry to take forward following the Hooper Study. The BBC will discuss how it could best contribute to the industry initiative. (For example, in line with the BBC's public purposes and our responsibility to provide media literacy, this could be creating a programme of copyright education using online, on-air and face-to-face channels).

Enforcement

The BBC approaches enforcement on a case by case basis, in light of the costs and benefits for licence fee payers and delivery of our public purposes. It is, for example, of concern that infringing activities can prevent BBCW from generating income, which would otherwise be

[3] http://www.ipo.gov.uk/dce-report-phase2.pdf Copyright works, Streamlining copyright licensing for the digital age: An independent report to the IPO by Richard Hooper CBE and Dr Ros Lynch, July 2012

reinvested in new public service content for UK audiences, also contributing to the health of the UK production sector and wider UK economy.

Copyright holders need to be able to address infringement in a proportionate, targeted and cost effective manner. Given the continuing evolution in technology, infringing products and services and end-user behaviour, we would highlight the importance of a toolkit of enforcement measures that target different points in the value chain.

The Initial Obligations Scheme will initially focus on infringement via P2P services in the UK. Nonetheless, copyright owners frequently face infringement via other services such as live TV streaming or embedded streaming[4], or in jurisdictions outside of the UK (the most common scenario for BBCW). The toolkit must therefore involve, in particular, effective collaboration by intermediaries to address the funding of infringing services (payment processors, advertising networks, search), a prompt ISP response to notice and take action requests, and timely court blocking injunctions. Work to strengthen the tools is underway; it is important that Government continues to facilitate and give momentum to UK stakeholder dialogue, and with Ofcom engages effectively with EU and international policy development[5].

In our responses to the BIS 2010 consultation on cost sharing and the Ofcom 2010 consultation on the Initial Obligations Code, we welcomed the Digital Economy Act measures subject to development of a clear and comprehensive Code and, in particular, a proportionate approach to costs. Like many stakeholders, we expressed concerns about the last point. Especially as the notifications scheme focuses on only a particular form of infringement and is one tool among others, costs must be transparent and kept to a minimum to enable the scheme to be used to any meaningful extent.

Ofcom's Implementation of the Sharing of Costs Order

In this submission, we ask Ofcom to consider ways in which the proposed system might be simplified and costs reduced or spread over a longer period. We also ask Ofcom to provide greater transparency around its own costs, and to provide more than one estimate as evidence for certain cost items, in line with its commitment to evidence-based policy making.

If the process is not simplified and the level of uncertainty around costs is not reduced and/or the final costs are high, there is significant risk that the system will not function effectively and may not be widely used.

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[4] For example, as found in 'The six business models for copyright infringement: A data-driven study of websites considered to be infringing copyright', A Google & PRS for Music commissioned report with research conducted by Detica, 27 June 2012

[5] Including the European Commission's initiative on the E-Commerce Directive procedures for 'notify and take action' and proposed revision of the Civil Enforcement Directive (2004/48/EC). We also note the European Parliament's September resolution 2011/2313(INI) calling for the Commission to consider ways to address the funding of unauthorised streaming services

In particular:

- ***Initial Costs and Qualifying Costs***: these are effectively an invoice to stakeholders. We would ask for a full breakdown to enable proper consideration of whether they are reasonable and represent value for money. Costs that *might* be incurred should not be included on a speculative basis; costs actually incurred should be recovered during the notification period when the benefitting stakeholders are participating, e.g. Qualifying Costs of setting tariffs for the second notification period should be recovered in that period; costs of a Technical Obligations Report and potential Code
- ***Schedule for payment of Initial Costs and Qualifying Costs***: to avoid loading pressure onto the launch of the scheme and to reduce the administrative burden, these should be recovered at the end of the first notification period, at which point the stakeholders actually participating in the first and second periods and the costs in fact incurred can be taken into account in a single invoicing process
- ***Appeals body***: once a copyright owner commits to the scheme, it becomes liable for *unknown* appeal costs. The appeals body must be flexible, non-bureaucratic and cost effective. We ask Ofcom to increase transparency around costs by setting out its aims and criteria for selection, including how it will ensure that costs are kept in check, and a breakdown of the proposed Initial Costs
- ***Relevant Costs***: we would welcome a broader evidence base (in some cases, only one estimate is provided) to increase costs certainty
- ***Consumer communications***: It will be important for copyright owners and ISPs to work together to agree the content of notification letters and other types of communication
- ***Timetable***: the proposed one month period for the iterative bidding process seems unrealistically short

Response to Consultation Questions

Question 3.1: Do you have any comments on the principles set out above; do you consider there are other economic principles to which we should have regard in setting fees

The principles seem reasonable.

