

PA RESPONSE TO OFCOM CONSULTATION: SHARING OF COSTS ORDER 2012

Introduction

1. The Publishers Association ('the PA') is the representative body for book, journal, audio and electronic publishers in the UK. Our membership of 112 companies spans the academic, education and trade sectors, comprising small and medium enterprises through to global companies. The PA's members annually account for around £4.6bn of revenue, with £3.1bn derived from the sales of books and £1.5bn from the sales of learned journals.
2. The Publishers Association has consistently called on the Government to implement the provisions of the Digital Economy Act (DEA) designed to deal with peer to peer copyright infringement. Accordingly, The PA welcomes the opportunity to respond to Ofcom's *Sharing of Costs Order* as a further step towards implementation.
3. The PA is broadly accepting of the costs as outlined in the Order, and of the principles used to determine these costs. However, it is our belief that the Costs as calculated and outlined will prove a significant barrier to participation, in particular for smaller rights holders.
4. Notwithstanding our strong reservations about the feasibility of participation on account of cost, we would welcome some additional clarity on some of the cost calculations, as set out below.

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

5. The PA welcomes Ofcom's attempts to ensure that only those costs "efficiently and reasonably incurred" by Qualifying ISPs in carrying out their obligations have been calculated as part of the costs copyright owners need to meet under the Order.
6. We note the economic principles underlying Ofcom's interpretation of the Costs Order, specifically that "as far as possible the charge to Copyright Owners for processing a CIR should reflect the specific cost incurred in processing." It is clear from this statement that ISP compliance with the Initial Obligations Code, and its carrying out of its duties to achieve this, are not designed as a commercial exercise, but to cover costs incurred.
7. We support Ofcom's proposal at 3.41 that Appeals Body Costs should be recovered through case and subscriber fees, and not Qualifying Costs. Whilst we understand that Ofcom is yet to tender for and appoint an Appeals Body, we look forward to learning how costs for the appeals process will be calculated, specifically the Case Fee. Point 1.5 of the Executive Summary states that the remaining costs of determining an appeal will be met by the Copyright Owner who submitted the CIR which has been appealed. We assume this will only be in the event that an appeal is successful.

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?

Additional CIRs

8. The PA agrees with Ofcom's proposal to determine the final Relevant Costs through an iterative process. However, we do have one concern to highlight: It is implicit in both the Costs Order and the Initial Obligations Code that Copyright Owners will not be able to bid for "top-up" CIRs within a Notification Period; or at least, if they wish to have more CIRs they may need to acquire them from other Copyright Owners' allocations, rather than increasing the overall total. We would like confirmation that this is indeed the case. Our view would be that allowing Copyright Owners to bid for more CIRs within a Notification Period would add a massively disruptive element of complexity to the process, as it would affect CIR prices across the board. Furthermore, Notification Periods of 12 or so months are sufficiently short for Copyright Owners to await the next round to increase their CIR activity.
9. Notwithstanding point 8 above, Ofcom should make clear that at no stage should the bidding process for CIRs – "top up" or otherwise – be treated as a commercial negotiation. Allowing negotiations to take place in this way would run contrary to the "promotion of efficiency" principle at 3.8 and could unduly discriminate against smaller rights holders.

Qualifying Costs

10. The terminology used by Ofcom in defining Qualifying and Initial Costs is unfortunately confusing. "Qualifying" would seem to be a misnomer, in that Ofcom and the Appeals Body which incur them will not have qualified for anything, per se (not in the way that ISPs and Copyright Owners will have). It may be more helpful to dub these as *Administration Costs*.
11. Furthermore, the Initial Costs are really a sub-category of Qualifying Costs, yet in the taxonomy they appear as separate items. Again, might it be more helpful to term these respectively as *Prior Administration Costs* and *Running Administration Costs*?

Timetable

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

12. It would be useful for rights owners to know as early as possible how costs for the appeals process will be calculated, specifically the Case Fee.
13. We support comments made by the MPA in their submission that the setting up of an Appeals process will require a determination of the meaning of the language in the Initial Obligations Code, and that this should involve representatives of participating Copyright Owners, ISPs, Ofcom, and consumer groups.

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?

14. Yes

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 different dates are feasible and preferable?

15. The proposed timetable seems justifiable, although having to estimate and commit to a specific number of CIRs for this time period (particularly in the first year of the DEA's operation) may prove to be a further disincentive to participation, particularly for smaller rights holders.

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

16. We accept the proposed payments schedules.

Qualifying Costs and Initial Costs

17. Included within Ofcom's calculation of Initial Costs is: "the development of a baseline of the levels of online copyright infringement in the UK, to ensure that the impact of the Initial Obligations can be accurately assessed." It would be useful to know when this baseline will be finished and made public, and of course what measurements Ofcom intends to employ for these purposes.

18. Ofcom's *Initial Costs* also include the following two bullets:

- i. "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)"
- ii. "...a total provision of £2.3m for spend external to Ofcom, covering research for Ofcom's reporting duties, the report on ISP costs, research in support of the Technical Measures report; and the setting up of the appeals body."

