

Additional comments:

Summary

1. We are concerned about the likelihood that a significant number of letters will be delivered late, and the lack of procedures for dealing with late or non-delivered letters; the cost recovery split across ISPs; and the arbitrary appeals fee of £20.
2. We estimate that with 2.33 million letters likely to be issued in the first year, approximately 165,000 of these letters will be delivered late.
3. BT will be reimbursed 26% more than the set average of 75% for each CIR. BSKyB will receive 12% less than the average.
4. We see no basis for the £20 appeals fee and are concerned that this is too high, with DCMS providing no basis for this figure. The fee stems from a concern about reducing the number of appeals, instead of a consideration about what a fair appeals process would look like.
5. More broadly, we agree with the Secondary Legislation Scrutiny Committee, that given the assumptions made in the formulation of this Costs order, questions must be raised "about whether DCMS's policy objective of reducing online infringement of copyright by 75% is achievable." (See <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/32/3203.htm#a4>)

An unfair appeals process

1. A fair appeals process cannot stem from a concern that there will be too many appeals. Basing a decision primarily on this criteria has led to an arbitrary figure that will potentially be a barrier to justice.
2. We note the Secondary Legislation Scrutiny Committee stated that 'copyright holders state that, if the proportion of appealed notifications increases, fewer CIRs will be sent'. (<http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/32/3203.htm#a4>)
3. In explaining the level of the fee in response to the Committee, DCMS said that £5 and £10 would be 'an insufficient deterrent to vexatious appeals intending to disrupt the system and potentially drive up costs to an unworkable level.'
4. Furthermore, neither DCMS nor Ofcom have defined what a 'vexatious' or 'frivolous' appeal might be - something also noted in the report of the Secondary Legislation Scrutiny Committee - or properly considered the likelihood of a large number of legitimate appeals. Nor has it been explained why there cannot instead be a fine for an improper appeal.

Letter volume

1. "CIR estimates were requested to cover a wide range of potential volumes - from 10,000 to 200,000 per month (120,000-2.4 million pa) for each of the 6 ISPs" (6.13, page 31).

2. "A "base case assumption" of 100,000 CIRs per month (1.2 million pa) was made".
3. "Ofcom's continuing discussion with copyright owners about the likely level of demand for CIRs now suggests that it is possible that monthly CIR volumes at the smallest of the qualifying ISPs (presumed to be O2 and Everything Everywhere - (Table of ISP sizes and of CIR reimbursement under flat fee, 6.51, Page 38)) may be below 10,000 per month, possibly as low as 2,500 per month" (6.20, page 32).
4. Assuming the "base case assumption" of 100,000 CIRs per month applies to the remaining top 4 ISPs, there will be approximately 405,000 $[(2,500 \times 2) + (100,000 \times 4)]$ CIRs issued in total each month, or 4.86 million per year.
5. Ofcom state that, based upon evidence from the French Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet (HADOPI), a reasonable estimate of the CIR-to-letter ratio (CIRs that trigger a warning letter to be sent to the subscriber) is 48% (7.54, page 50).
6. The other (estimated) 52% of CIRs will not trigger notification either because the alleged infringement occurred during a 'grace period' for that subscriber (42%), or because the IP address could not be matched to a subscriber (10%).
7. This means that, of the 4.86 million CIRs estimated to be issued in this first year, 2,332,800 CIRs first class letters may be sent to customers.
8. Approximately 165,628, or 7.1%, of these letters will be delivered late (Assuming 7.1% of first class post delivered late, as was the case between April and June 2012 - see <http://www.telegraph.co.uk/news/uknews/royal-mail/9511937/Nearly-one-in-10-first-class-letters-delivered-late-by-Royal-Mail.html>). No figures are available as to how many will be lost, as Royal Mail do not publish this for specific classes of letter.

Fees

1. An average of 75% of the costs of processing CIRs is to be borne by the copyright owners issuing them through payment of a fee for each CIR they expect to issue. The remaining 25% will be paid by the ISPs.
2. Ofcom have considered a 'flat' CIR fee for all 6 ISPs (paid for by the copyright owners), but considered this unfair given the large difference in volume of CIRs (and thus difference in incurred costs due to economies of scale) expected to be processed by the very smallest ISP (O2) compared to the very largest (BT).
3. Under a 'flat' model, BT would be reimbursed 142% of its costs in processing a CIR, whilst O2 would receive only 14% of its costs (Table of ISP sizes and of CIR reimbursement under flat fee, 6.51, Page 38). The average would nevertheless be 75%.
4. Ofcom thus propose a two-tier fee system, where the top 4 ISPs (BT, Virgin, TalkTalk and BSkyB) are paid a lower amount per CIR than the bottom 2 ISPs (O2 and Everything Everywhere).

5. Although less distorted than a flat fee, the second tier does not solve the problem. Because of its size, BT will receive 101% of costs incurred per CIR, whereas BSkyB will be reimbursed only 63% of what it cost them to process the CIR. Everything Everywhere will receive 81% of costs compared to O2's 69% despite only having 100,000 more customers (Table of ISP sizes and of CIR reimbursement under two-tier fee, 6.60, Page 40).

6. Ofcom have decided not to introduce a third tier, in which would be placed BT, for fear of over complicating the fees system (6.71, page 40).

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:

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?:

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

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?:

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?:

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

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?:

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

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.:

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?:

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

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?:

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?:

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?:

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?:

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