Question 4.1: 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?

This consultation is the first real indication of the potential costs of sending CIRs, which on the estimates set out at para. 8.4, are substantial.

We appreciate that overcoming the fact that the price per CIR depends on the total volume of CIRs sent, for each notification period, is a challenge. On balance, an iterative process of bidding rounds is not an unreasonable way to approach this. We agree with the proposal that each Copyright Owner (CO) submit a single bid, rather than a full demand curve, in the name of simplicity.

However, this is still a complex system. In practice, a CO will only ever gain knowledge of each other's volume bids under the particular circumstances of the previous round. While it may adapt its bid on this information, so may the other bidders.

Ofcom states there is a risk of the process falling into a downward spiral of lower bids and higher prices, which could cause it to fail (para. 4.7). Ofcom considers that '*[t]his would reflect a valuation of the benefits to Copyright Owners of sending CIRs which is below the costs of operating the scheme*'; it may also flow from the complexity of the iterative process.

The risk of ever higher prices that Ofcom identifies seems most likely to arise in the event that the first round leads to a per-CIR price that is above Ofcom's estimates. According to para. 8.4, all else being equal the value for money of sending a CIR to a small ISP is around 50% less than sending a CIR to a large ISP. Ofcom understands that, in practice, the smaller Qualifying ISPs may only receive 2,500 – 10,000 CIRs per month rather than the minimum volume priced up (70,000 per month) (para. 6.2). In that scenario, the costs per CIR would increase significantly in the second round (from £45.10). Ofcom notes that COs may make a commercial decision as a result of the bidding process to not send any CIRs to the smaller Qualifying ISPs in the first notification period (para. 8.7). It seems that Ofcom has sought to balance fairness and practicality in including the smaller Qualifying ISPs in the bidding process; in an ideal world both would be fully met but perhaps that is not possible in this case.

Question 4.2: Do you have any comments on the proposed process or timetable for establishing the appeals body

The timetable allowed for the appeals body tender process seems reasonable, although we are concerned that the amount of time allowed for the CO iterative bidding process is unrealistic (see question 4.1), which would affect Ofcom's proposal to start the tender around February 2013.

As part of this consultation process, we would ask Ofcom to set out its aims and criteria for selecting an appeals body. For the benefit of all stakeholders, this must be a nimble, flexible, non-bureaucratic and cost effective set up. We would suggest that Ofcom thinks imaginatively about different models, e.g. we understand that Nominet's Dispute Resolution Service calls on a panel of independent Experts. If it were necessary to secure premises and hire staff, four months seems short (para. 4.20).

We would also like to comment on the cost of establishing the appeals body. It is unclear how much of the £3.1 million Initial Costs for 2013/14 is allocated to this activity. Para. 5.9 includes the cost item, 'The establishment of the appeals body, including the development of appeals handling processes, and the publication of guidance (including £700k of spend by the appeals body)'. We would welcome clarification of what the figure of £700,000 is based on and what it includes. Will Ofcom also spend money on this activity, in addition to the £700,000 allocated to the appeals body?

s124M 4(b) Communications Act 2003 and s4(3) draft Costs Order appear to provide for Ofcom to refund underspend, and not to recover overspend in relation to Initial Costs. The incentive is therefore to be generous in estimating cost levels for establishing the appeals body. However, a careful balance must be met – providing for high costs (as these are), which are all loaded onto the first year, could put at risk the launch of the Initial Obligations scheme.

Question 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?

This seems reasonable.

Question 4.4: 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 a different date is feasible and preferable?

Given the delays already incurred, we understand that Ofcom might be keen to propose a challenging timetable. However, one month does not seem sufficient to cover 'CIR volume estimation' and 'Cost sharing finalised and charges set', all the more because that month falls over the Christmas and New Year period.

A *single round* of the bidding process is likely to involve a CO conducting internal assessment of demand and budget, internal approval, and bid submission; Ofcom calculating the resulting price and communicating this to COs; a CO analysing the implications of the price compared to its estimated demand and budget. The process is only complete when 'the costs per CIR for both [ISP] groups are within 10% of expected cost for all Copyright Owners' (para. A67). Ofcom itself expects that this will take more than one round, as it has designed an 'iterative process' (para. 4.5). The proposed timetable does not seem to allow for this.