It is unclear how these two points are mutually exclusive, and why the establishment of the appeals body is calculated alongside a separate £2.3m, some of which will be used to pay for "the setting up of the appeals body."

The Qualifying Costs: Ofcom

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?

19. At paragraph 5.12 Ofcom itemises the activity which will be funded by the Qualifying Costs, which it estimates to be £3.3m in the first notification period. It would be instructive to see how each line item is costed, particularly in order to see how variations in activity level might affect each item. For example "*monitoring the appeals body's performance*" would seem to be less susceptible to variation than "*handling complaints*".
20. Equally "*on-going engagement with government and stakeholders in relation to the operation of the Code*" seems a very nebulous term and one which could be subject to narrow or wide interpretation as Ofcom saw fit. It would be instructive to see what ratio of the overall cost this represented. Given this would likely to be integrated with very

many aspects of Ofcom's pre-existing duties, it is unclear how those conversations relevant solely to the DEA would be separated out for the purposes of costs calculation.

21. With regards to the *item "Reviews of Qualifying ISPs' and Copyright Owners' evidence gathering processes and procedures"*: Copyright Owners are already paying an estimated £75,000 for an ISP specification, and one that ISPs do not even have to use. It is our view that ISPs not wishing to use the voluntary specification should have to cover Ofcom's costs for the review of their evidence gathering process and procedures.
22. We would welcome further details on the estimated (in our view excessive) £1.3million outlined at 5.12 in relation to "research for Ofcom's reporting duties, and for input to the setting of a notification fee for 2015/16.

The Qualifying Costs: Appeals Body Costs

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

23. Yes, in particular the setting of the case fee to ensure that "the aggregate amount of case fees and subscriber fees it retains are sufficient to meet but do not exceed the costs that the appeals body may incur in making determinations in that period."
24. We support Ofcom's proposal at 3.41 that Appeals Body Costs should be recovered through case and subscriber fees, and not Qualifying Costs.
25. However, we would welcome further information on the estimated £700,000 for the selection and establishment of an appeals body – specifically a breakdown of these costs. This figure seems rather high, and we would be interested to know if and how Ofcom intends to refund rights owners in the event that the tender process is cheaper (which we expect it will be, based on conversations we know have taken place with potential tenders).

Relevant Costs: Qualifying ISP Capital Expenditure and Fixed Operating Costs

26. The PA has two general concerns about how ISP costs have been calculated in the BWCS Report:
 - i. With regard to ISP's capital costs, Section 1.3 of the BWCS report states that no detailed audit of the development work and costings provided by the ISPs has been undertaken. This is extremely concerning, as it raises the possibility that the estimates upon which costs have been calculated may not have been accurate in the first place.
 - ii. The BWCS Report was carried out two years ago, and we would question whether the same study would yield the same conclusions – and figures – if carried out today, not least because of advances in technology and a clearer understanding on the part of ISPs as to what is required of them under the DEA. ISPs costs in certain areas might themselves have declined in the last two years, for example through the use of twitter and other media to handle customer services.

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?

27. The PA agrees that “*slippage of other projects*” should not be calculated and included as part of ISP capital expenditure, 75% of which rights owners would have to cover. Although Ofcom is excluding this cost for other reasons, we would also question how this cost could be one “*reasonably and efficiently incurred.*”

Notification Fees

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?

28. Yes, although this inevitably adds further complexity to the system.

Relevant Costs: Qualifying ISP Variable Costs

Question 7.1: Do you agree with proposals for the ISP cost items to be counted as part of the Relevant Costs; do you have evidence to support alternative approaches?

29. The PA agrees and supports Ofcom’s decision to disallow “save” calls as part of Qualifying ISP costs, as well as to disallow the opportunity cost of future potential revenues/contribution from a subscriber being foregone because that subscriber leaves the ISP. The latter is expressly excluded in the definition of Relevant Costs, and the former is not a cost “reasonably” incurred as a result of carrying out obligations under the Initial Obligations.
30. Paragraph 7.9 identifies a number of main activities generating variable costs, including “call handling” and “handling complaints”. In practice it may be difficult or impossible to differentiate between these activities, especially where a customer call may cover a number of issues, not just pertaining to the DEA. It is not clear how that part of the call related to the DEA could be separated out for the purposes of costs calculations. It would also be useful to see a breakdown of the £34 “complaint” charge, listed on p25 of the BWCS report.
31. As an additional point, we would note that the DEA is primarily an educational tool, and so customer service staff should be advising those in receipt of a notice how they can secure their internet connection and where they can go to access legal services. Care must be taken to ensure nothing is said to undermine the spirit and intent of the Act.
32. As set out at point 21, Copyright Owners are already paying an estimated £75,000 for an ISP specification, and one that ISPs do not even have to use. It is our view that ISPs not wishing to use the voluntary specification should have to cover their own regular quality control and audits (contrary to what is proposed at 7.21). Furthermore, we support the proposal at 7.20 for Ofcom to use its enforcement powers where a Qualifying ISP appears to be generating an excessive level of CIR matching failures.