Question 4.5: Do you agree with the proposed industry payment schedules for fees in respect of Initial and Qualifying Costs

Initial Costs

Before turning to the payment schedule for the Initial Costs, we would like to comment on the size and makeup of those costs.

The Initial Costs amount to a significant sum and would, in effect, represent an invoice to participating COs. However, Ofcom has not provided a full breakdown of the costs (paras 5.8-5.9) in a way that would enable COs to determine if the inclusion, timing or size of each cost is reasonable and represents value for money. We would also welcome clarification of whether the list of costs incurred at para. 5.9 is exhaustive.

In particular, we understand from a May 2011 FOI response from Ofcom[6] that a sum of £1.8 million was incurred for the year 2010/2011 (the same sum as quoted at para. 5.8 of the consultation) and that this included '*internal and external (judicial) reviews of the Act itself…*'. The only item clearly described as not included in that £1.8 million is that '*Ofcom has spent £0.1m on the report to review the potential efficacy of the site-blocking provisions of the DEA (section 17 and 18)*'. It is unclear whether the following items are included in the £1.8 million: '*policy work in relation to the use of DEA S17 & S18 (web blocking) provisions, and any related policy work looking at "self regulation" (industry-lead) alternatives to achieving a similar outcome to the provisions described in S17 and S18 on a non-statutory basis*'.

In our view, no costs incurred in association with the Judicial Review of the DEA or sections 17 and 18 DEA 2010 are covered by the DEA provisions permitting Ofcom to recover costs from the Copyright Owners who participate in the Initial Obligations scheme, because they relate to the underlying DEA legislation[7].

As regards the items listed, we would disagree with the proposed inclusion as an Initial Cost of 'spend external to Ofcom, covering… research in support of the Technical Measures report'. While it seems that the Secretary of State may order Ofcom to carry out this report at any time, the structure of the Act is such that technical obligations are intended to be introduced if the initial obligations imposed do not achieve the objective of reducing unlawful file-sharing to a satisfactory extent[8]. Clearly, they cannot have produced such an effect before the start of the first notification period, which is the cut-off date for the inclusion of Qualifying Costs as Initial Costs. It does not seem feasible that the Secretary of State would make an order at such a time.

At para. 5.10, Ofcom states '*it is feasible that the Secretary of State will request Ofcom to provide a report under the 124G Communications Act 2003 before the end of the first notification period*',

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[6] FOI Response (1-178832741) http://www.ofcom.org.uk/files/2011/07/1-178832741.pdf

[7] Ofcom does not appear to have a function specified in S17 and S18 DEA and the sections do not relate to the administration or enforcement of the Initial Obligations Code or any potential Technical Obligations code. Moreover, it appears from s17(8)(a) that any such regulations would have resulted in an amendment to the CDPA 1988, which would be of universal benefit and not simply to benefit the Copyright Owners taking part in the scheme. The 'Contested Provisions' in the 2011 Judicial Review were wider than the Initial Obligations and Technical Obligations, as they included s17.

[8] As noted in the Judicial Review decision [2011] EWHC 1021 (Admin) http://www.bailii.org/ew/cases/EWHC/Admin/2011/1021.html

in which case the cost of the report itself could potentially amount to a Qualifying Cost if the cost is incurred during the first notification period rather than before it begins. In our view, the costs of the providing the report should not be included as Qualifying Costs for the first notification period either. Such a report would risk lacking credibility if it sought to make an assessment of the effects of the Initial Obligations, likely to include the effectiveness of any targeted legal action based on the CIL, before one full notification period has been completed.

In any case, if the report led to the creation of a technical obligations code, the associated remedies would only be available to COs that took part in a subsequent notification period. That is where any costs burden should fall. Section 124J(c) provides that provision about contributions to costs for a technical obligations code would be made by an order under s124M, which would be a further order to the one considered in this consultation. The costs of the report should be addressed in an order at that time as 'Initial costs' for the creation and implementation of the technical obligations code.

In sum, given the already substantial amount of Ofcom's costs as set out above, we are concerned that speculative costs that might only 'feasibly' be incurred should not be included, not least to avoid overburdening the scheme and because they are recoverable elsewhere.

We now consider the proposed schedule of payment for the Initial Costs.

It is not clear why Ofcom states at para. 1.10 that the Initial Costs '*must* all be charged to Copyright Owners at the beginning of that first [notification] period' [emphasis added]. s124M Communications Act 2003 provides that the Secretary of State may by order specify provision for payment in advance of expected costs (and for reimbursement of overpayments where the costs incurred are less than expected); and other provision about when and how contributions must be paid. Therefore the DEA does not appear to place an obligation on Ofcom that it *must* recover costs in advance of the notification period, and gives Ofcom flexibility. The draft Costs Order only provides that, 'before the start of each of the first and second notification periods OFCOM must *notify* each qualifying copyright owner of the amount payable and the date by which such amount must be paid' [emphasis added].

Loading upfront payment of high Initial Costs onto the first year of the scheme could put the scheme's launch under additional pressure. We would propose that payment of the Initial Costs should be due at the end of the first notification period. Ofcom may then also take into account the number of COs participating in the second notification period when allocating the costs. That would significantly streamline the invoicing and payment process, saving Ofcom and COs resources.

Qualifying Costs

We understand that, '*where it is recovering costs from its stakeholders, Ofcom tries to reflect the timetable over which its costs are incurred*' (para. 4.35). However, we do not agree with the proposed interpretation of four payments due in advance of each quarter of a notification period, which does not have a basis in the DEA or the draft Costs Order.

Given that the draft Costs Order provides for a statement of costs actually incurred at the end of each notification period (s3), the system would be considerably more transparent and streamlined if Ofcom were to require payment at that stage. Otherwise both Ofcom and COs will incur administrative costs issuing invoices and payment orders four times a year, plus a final statement and a further invoice or a refund. We are concerned that this would add unnecessary complexity and cost to an already complex regime.

The draft Costs Order itself was laid before the House of Commons on 26 June and is not part of Ofcom's consultation. However, we would like to take this opportunity to note that the wording of s3(5) draft Costs Order does not properly address the refund of overpayments to Copyright Owners participating in the first notification period in the event that Ofcom's estimates of the Qualifying Costs are not accurate.

The Ofcom statement referred to in s3(4) draft Costs Order is a statement of the total amount of fees paid by Copyright Owners, and under s3(5) Ofcom can carry forward any deficit or surplus to be taken into account in the fixing of fees in respect of the qualifying costs of the second notification period. It seems that this gives Ofcom the power to apply any surplus or deficit generally when setting fees for the subsequent period and not specifically to any COs that overpaid in the previous notification period.

Section 15 of the DEA allows that the items listed (a) to (c) 'may' be included within a costs sharing order. In our view, the effect of s15(4)(b) DEA is that where the Secretary of State chooses to make provision for payment in advance for expected costs in the order, the use of the word 'and' in that section is a requirement that the wording in brackets '(and for reimbursement of overpayments where costs incurred are less than expected)' creates an obligation to reimburse. However, s3 of the draft Costs Sharing order does not provide for reimbursement. Notably the wording in this section differs from the wording in relation to Initial Costs in s4(3), which does specify refunds although the words 'may' and 'if they consider appropriate' appear to make this within Ofcom's discretion, which we do not consider to be in accordance with the DEA provisions.

This is especially important to address given the uncertainty and limited transparency of Ofcom's cost estimates. In addition, if there is a deficit, it seems that any new Copyright Owners who join the second notification period will be paying for the Qualifying Costs of the operation and administration of the scheme in a period in which they were not involved.

Question 5.1: 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?

As we have said in respect of the Initial Costs, this is effectively an invoice to Copyright Owners and all proposed spend should be detailed in full. For example, we note that 'research for Ofcom's reporting duties' is also included under Initial Costs and it is not possible to consider the reasonableness of the proposal to recover this under both types of Costs (aside from timing, presumably). Equally, we are not in a position to determine if £1.3 million is a reasonable amount for the planned external spend. Lastly, we would appreciate clarification of whether this is an exhaustive list of Qualifying Costs.

Regarding the proposed activities, we consider that 'Setting a tariff for the 2015-2016 notification period' should not be included in the Qualifying Costs payable during the first notification period. This is for the benefit of the parties participating in the second notification period, and should be payable as part of participating in that.

On Ofcom's reporting duties, where it would increase their efficiency and effectiveness, we would suggest that Ofcom seeks to identify any useful links with the research activities of international actors. The European Observatory on Infringements of Intellectual Property Rights within the Office for Harmonisation in the Internal Market (OHIM), has a role to provide research-based knowledge to support policymaking, enforcement and the strategic development of legal content businesses[9]. Other countries, such as New Zealand[10], France, USA and Korea are also carrying out policy programmes to address online copyright infringement. In addition, to the extent that this could result in research results using a comparable methodology across more than one country, it would provide a richer knowledge base for the measurement of developments in both infringement and legitimate online content services – both global activities.

Question 5.2: Do you agree with our proposed approach to the costs incurred by the appeals body during a notification period?

The uncertainty around the appeals body costs is a significant source of concern.

COs are required to estimate, and commit to, the volume of CIRs that they will send in the notification period without knowing what costs they may face for appeals (case fees) or when those fees may be payable. It is unclear if the case fee will be a single or tiered amount, according to the complexity of the case. A CO is likely to have a fixed yearly budget for participation in the Initial Obligations regime as a whole. It will be obliged to conservatively reduce the number of CIRs that it bids to send in the first round, because the appeals costs are unknown. Once the CO is committed to participate in the notification period, it becomes liable for those unknown costs. This seems unreasonable and lacks transparency.

[9] Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012

[10] For example, initial learnings are here: http://www.med.govt.nz/business/intellectual-property/pdf-docs-library/copyright/notice-process/illegal-peer-to-peer-file-sharing-submissions-on-fee-review-discussion/

We note that in the Judicial review judgement, Mr Justice Kenneth Parker comments at para. 260 that the evidence from the Secretary of State for Innovation Business and Skills was that it is not expected that the appeals process would be unduly complex or expensive. However, there is no indication from Ofcom as to potential structures for the appeals body or how they intend to ensure costs are kept in check.

Getting the system up and running depends on a design that is as simple and stable as possible. We would urge Ofcom to seek to provide further evidence on possible appeals costs, for example from international schemes to address online copyright infringement, which has now been running for around a year, or by reference to other schemes such as the Nominet Dispute Resolution Service or WIPO Arbitration and Mediation Centre.

Question 6.1: 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 Relevant Costs for the purpose of setting a Notification Fee? If not, please provide your reasons for that view.

No comment.

Question 6.2: 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?

No comment.

Question 6.3: Do you agree that the Relevant Costs for the first notification period should include 100% of ISP relevant capital expenditure?

No comment.

Question 6.4: 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?

We do not have any comments on the estimates provided, although we would welcome a broader evidence base e.g. by referring to the experiences of ISPs involved in international schemes to address online copyright infringement.

Question 6.5: 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?

It seems right in principle to set two notifications fees to provide for greater recovery of capex by the smaller ISPs.

Question 7.1: 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?

The proposed disallowance of 'save calls' and 'lost customers' is reasonable. We would also note the potential benefits to ISPs where bandwidth consumption by infringing P2P activity is reduced as part of the scheme.

Complaint handling costs should be covered to the extent that the complaint does not relate to the quality of the ISP's handling of the process. Quality assurance of complaints handling processes is essential, as this could affect the CO's (and ISP's) brand. On a related point, it will be important for CO and ISPs to work together to agree the content of notification letters and other forms of consumer communication.

Ofcom has included costs for a 10% failure rate in IP address matching, 'regular quality control and audits' and 'the continuous monitoring of the quality of CIRs', respectively (paras 7.20-7.22). We would welcome clarification of how these fees have been included, and that all ISPs will in fact carry out such audits and monitoring. In addition, it is important for the results to be communicated to Ofcom in the context of its dispute resolution and enforcement role[11], and to COs to ensure transparency around the service provided in exchange for the CIR fees.

Question 7.2: 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?

While we understand that Ofcom has had difficulties sourcing estimates, we are concerned that the complaint handling cost estimate is based only one figure. All ISPs handle complaints, as do many other bodies. We would ask Ofcom to seek to gather more evidence, as a step towards increasing certainty around costs.

Question 7.3: Do you with agree the proposed values for the operational ratios? Can you provide evidence to support alternative values?

For monitoring quality, a ratio of 1 in 500 seems reasonable. For complaints per letter, again, this cost is based on only one estimate from one ISP. We would ask Ofcom to seek further information to help increase the predictability of the costs base.

[11] While s41 - s43 of the draft Initial Obligations Code contain Ofcom's enforcement powers to levy a fine of up to £250k and to pay compensation and costs to anyone affected by a contravention of the Code, it is not clear what level of CIR matching failure would amount to a contravention.